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ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

VOL. VI.
CONTRACT

ROCHESTER, N. Y.
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RULING CASES.

CONTRACT.

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SECTION I. — *Consideration.*

No. 1. — RANN *v.* HUGHES.

(H. L. 1778.)

RULE.

A PROMISE not under seal does not form a ground of action unless supported by a consideration.

**Rann and others, Executors of Mary Hughes *v.* Isabella Hughes,
Administratrix of J. Hughes.**

7 T. R. 350 n.-351 n. (s. c. 4 Bro. P. C. 27).

Contract. — Promise by Executor. — Absence of Consideration. — Statute of Frauds.

I. H., who is the administratrix of J. H., promises to R. (who is executrix of M. H.) to pay out of her (I. H.'s) own goods, a debt due by J. H. to M. H. Such a promise, being without consideration, does not support an action in which judgment is given against J. H. for payment of the debt out of her own goods, even although it appeared that the intestate died possessed of sufficient goods to pay the debt.

[350 n.] The declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator (Mary Hughes) and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded, that the defendant's intestate should pay to the plaintiff's testator £983. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors, the said sum, and being so liable *she* in consideration thereof undertook and promised to pay, &c." The defendant pleaded *non assumpsit*; *plene administravit*; and *plene administravit*, except as to certain goods, etc., which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth, &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where after argument the following question was proposed to the Judges by the LORD CHANCELLOR, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant, in error in her personal capacity;" upon which the Lord Chief Baron SKYNNER delivered the opinion of the Judges to this effect. — It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defend-

No. 1. — *Rann v. Hughes*, 7 T. R. 350 n. 351 n.

ant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that *cannot be [* 351 n.] where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of *Pillans v. Van Meierop and Hopkins*, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and

does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Meierop* in Burr. and the case of *Losh v. Williamson*, Mich. 16 G. III., in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.

ENGLISH NOTES.

This rule has been established by numerous cases from the Year Books downwards. The principle is avowedly founded upon the civil law, and has been summed up in the maxim “*Ex nudo pacto non oritur actio.*” It appears in the early cases as if this maxim has been reiterated by way of protest against the contrary doctrine of the canonists, which survives in the Scotch law and some continental systems. By the Roman law *nudum pactum* was a promise neither accompanied by any legal solemnity, nor belonging to one of the recognised (or nominate) contracts, nor supported by “*causa*” meaning something given or performed on the other part. English law has followed the analogy with a more extensive interpretation of the word “*causa*,” so as to include all acts and forbearances of the promisee.

To the same rule may be referred the cases in which the Common Law Courts have held that a person who is a stranger to the consideration of a contract cannot maintain an action upon it. Thus in *Tweddle v. Atkinson* (1861), 1 B. & S. 393, 30 L. J. Q. B. 265, 4 L. T. 468, where William Guy and John Tweddle mutually agreed to give £200 each to William Tweddle, power being reserved to the latter to enforce the payment of these sums, and William Tweddle sued the executors of William Guy on the agreement: the action was held not to be maintainable. So, where the members of a company agreed amongst themselves to employ A., as the solicitor of the company during good behaviour, but the directors dismissed A. without any default on his part, the Court of Appeal held that A. had no right of action against the company. *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, 45 L. J. Ex. 451, 34 L. T. 190.

A similar rule holds good in equity. The rule in equity has been

No. 1. — *Rann v. Hughes.* — Notes.

expressed by the maxim “A Court of Equity does not interfere for volunteers,” and the rule extends to cases where the instrument sought to be enforced in equity is a deed under seal on which there might perhaps have been a right of action for nominal damages at law. *Graham v. Graham* (1791), 1 Ves. Jr. 272, at p. 275; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, p. 112, 11 R. R. 151; *Buckle v. Mitchell* (1813), 18 Ves. 112, 11 R. R. 159; *Ex parte Pye* (1813), 18 Ves. p. 149, 11 R. R. 173; *Colyer v. Mulgrave* (1836), 2 Keen, 81. In *Buckle v. Mitchell*, Sir W. GRANT, M. R., observed “In *Pulvertoft v. Pulvertoft* the present LORD CHANCELLOR (LORD ELDON) has held that even before any third person has acquired an interest in the property voluntarily settled, and when the matter rests entirely between the grantor and grantee, the latter has no equity to prevent the former from defeating the grant by a sale of the estate. It would be a strong thing then to say, that he has an equity after the estate is contracted for, and after a third person has acquired an interest in it, to prevent that third person from obtaining the benefit of the contract, which the Court would not restrain the settlor himself from entering into.” In *Colyer v. Mulgrave*, A., father of four illegitimate daughters, and his son B. entered into covenants, by which A. agreed to give £20,000 to the daughters, and B. agreed to to pay A.’s debts. Demurrer was allowed to a bill filed on behalf of the daughters for specific performance of the covenants. In *Walwyn v. Coutts* (1815), 3 Sim. 14; *Garrard v. Lauderdale* (1831), 2 R. & M. 451, and *Woodgate v. Acton* (1834), 2 My. & K. 495, voluntary deeds of assignment for the benefit of creditors who were not parties thereto, were not enforced. In *Jeffreys v. Jeffreys* (1840), 1 Cr. & Ph. 138, the Court refused to specifically enforce a voluntary covenant to surrender copyholds.

The case of *Jeffreys v. Jeffreys*, last cited, illustrates a distinction which must be kept in view as regards volunteers in equity. By the voluntary settlement which was in question, certain freeholds had been conveyed by the settlor in trust for his daughters; and, the conveyance in respect of the freeholds being complete, the daughters who were the plaintiffs were held entitled to a decree to have the trusts of the settlement carried into effect. “With regard to the copyholds,” the LORD CHANCELLOR (COTTENHAM) said, “I have no doubt that the Court will not execute a voluntary contract, and my impression is that the principle of the Court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement.”

Where a settlement is made in consideration of marriage, children of the marriage are clearly entitled, although the settlement is executory, to enforce its provisions in a Court of Equity. And it has been decided

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by FRV, J. (sitting alone as an equity Judge), in *Gale v. Gale* (1877), 6 Ch. D. 144, 46 L. J. Ch. 809, 36 L. T. 690, that provisions of a marriage settlement, including a covenant to surrender copyholds, made upon the marriage of a widow in favour of her children by a former marriage, were supported by the marriage consideration and could be enforced by the children. This decision was founded upon a judgment of Lord HARDWICKE in *Newstead v. Searles* (1737), 1 Atk. 265, L. R., 9 App. Cas. 320, n., where he decided that such children were not volunteers, so that the settlement could not be avoided as against a purchaser, or creditor, under the Statutes 13 & 27 Eliz. (See, as to effect of these statutes, notes to Nos. 1 and 2 of "Bill of Sale," 5 R. C. 27). It has been held by KAY, J., in *In re Cameron and Wells* (1887), 37 Ch. D. 32, 57 L. J. Ch. 69, 57 L. T. 645, that the extension of the marriage consideration to the children of a widow about to marry did not apply to the children of a widower. The learned Judge professed himself unable to understand how the exception in the case of the children of the wife, which rests on the authority of Lord HARDWICKE, came to be introduced; and he cited several cases to show that other Judges, presumably in the same mental condition, had refused to extend the exception to the children of the husband.

Another apparent exception to the rule in equity as to specific performance of a contract in favour of volunteers is exemplified by the case of *Mackie v. Herbertson* (1884), 9 App. Cas. 303, where it was held that although a contract in a marriage settlement is not as a rule enforceable in favour of volunteers, yet when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then the consideration of the mutual contract extends to and comprehends them.

Whether an executed conveyance by way of settlement in favour of a volunteer can be set aside by the settlor is a different question, and depends on various considerations. There have been cases decided by judges of first instance in equity, where provisions in marriage settlements in favour of persons not coming within the marriage consideration have been held revocable (or presumably intended to be so) on the mere ground of want of consideration. But the Court of Appeal in *Tucker v. Bennett* (1887), 38 Ch. D. 1, 57 L. J. Ch. 507, 58 L. T. 650, has discountenanced any such view, and it is there observed by COTTON, L. J. (38 Ch. D. p. 10), "It is a mistake altogether to apply to a provision in a marriage settlement, although one of a voluntary character, the same rules as the Court acts upon in considering whether a voluntary deed is one which the settlor can set aside." The same principle was followed in *Paul v. Paul* (No. 2) (C. A. 1882), 20 Ch. D. 743, 51 L. J.

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Ch. 839, 47 L. T. 210, where it was held that a trust under a marriage settlement of the wife's property in favour of her next of kin could not be set aside. It seems necessary to advert to the above distinction, because it has been sometimes lost sight of in questions relating to strangers claiming under a marriage settlement. But questions relating to the setting aside of voluntary executed conveyances belong altogether to another topic.

AMERICAN NOTES.

The principal case is much cited in this country, and its doctrine is fully accepted here. The latest writer on the subject (Lawson on Contracts, § 91) quotes from the case, and observes: "No principle is better settled in the Courts of the United States than the principle thus laid down in *Rann v. Hughes*."

In *Whitehill v. Wilson*, 3 Penrose & Watts (Pennsylvania), 405; 24 Am. Dec. 326, the written promise of a creditor to release a levy on a judgment, made without consideration, was held voidable, the Court observing of the principal case that it "is considered as having settled the law," and of the case of *Pillans v. Van Micrope* that it was thereby "much and perhaps justly shaken."

A familiar application of the doctrine is on subscriptions, which are not enforceable unless money has been expended or expense has been incurred on the faith of them. *University of Des Moines v. Livingston*, 57 Iowa, 307; 42 Am. Rep. 42; *Trustees v. Stewart*, 1 New York, 581; *Cottage Street M. Church v. Kendall*, 121 Massachusetts, 528; 23 Am. Rep. 286; and cases cited in Browne on Parol Evidence, § 111.

A promise to pay for improvements erected on public lands to which the promisor has acquired title from the government is without consideration and void. *Carson v. Clark*, 1 Scammon (Illinois), 113; 25 Am. Dec. 79. Same principle, *Smith v. Rankin*, 4 Yerger (Tennessee), 1; 26 Am. Dec. 213.

In *Jones v. Holliday*, 11 Texas, 412; 62 Am. Dec. 487, it was held, citing the principal case, that in an action on a written unsealed contract consideration must be averred and proved, unless the paper itself affords evidence thereof.

A creditor's promise to extend the time of payment of an overdue debt in consideration of payment of the future interest is not binding. *Kellogg v. Olmsted*, 25 New York, 189. So of a promise to discontinue a suit and give time in consideration of payment of costs. *Parmelee v. Thompson*, 15 New York, 58; 6 Am. Rep. 33.

"There must be a consideration to support every promise, whether it be evidenced by writing or not." *Stewart v. Jerome*, 71 Michigan, 201; 15 Am. St. Rep. 252.

An agreement by grocers not to buy any butter from the makers for two years, if a firm shall open a butter store in the place, is void for lack of consideration where the firm pays nothing therefor nor buys any established plant, place of business, or good-will. *Chapin v. Brown*, 83 Iowa, 156; 12 Lawyers' Rep. Annotated, 428. The Court said: "Suppose the plaintiffs had made a proposition to the dry-goods merchants of Storm Lake that if they

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would all quit business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry-goods store at that place, and the proposition had been accepted, it would be a marvellous decision if any Court should hold that there was any consideration for such a contract."

In *Mills County Nat. Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228, it was held that an agreement by a cashier that the defendant might renew his note to the bank, and that the bank would not foreclose a mortgage given as collateral to it, was void for want of consideration.

In *Ferrell v. Scott*, 2 Speers Law (So. Car.), 344; 42 Am. Dec. 371, it was held not a sufficient consideration to support a promissory note given by the widow of a pauper, shortly after the husband's death, to one of his creditors, that the demand was discharged against the husband's estate on account of her undertaking to pay it. The Court said: "Some good or valuable consideration is essential to support all contracts; and in general, where the party promising is to receive a benefit, or where the party to whom the promise is made is subjected to detriment or prejudice, or is delayed or hindered in enforcing his rights, by the undertaking of the promisor, such undertaking will have a sufficient undertaking to support it. We must therefore look to a benefit to the one, or any injury to the other, for the foundation of the consideration. . . . It was urged that she gave her note to relieve herself from any legal obligation. Place it in the most favorable point of view, it was a voluntary undertaking on her part to pay a debt for which she was not liable, and for the collection of which the plaintiff had no possible legal remedy. And the question recurs, did the plaintiff give up any right that was worth anything, or suffer any loss by discharging a demand against a deceased pauper? It seems to me it was no more than discharging a debt against a fictitious person, against whom it might have been charged, by way of exercise, in a book kept for the purpose of learning the art of book-keeping. The demand was utterly unavailable, and not worth the ink and paper employed in perpetuating it. The defendant's undertaking must therefore be regarded as voluntary, and without benefit, so far as she was concerned, and one which subjected the plaintiff to no possible loss or detriment, and being thus without consideration, must be regarded as *nulum pactum*, and void."

A statement in a letter without consideration that the writer will never proceed legally against the person addressed does not amount to a covenant not to sue. *Grunwald v. Freese* (California), 34 Pacific Reporter, 73.

The principle is sustained by *Utica, &c. R. Co. v. Brinckerhoff*, 21 Wendell (New York), 139; 34 Am. Dec. 220; *Shepard v. Rhodes*, 7 Rhode Island, 470; 81 Am. Dec. 573 (where a recited consideration of one dollar was held inadequate to support a promise to pay above a thousand dollars); *Bolles v. Carli*, 12 Minnesota, 113; *Pomeroy v. Slade*, 16 Vermont, 220; *Reed v. Vannorsdale*, 2 Leigh (Virginia), 618; *Ashe v. Dr. Rosset*, 8 Jones Law (No. Carolina), 240; *Richardson v. Williams*, 49 Maine, 558; *Whitson v. Fowlkes*, 1 Head (Tennessee), 533; 73 Am. Dec. 184.

The rule is the same although the promisee has sustained damage by relying on the agreement. As where one joint-owner of a vessel voluntarily under-

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took to get it insured and neglected to do so, and it was lost. *Thorne v. Deas*, 4 Johnson (New York), 84.

A very recent recognition of the doctrine is found in *Strong v. Sheffield*, 144 New York, 392, an action against defendant as an indorser of a note payable on demand, given by the maker to the plaintiff to secure an antecedent indebtedness. There was no request for forbearance; but the plaintiff agreed that he would not pay the note away nor put it in bank for collection, but would hold it until he wanted the money, and would then demand it, and thereupon, at the maker's request, the defendant indorsed the note. It was held that there was no consideration for the indorsement. The Court said: "The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*."

Parsons cites the principal case and adopts its doctrine, citing *Cook v. Bradley*, 7 Connecticut, 57, which quotes the principal case as laying down "the true doctrine of the common law," and *Burnet v. Bisco*, 4 Johnson (New York), 235; *Brown v. Adams*, 1 Stewart (Alabama), 51; *Perrine v. Cheeseman*, 6 Halstead (New Jersey Law), 174, — all citing the principal case.

The division of contracts in *Stackpole v. Arnold*, 11 Massachusetts, 27: 6 Am. Dec. 150, into three classes, viz., "specialties, written contracts not under seal, and parol or verbal contracts," is not approved by the later authorities. See Story on Contracts (5th ed.), § 10, note 2.

A seal unnecessarily affixed to a contract does not affect the rights of the parties, nor shut out any defence which would have been available if the instrument had been unsealed. *Bridger v. Goldsmith*, 143 New York, 424.

An agreement to pay a disabled servant his salary for the remainder of the term of employment is void for want of consideration. *Prior v. Flagler*, 13 Misc. (N. Y.) 115.

No. 2. — SHADWELL *v.* SHADWELL.

(1860.)

RULE.

CONSIDERATION to support a promise as a ground of action may consist in an act done, or a detriment incurred by the promisee at the request (express or implied) of the promisor.

Shadwell v. Shadwell and another. Executors, &c.

30 L. J. C. P. 145-150 (s. c. 9 C. B. N. S. 159; 7 Jur. N. S. 311; 3 L. T. 628; 9 W. R. 163).

Contract. — Consideration. — Promise.

[145]

C., the testator, wrote the following letter to L., his nephew: "I am glad to hear of your intended marriage with E., and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £120 yearly during my life, and until your annual income, derived from your profession of a Chan-

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cery barrister, shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require." L. having afterwards married E. sued C.'s executors for arrears of the annuity accrued due during C.'s lifetime: — *Held*, per ERLE, C. J., and KEATING, J., that the above letter contained a good consideration for C.'s promise to pay the annuity; the consideration pleaded being, that L. would marry E., and his subsequent marriage. Per BYLES, J., that the letter was a mere letter of kindness, and created no legal obligation.

Held, per ERLE, C. J., BYLES, J., and KEATING, J., that L.'s continuance at the bar was not a condition precedent to his right to the annuity.

The declaration stated, that the testator, in his lifetime (in consideration that the plaintiff would marry Ellen Nicholl), agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter, addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say, —

" 11th August, 1838, GRAY'S INN.

" MY DEAR LANCEY, — I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one [* 146] hundred and fifty * pounds yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.

" Your ever affectionate uncle,

" CHARLES SHADWELL."

Averment, that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of £150 each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator, and that the plaintiff's annual income derived from his profession of a Chancery barrister never amounted to 600 guineas, which he was always ready and willing to admit and state to the said testator, and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, £12 of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in

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arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea, that before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator before and at the time of making the supposed agreement and promise also had notice, and the said marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and without the request of the testator. And the defendants further say, that save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea, to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855, the defendants say that although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same; yet, that after the making of the said agreement and promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister, which before and at the time of the said making of the said supposed agreement and promise, he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister, appointed yearly to revise the list of voters for the year, for the county of Middlesex, according to the provisions of the statutes

in that behalf, by holding open Courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea, that the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters and figures, following, and in none other, that is to say — [setting out the letter as in the declaration above] — Averment, the plaintiff afterwards married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked, and that he so married while his annual income derived from his profession of a Chancery barrister did not amount, and was not by him admitted to amount to 600 guineas.

[* 147] * Second replication to the fifth plea, that the said agreement declared on was in writing, signed by the said testator, and was and is in the words, letters and figures set out in the next preceding replication, and in none other, and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity. Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Bullar, in support of the demurrers (Nov. 9). — The letter declared on discloses no consideration for the promise of the testator. It was nothing more than a voluntary kindness on his part; and no intention is expressed in the letter to make it binding on him. *Hawes v. Armstrong*, 1 Bing. N. C. 761; 1 Scott, 661. The promise to pay the annuity is not in consideration that "you will marry Ellen Nicholl," but it refers to a previous promise to assist the plaintiff "at starting," and that more naturally refers to his starting in his profession than to his starting in married life. And even if it be taken as referring to his starting in married life, the marriage is referred to in the letter as an obligation already incurred on the part of the plaintiff; the consideration, therefore, on which the testator's promise was based, was a consideration that the plaintiff should do what he was already bound to do; and that is not sufficient. *Wennall v. Adney*, 3 Bos. & P. 247; 6 R. R. 780; *Eastwood v. Kenyon*, 11 Ad. & El. 438; No. 3, p. 23, *post*; *Rann v. Hughes*, 7 T. R. 350 n., p. 1, *ante*; *Hopkins v. Logan*, 5 M. & W. 241; 8 L. J. (N. S.) Ex. 218; *Stilk v. Myrick*, 2 Camp. 317; 6 Esp. 129; 11

R. R. 717; *Clutterbuck v. Coffin*, 3 Man. & G. 842; *Cowper v. Green*, 7 M. & W. 633; 10 L. J. Ex. 346; Pothier on Obligations (by Evans), 25; *Crowhurst v. Laverack*, 8 Ex. 208; 22 L. J. Ex. 57. As to the fifth plea, the question is whether the plaintiff's continuance at the bar was made a condition precedent to his right to the annuity? It is submitted that it was, and that when the plaintiff voluntarily abandoned his profession, his right to the annuity ceased, just as a covenant to pay rent during a term may be put an end to by the covenantee putting an end to the term.

V. Harcourt, in support of the replication. — It is true that where the contract must be in writing, the consideration must appear on the face of the contract; but that is not so where the contract need not be in writing, *Shortrede v. Cheek*, 1 Ad. & E. 37; and it was not necessary that the contract in this case should be in writing; for the Statute of Frauds does not apply where the promise is founded on a consideration executed. *Souch v. Strawbridge*, 2 C. B. 808; 15 L. J. C. P. 170; *Green v. Suddington*, 7 El. & B. 503, and Chitty on Contracts, 456. But, assuming that the consideration must appear in the writing containing the promise, it sufficiently appears in this case. The plaintiff having made an engagement to marry, the testator promised to assist him on starting in married life, viz., by giving him an annuity; and the plaintiff, relying on that promise, married. It is said, on the other side, that the plaintiff had already incurred an obligation to marry, and that a promise based on the consideration that he would fulfil that obligation is void. But the *quantum* of consideration is not material; and it is quite consistent with these pleadings that the plaintiff changed his condition sooner than, but for the testator's promise, he would have done, or even that, but for that promise, he might have broken off the engagement altogether. Or the true construction may be, that the plaintiff received a promise from the testator that, if he married, the testator would assist him at starting, on the faith of which he made his engagement to marry, and then the testator writes the letter referring to the former promise, and on the faith of that the plaintiff married. In either view there is a sufficient consideration to maintain this action. *England v. Davidson*, 11 Ad. & E. 856; 9 L. J. (N. S.) Q. B. 287; and * *Ken- [*148] nuway v. Treleavan*, 5 M. & W. 498; 9 L. J. (N. S.) Ex. 20. Till the marriage was executed there was a good continuing consideration to support the promise. *Wareop v. Morse*, Cro. Eliz.

138; *Payne v. Wilson*, 7 B. & C. 747; Rol. Abr. 'Consideration,' Q. 12, Com. Dig. tit. 'Action of Assumpsit,' B. 12. And when persons have been induced to change their position on the faith of a promise, the person promising is not allowed to say there was no consideration. *Pickard v. Sears*, 6 Ad. & E. 469; *Crosbie v. McDoual* 13 Ves. 148; 9 R. R. 161; *Montefiori v. Montefiori*, 1 W. Bl. 360; *Bold v. Hutchinson*, 20 Beav. 250; 24 L. J. Ch. 285. As to the replication to the fifth plea, the plaintiff's continuance at the bar is not made a condition precedent. If it had been the intention of the testator to make it a condition precedent he would have expressly so stipulated.

Bullar replied, and cited *Wain v. Warlters*, No. 22 post, 5 East, 10; 1 Smith 299; 7 R. R. 645; *Lampleigh v. Brathwait*, Hob. 105; and *Thomas v. Thomas*, 2 Q. B. 851; 11 L. J. Q. B. 104. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of himself and KEATING, J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of £150 per annum. If there be such a consideration, it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise, that is, in the letter of the 11th of August, 1838, and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are, that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be, namely, £150 per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed 600 guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of

his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss, if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be *ex- [*149] pressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited; but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of *Montefiori v. Montefiori* and *Bold v. Hutchinson*, are examples. I do not feel it necessary to add anything about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff; and I should state that this is the judgment of my Brother Keating and myself; my Brother Byles differing with us.

BYLES, J. — I am of opinion that the defendant is entitled to the judgment of the Court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea, that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question — Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words — [his Lordship read it]. It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be, "at starting in the profession," for it will be observed, that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration, that the annuity is not, in terms, made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which, by law, must be in writing; and the fourth plea shows that no consideration or request, *dehors* the letter, existed, and, therefore, that no such consideration, or request, can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration; but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be, a detriment to the plaintiff; but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you £500 if you break your leg," would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise, if the testator had said, "I will give you £100 a year while you continue in your present chambers?" I conceive that the promise

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would not be binding for want of a previous request by the testator. Now, the testator in the case before the Court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point — Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea, that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator * at the engagement as an accomplished fact. No [* 150] request can, as it seems to me, be inferred from them.

And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff before the letter had already bound himself to marry, by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position, that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person — see *Herring v. Dorell*, 8 Dowl. P. C. 604, and *Atkinson v. Settree*, Willes, 482. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty, by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging, that though he had promised to marry before the testator's promise to him, nevertheless, he would have broken his engage-

ment, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record, I agree with the rest of the Court.

Judgment for the plaintiff.

ENGLISH NOTES.

In *Scotson v. Pegg* (1861), 6 H. & N. 295, 30 L. J. Ex. 225, A. had contracted to deliver a cargo of coals to the order of B., who ordered him to deliver it to C. C. agreed with A. that in consideration of A.'s delivering the coal, C. would unload it in a certain time. A. now sued C. for breach of his promise. C. pleaded that A. was already bound by his contract with B. to deliver the coals to him, and that therefore there was no consideration for his promise. It was held that the plea was no answer to the action. For although A. was already bound by his contract with B. to deliver the coals, his contracting directly with C. sufficiently altered his legal position.

It may be appropriate here to refer to the expression of the judgment of the Court in *Currie v. Misa* (1875), 4 R. C. 317, 320 (L. R., 10 Ex. 153, 44 L. J. Ex. 94): "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."

Towards defining "consideration" two salient points may be noted: First. Consideration consists in what is actually given or suffered and accepted for a promise; ulterior motives, though present, are immaterial. *Thomas v. Thomas* (1842), 2 Q. B. 851, 2 Gale & Dav. 226, 11 L. J. Q. B. 104. There the executors of A. in pursuance of the wishes of the testator agreed to convey a house to his widow for her life, she undertaking to pay £1 a year towards the ground rent, and to keep the premises in repair. In an action for breach of the agreement, the plaintiff set out the consideration to be the promise to pay the rent and to keep the premises in repair. It was objected that this was not the sole consideration, and that the plaintiff ought also to have included the intention of the testator as recognised by the executors. The Court held that the agreement to pay and to keep in repair was the consideration for the agreement; and that respect for the wishes of the testator

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was no part of the legal consideration and need not be stated in the declaration. Secondly. Consideration is not so much the advantage accruing to the promisor, as the detriment suffered or burden undertaken by the promisee. If the promisee suffers the loss, or undertakes the burden, it is immaterial that the promisor derives no benefit, or that the benefit is not adequate as an equivalent to the thing promised. So early as 1459, in M. 37, H. VI. 8, pl. 18, DANVERS, J., said: "So if I tell a man if he will carry twenty quarters of wheat for my master Prisots to G., he shall have 40/, and thereupon he carry them, he shall have his action of debt against me for the 40/, and yet the thing is not done for me, but only by my command." That the sufficiency of the consideration is immaterial has been undoubted law ever since the notion of consideration began to be developed. The reason is that the parties are the best judges of the bargains entered into. As Hobbes says, "The value of all things contracted for is measured by the appetite of the contractors." Neither common law nor equity inquires into the adequacy of a consideration. In *Westlake v. Adams* (1858), 5 C. B. (N. S.) 248, 265, 27 L. J. C. P. 271, 274, BYLES, J., observed, "It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration." In *Coles v. Trecothick* (1804), 9 Ves. 246, 7 R. R. 167, Lord ELDON said: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."

The consideration must, however, be *real*: that is, the promisee must do or forbear beyond what he is already bound to, either by the general law or by a subsisting contract with the other party.

Where in the course of a voyage some of the seamen deserted, and the captain not being able to supply their place promised to divide the wages which would have accrued to them among the remainder of the crew, the promise was held to be void for want of consideration. *Still v. Myrick* (1809), 2 Camp. 317, 319, 14 R. R. 717, 718. Lord ELLENBOROUGH said: "There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. . . . If the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original

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contract to exert themselves to the utmost to bring the ship in safety to her destined port." But a promise of extra pay to a ship's crew for continuing a voyage after accident has so reduced the number of hands as to make the voyage unsafe is supported by a consideration, for the crew is not bound to proceed under the original articles. *Hartley v. Ponsonby* (1857), 7 El. & B. 872, 26 L. J. Q. B. 322.

Again, a constable is not entitled to a reward for rendering services within his ordinary duty; *contra*, if he renders services beyond his ordinary duty. *England v. Davidson* (1840), 11 Ad. & El. 856. So where an entire sum is due, an agreement to accept payment by instalments is voluntary, unless the debtor proves some consideration given for the indulgence, *e. g.* that he undertook not to tender the whole sum, promised higher rate of interest, or provided some additional security. *McManus v. Bark* (1870), L. R., 5 Ex. 65, 39 L. J. Ex. 65, 21 L. T. 676. So an agreement between a creditor and his debtor, that the latter should be discharged from the debt on payment of seven shillings in the pound is unenforceable for absence of consideration, *Fitch v. Sutton* (1804), 5 East, 230, 1 Smith, 415; but a composition between a debtor and his several creditors is enforceable, the consideration for the promise of each creditor to forego a part of his claim being the promise of the other creditors to do the same. *Good v. Cheeseman* (1831), 2 B. & Ad. 328.

Where the consideration is *executory*, that is, consists in a promise, it must be enforceable; in other words, lawful, possible, and definite. Thus a promise by a son not to worry his father about the family conduct of the latter is too vague to be a consideration for the latter's promise not to press payment of a debt due from the former. *White v. Bluett* (1853), 23 L. J. Ex. 36. So a voluntary conveyance of real estate does not cease to be voluntary by the promise of the grantee to build on the land such a dwelling-house as he or his heirs shall think fit. *Rosher v. Williams* (1875), L. R., 20 Eq. 210, 44 L. J. Ch. 419.

Consideration is necessary to discharge a contract. See *Foakes v. Beer* (Accord and Satisfaction, No. 2, 1 R. C. 370), 9 App. Cas. 605, 54 L. J. Q. B. 130.

Consideration may consist in forbearance, for instance, forbearance to sue or to press for immediate payment of a debt already due. *Calisher v. Bischoffsheim* (1870), L. R., 5 Q. B. 449, 39 L. J. Q. B. 181. But the right forborne must actually exist, or be honestly believed to exist. *Wade v. Simeon* (1846), 2 C. B. 548, 3 D. & L. 587, 15 L. J. C. P. 114.

Compromises are held to be binding, the consideration being the abandonment of claims honestly believed to exist, though they may not exist in fact. *Stapilton v. Stapilton* (1739), 1 Atk. 2, 2 White & Tudor L. Ca.

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AMERICAN NOTES.

This doctrine is universally accepted in this country. "A consideration which will support a simple contract is some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Lawson on Contracts*, § 92. Thus an agreement to pay another's expenses if he will take a trip to Europe, in no way connected with the promisor's business, is upon sufficient consideration. *Derecmon v. Shaw*, 69 Maryland, 199; 9 Am. St. Rep. 422. In this case the Court said: "It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon the express promise by him that he would repay the money spent. It was a burden incurred at the expense of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It was nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way rather than in some other mode. If it is not fulfilled, the expenditure will have been procured on a false pretence." See *Chick v. Trerett*, 20 Maine, 462; 37 Am. Dec. 68; *Holt v. Robinson*, 21 Alabama, 106; 56 Am. Dec. 240; *Dickinson v. Ripley County*, 6 Indiana, 128; 63 Am. Dec. 373 (payment of interest in advance to procure delay); *Cobb v. Cowdery*, 40 Vermont, 25; 94 Am. Dec. 370; *Muscolo v. Montesanto*, 61 Connecticut, 50; 29 Am. St. Rep. 170 (note given for withdrawal of suit against maker's minor son, in which he had been arrested, founded on *Bidwell v. Catton*, Hob. 216); *Ballard v. Burton*, 64 Vermont, 387; 16 Lawyers' Rep. Annotated, 664 (forbearing to withdraw money from a bank for a reasonable but indefinite time to induce a third party to sign as surety on the issue of a new certificate of deposit).

But the agreement to perform a legal duty does not afford a consideration. Thus the resumption of her marital duties by a wife who has voluntarily estranged herself from her husband because of her dissatisfaction with a valid and binding ante-nuptial contract, is no consideration for the revocation of said contract. *Appeal of Lukens*, 143 Pennsylvania State, 386; 13 Lawyers' Rep. Annotated, 581, — "The sole inducement was the doing of that which Mrs. Kesler was legally bound to do." So in *Roberts v. Frisby*, 38 Texas, 219, it was held that the husband is not bound by a post-nuptial contract in which he hires the wife to live with him. The same principle is recognized in *Copeland v. Boaz*, 9 Baxter (Tennessee), 223; 40 Am. Rep. 89; and *Merrill v. Peaslee*, 146 Massachusetts, 460. On the other hand, in *Phillips v. Myers*, 82 Illinois, 67; 25 Am. Rep. 295, it was held that a promissory note made by a husband for his wife, in consideration of her discontinuing an action of divorce on account of his drunkenness and abuse, and her returning to live with him, was valid, citing *Nicholls v. Dawvers*, 2 Vern. 671. The Court said: "We do

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not have the shadow of a doubt that this formed a sufficient consideration to support the note, nor do we see in what manner it is immoral, or can be held opposed to some public policy."

In *Ballard v. Burton*, *supra*, the Court said: "Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne. In Anson on Contracts, p. 62, it is said: 'Courts will not inquire whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any benefit to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as a consideration for the promise made to him.' The law will not enter into an inquiry as to the adequacy of the consideration for a promise, but will leave the parties to be the sole judges of the benefits to be derived therefrom, unless the adequacy of the consideration is so gross as of itself to prove fraud or imposition. *Judy v. Louderman*, 48 Ohio St. 562. In general, a waiver of any legal right, at the request of another party is a sufficient consideration for a promise. 1 Parsons on Contract, p. 444. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. 2 Kent Com. 12th ed. p. 465. In *Burr v. Wilcox*, 13 Allen, 273, WELLS, J., in defining 'consideration,' says: 'Any act done at the defendant's request, and for his convenience, or to the inconvenience of the plaintiff, would be sufficient.' The Exchequer Chamber in 1875 defined 'consideration' as follows: 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud, and with full knowledge of all the circumstances. *Doyle v. Dixon*, 97 Mass. 213; 93 Am. Dec. 80. Pollock, in his work on Contracts, p. 166, says: 'Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present.' In *Boyd v. Freize*, 5 Gray, 554, SHAW, Ch. J., says: 'An agreement, therefore, to forego one's legal right or forbear collecting a debt, or enforcing any other beneficial right, is a good consideration for an express promise made upon it. Such agreement may be express or implied by law.'"

In *Doyle v. Dixon*, referred to above, the Court observed: "The agreement of the plaintiff to settle and adjust all matters between the parties, and to sign the lease on the 21st of November, ten days before the time when he was bound by the written contract to do so, was a legal consideration for the defendant's agreement."

Two very remarkable applications of the doctrine of detriment as a consideration have recently been made in this country. In *Talbot v. Stemmons' Exrs.*, 89 Kentucky, 222; 25 Am. St. Rep. 531; 5 Lawyers' Rep. Annotated, 856, it was held that the abandonment of the use of tobacco by one party during the life of another is a sufficient consideration for a promise by the latter to pay the former an agreed sum of money. The Court said: "The right to

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use and to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless the surrender of that right caused the promise, and having a right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to support the promise." This was followed in *Hamer v. Sidway*, 124 New York, 538; 21 Am. St. Rep. 693; 12 Lawyers' Rep. Annotated, 463, where an uncle promised his nephew that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him five thousand dollars. The principal case was relied on. The defendant's contention was that the conduct promised was beneficial, and not detrimental, to the promisor, and therefore the promise was without consideration. The Court quote and approve Anson on Contracts to the doctrine that "It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made," and Pollock on Contracts to the doctrine that "Consideration means, not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." In *Lindell v. Rokes*, 60 Missouri, 249; 21 Am. Rep. 395, it had been held that a promissory note payable on condition that the payee abstain for a certain time from the use of intoxicating liquors, is binding. The Court said: "It requires no argument to combat the position to the contrary."

No. 3. — EASTWOOD v. KENYON.

(1840.)

RULE.

AN expense already incurred by A. for the benefit of B is not in law a consideration to support a subsequent promise by B. for his re-imbursement, unless the expense was incurred under such circumstances that a previous request by B. might be presumed.

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11 Adol. & Ell. 438-453 (s. c. 4 Jur. 1081).

Contract. — Promise. — Past Consideration. — Statute of Frauds.

A pecuniary benefit, voluntarily conferred by plaintiff and accepted by [438] defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by defendant to reimburse plaintiff.

Therefore, where the declaration in assumpsit stated that plaintiff was executor of the father of defendant's wife, who died intestate as to his land,

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leaving defendant's wife, an infant, his only child and heir; that plaintiff acted as her guardian and agent during infancy, and in that capacity expended money on her maintenance and education, in the management and improvement of the land, and in paying the interest of a mortgage on it; that the estate was benefited thereby to the full amount of such expenditure; that plaintiff, being unable to repay himself out of the personal assets, borrowed money of A. B. on his promissory note; that defendant's wife, when of age and before marriage, assented to the loan and the note, and requested plaintiff to give up the management of the property to her, and promised to pay the note, and did in fact pay one year's interest on it; that plaintiff thereupon gave up the management accordingly; that defendant, after his marriage, assented to the plaintiff's accounts, and upon such accounting a certain sum was found due to plaintiff for monies so spent and borrowed; that defendant, in right of his wife, received all the benefit of plaintiff's said services and expenditure, and thereupon in consideration of the premises, promised plaintiff to pay and discharge the note: —

Held, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for defendant's promise.

Assumpsit. The declaration stated, that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned: that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law surviving: that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased;

that from and after the death of John Sutcliffe until the [~ 439] said Sarah Sutcliffe came of full age, * plaintiff, executor

as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and

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having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof: that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own moneys, and did advance, a large sum, to wit £140, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the control and management of the *said property, and then promised the plaintiff to pay [*440] and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of £140 to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the control and management of the property to the said agent on behalf of the said Sarah Sutcliffe; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or reward whatsoever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said £140. That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, &c., for moneys so expended and borrowed by him as aforesaid; and it also then appeared that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had

and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed, and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the [* 441] amount thereof, defendant did *not, nor would then, or at any other time pay or discharge the amount, &c., but wholly refused, &c.

Plea: *Non Assumpsit*.

On the trial before PATTESON, J., at the York Spring assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds 29 Car. 2, c. 3, s. 4, and ought to have been in writing; on the other hand it was contended that such defence, if available at all, was not admissible under the plea of *Non Assumpsit*. The learned Judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following term, obtained a rule *nisi* according to the leave reserved, and also for arresting judgment on the ground that the declaration showed no consideration for the promise alleged. In Trinity Vacation, 1839,¹

Alexander and W. H. Watson showed cause. The defence is not available under the general issue. [Upon this point, *Buttmore v. Hughes*, 5 M. & W. 456,² decided on the same day, was mentioned to the Court, and was considered conclusive.] Then, the promise is not within the statute, which requires a writing only where the promise is "to answer for the debt, default, or miscarriages of *another person*." Here there is no other [* 442] person in default, but the promise is to pay the amount *to the plaintiff. [PATTESON, J. It is rather a promise to pay Blackburn; a promise to take up the bill.] In substance it is a promise to pay the plaintiff what he is liable to pay Blackburn. No case has yet decided that a promise to pay the

¹ June 19th. Before LORD DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, JJ.

² The same point arose in *Williams v. Burgess*, 10 A. & E. 499; and *Jones v. Flint*, 10 A. & E. 753.

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promisee's own debt to a third person is within the statute, which evidently contemplates the debt or default of third persons. The same point might be made in every case of an implied promise to indemnify, as where the plaintiff accepts a bill for the defendant's accommodation or where the drawer is sued on the default of the acceptor. It is said by PARKE, J., in *Thomas v. Cook*, 8 B. & C. 728, 732, that if the plaintiff at the request of the defendant paid money to a third person, a promise to repay need not be in writing. In *Castling v. Aubert*, 2 East, 325, a contract to indemnify the plaintiff if he gave up a lien was held not to be within the statute. *Williams v. Leper*, 3 Burr. 1886, is to the same effect. *Green v. Cresswell*, 10 A. & E. 453 (see also *Cresswell v. Wood*, 10 A. & E. 460), may be relied on, where a promise to indemnify the plaintiff against the consequence of becoming bail for a third party was held to require a writing; but there the defendant made himself answerable for the default of another, and so came exactly within the words of the statute. Then, as to the consideration; it has been distinctly held, that a moral obligation will support an express promise. There must be something done by the plaintiff at the defendant's request, or an act done for the defendant's benefit must be ratified by an express promise to pay; in either case, an action will lie. [COLERIDGE, J. How are we to know the difference between an express and *an implied promise on the pleadings?] After verdict an express promise must be presumed. [COLERIDGE, J. The same question may arise on demurrer.] In *Lee v. Muggeridge*, 5 Taunt. 36, executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. The same doctrine was upheld in *Seago v. Deane*, 4 Bing. 459, *Atkins v. Hill*, Cowp. 284, and in several other cases, cited in the note to *Wennell v. Adney*, 3 Bos. & P. 247; 6 R. R. 780, p. 34, *post*. A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant, while she was under age, and where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

Cresswell, contra. The case is within the words, as well as

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the spirit and mischief of the statute. It is a promise to discharge the note. The words of the breach in the declaration all point at the note. If the defendant had paid Blackburn, could it have been contended that the promise was to pay the plaintiff, and that the payment to Blackburn was no answer to an action by the plaintiff? This is in truth a promise to pay Blackburn the debt due to him from the plaintiff, and it is not the less within the statute, because the promise is made to the plaintiff and not to Blackburn himself, for the act does not say to *whom* the promise is to be made. The case of an accommodation acceptor, and the other cases of implied promises to indemnify [* 444] are not in point. *They are either promises to pay the

defendant's own debt, or they are cases of liability arising by operation of law, where no real promise is ever made or required, and which are, therefore, not within the mischief of the statute. In *Williams v. Leper* and *Castling v. Aubert*, there was a purchase by the defendant from the plaintiff. In the former, the landlord's right of distress was bought; in the latter, the plaintiff's lien on certain policies. Here the plaintiff has sold nothing to the defendant. Then as to the consideration: Suppose A. gives a parol guarantee to a tradesman to induce him to supply goods to another, can A. be made liable on a subsequent parol promise? Such a construction would defeat the statute; yet the case is in principle the same as the present, and the moral obligation much stronger. A promise may be evidence of a precedent request, but has no efficacy in itself. What is it that constitutes the moral obligation here? Not the expenditure on the estate, for no duty was cast on the plaintiff to lay out any thing on it, nor had he any right to interfere with the management; and if he had, the defendant had at that time no interest in it at all. If the honesty of the outlay causes the moral obligation, then it is indifferent whether it turned out profitable, or not, to the defendant or his wife. It would support a promise though the property had been damaged by it. If the benefit constitutes the consideration, then whenever a party benefits another against his will, a subsequent promise will be a ground of action. If it had appeared that the wife was liable at the time of her marriage, then the consequent liability of the [* 445] defendant might have supported his promise; but *no liability of the wife is stated, nor is it said that she

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promised in consideration of the premises. As to the agreement of the plaintiff to give up the control and management of the property, he had no right to either, and therefore nothing to give up; and if he had, it is not alleged to have been the consideration of the wife's promise. The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy, bankruptcy, and the Statute of Limitations; and these were the cases referred to by Lord MANSFIELD when he laid down the above doctrine. As a general rule, it cannot be supported. *Littlefield v. Sher*, 2 B. & Ad. 811. The law is correctly laid down and the cases explained in the note to *Wennall v. Adney*, 3 Bos. & P. 247; 6 R. R. 780, p. 34, *post*.¹ *Cur. adv. vult.*

In this term (January 16th), the judgment of the Court was delivered by

Lord DENMAN, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of *Buttemere v. Hayes*, that this defence might be set up under the plea of *Non Assumpsit*.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant for *a [*446] consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in

¹ See also the argument of the Attorney-General in *Huigh v. Brooks*, 10 A. & E. 315, 316.

which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, whilst the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage

the plaintiff's accounts were shown to the defendant, [* 447] who assented *to them, and it appeared that there was

due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney*, 3 Bos. & P. 249,¹ and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts,

¹ See English Notes, p. 34, *post*.

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as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Lloyd v. Lee*, 1 Stra. 94; debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly *examined. *Barnes v. Hedley*, 2 Taunt. 184; 1 Camp. [*448] 157, decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge*, 5 Taunt. 36,¹ upheld an assumpsit by a widow that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter occasion the language of MANSFIELD, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the Judges of this Court in *Cooper v. Martin*, 4 East, 76, where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 Bos. & P. (p. 34, *post*), above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley* is fully consistent with the doctrine in that note laid down. *Cooper v. Martin* also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a Court of equity would hold as to a stepfather's liability, and rather to have *assumed the point before us. It should, however, [*449] be observed that Lord ELLENBOROUGH in giving his judgment says, "the plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by

¹ On a previous suit in equity to declare the bond a charge on the separate estate of the testatrix, the Master of the Rolls had refused relief. 1 Ves. & B. 418.

the jury ;” and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* must however be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should however be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law ; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee*, 2 B. & Ad. 811, tried by GASELEE, J., at N. P., when that learned Judge held, notwithstanding, that “ the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon.” After time taken for deliberation this Court refused even a rule to show cause why the nonsuit should not be sit aside. *Lee v. Muggeridge* was cited on the motion, and was sought to be distinguished by Lord TENTERDEN, because there the circumstances raising the consideration was set out truly upon the record, but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had [* 450] * supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant’s husband, and not to her. But Lord TENTERDEN added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*, where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* spoke of Lord MANSFIELD as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney*, p. 34, *post* ; 3 Bos. & P. 249 ; 6 R. R. 780, shows the deduction to be erroneous. If the former, Lord TENTERDEN and this Court declared that they could not adopt it in *Littlefield v. Shee*. Indeed the doctrine would annihilate the

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necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to *claims for just debts. Suits would [*451] thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson*, 7 T. R. 348, shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as a matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that *case have been available under the [*452] plea of *Non Assumpsit*.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. Brathwait, Hob. 105, is selected by Mr. Smith, 1
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Smith's *Lead. Cas.* 67, as the leading case on this subject, which was there fully discussed, though not necessary to the decision. HOBART, C. J., lays it down that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by *Hunt v. Bate*, Dyer, 272 (a) there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay £20 to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in *Townsend v. Hunt*, Cro. Car. 408, and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord MANSFIELD, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

[* 453] * Upon the whole we are of opinion that the rule must be made absolute to arrest the judgment.

Rule to enter verdict for defendant, discharged.

Rule to arrest judgment, absolute.

ENGLISH NOTES.

The note to *Wennall v. Adney* (1802), 3 Bos. & Pul. 249, n. (6 R. 780), referred to in the argument and in the judgment, is as follows: —

"An idea has prevailed of late years that an *express* promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord MANSFIELD and Mr. Justice BULLER, which, if construed with the qualifications fairly belonging to them, do not warrant the conclusion which appears to have been rather hastily drawn from thence. In *Atkins v. Hill*, Cowp. 283, which was assumpsit against an executor on a promise by him to pay a

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legacy in consideration of assets, Lord MANSFIELD said, 'It is the case of a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise he could not be compelled to pay.' And in *Hawkes v. Sanders*, Cowp. 290, which was a similar case with *Atkins v. Hill*, Lord MANSFIELD said that the rule laid down at the bar, 'that to make a consideration to support an assumpsit there must be either an immediate benefit to the party promising or a loss to the person to whom the promise was made,' was too narrow; and observed, 'that a legal or equitable duty is a sufficient consideration for an actual promise; that where a man is under a moral obligation, which no Court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration.' His Lordship then instanced the several cases of a promise to pay a debt barred by the statute of limitations, a promise by a bankrupt after his certificate to pay an antecedent debt, and a promise by a person of full age to pay a debt contracted during his infancy. The opinion of Mr. Justice BULLER in the last case was to the same effect, and the same law was again laid down by Lord MANSFIELD in *Trueman v. Fenton*, Cowp. 544. Of the two former cases it may be observed, that the particular point decided in them has been overruled by the subsequent case of *Deeks v. Strutt*, 5 T. R. 690. And it may further be observed, that however general the expressions used by Lord MANSFIELD may at first sight appear, yet the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Lord MANSFIELD will an *express* promise have any operation, and there it becomes necessary, because though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not as in ordinary cases imply an assumpsit against him. The same observation is applicable to *Trueman v. Fenton*, that being an action against a bankrupt on a promise made by him subsequent to his certificate respecting a debt due before the certificate. There is, however, rather a loose note of a case of *Scott v. Nelson*, Westminster Sittings, 4 Geo. III. cor. Lord MANSFIELD (see Esp. N. P. 945), in which his Lordship is said to have held a father bound by his promise to pay for the previous maintenance of a bastard child. And there is also an anonymous case, 2 Show. 184, where Lord Chief Justice PEMBERTON ruled that

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‘for meat and drink for a bastard child an *indebitatus assumpsit* will lie.’ Although the latter case does not expressly say that there was a previous request by the defendant, yet that seems to have been the fact, for Lord HALE’s opinion is cited to show ‘that where there is common charity and a charge,’ the action will lie; which seems to imply that if a charge be imposed upon one person by the charitable conduct of another, the latter shall pay; and though he adds ‘and undoubtedly a special promise would reach it,’ that expression does not necessarily import a promise subsequent to the charge being sustained, but may be supposed to mean that where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable even though he should not be so where the charge was only induced by his conduct without such engagement. The case of *Watson v. Turner*, Bull. N. P. 147, has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord MANSFIELD, because in that case overseers were held bound by a mere subsequent promise to pay an apothecary’s bill for care taken of a pauper; but it may be observed that ‘this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor;’ which obligation being a legal obligation distinguishes the case. Indeed in a late case of *Atkins v. Bonwell*, 2 East, 505, that distinction does not seem to have been sufficiently adverted to, for *Watson v. Turner* was cited to show that a

[251] mere moral obligation is sufficient to *raise* an implied assumpsit,

and though the Court denied that proposition, yet Lord ELLENBOROUGH observed that the promise given in the case of *Watson v. Turner* made all the difference between the two cases, without alluding to another distinction which might have been taken, viz. that though the parish officers were bound by law in *Watson v. Turner*, the defendants in the principal case were not so bound, because the pauper had been relieved by the plaintiffs as overseers of another parish, though belonging to the parish of which the defendants were overseers. In the older cases no mention is made of moral obligation; but it seems to have been much doubted whether mere natural affection was a sufficient consideration to support an assumpsit, though coupled with a subsequent express promise. Indeed Lord MANSFIELD appears to have used the term ‘moral obligation’ not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because if it were not for the exemption they would be enforced at law through the medium of an implied promise. In several of the cases it

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is laid down that to support an *assumpsit* the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the plaintiff; *per* COKE and all the Justices, *Hatch and Capel's Case*, Godb. 203; *per* REEVE, J., Mar. 203; *per* COKE, Chief Justice, and DODDERIDGE, J., 3 Bulst. 162, and *per* COKE, Chief Justice, Roll. Rep. 61, pl. 4. And in *Lampleigh v. Brathwait*, Hob. 105, it was resolved 'that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit.' And in *Bret v. J. S. and his Wife*, Cro. Eliz. 755, where the first husband of the wife sent his son to table with the plaintiff for three years at £8 *per ann.* and died within the year, and the wife during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the plaintiff £6 13s. 4d. for the time past, and £8 for every year after, and upon which promise the plaintiff brought his action; the Court held that natural affection was not of itself a sufficient ground for an *assumpsit*; for although it was sufficient to raise an use, yet it was not sufficient to ground an action without an express *quid pro quo*; but that as the promise was not only in consideration of affection but that the son should afterwards continue at the plaintiff's table, it was sufficient to support a promise. In *Harford v. Gardner*, 2 Leo. 30, it was said by the Court that love and friendship are not considerations to found actions upon, and in *Best v. Jolly*, 1 Sid. 38, where a father was held liable for his own and his son's debt, because he had promised to pay them if the plaintiff would forbear to sue for them, yet the Court said, 'he was not liable for his son's debt,' but having induced forbearance, which is a damage to the plaintiff, he was held liable, 'though as to the son's debt it was no benefit to the defendant.' So in *Besfisch v. Coggil*, Palm. 559, it was debated whether the defendant was liable upon an express promise to repay the plaintiff money laid out by him in Spain for the defendant's son, and the charges of his funeral, HYDE, Chief Justice, and WHITLOCK being of opinion that the action could not be maintained; JONES and DODDERIDGE *à contrà* that it could. The former of which it should seem was the better opinion; for in *Butcher v. Andrews*, Carth. 446, on *assumpsit* for money lent by the plaintiff to the defendant's son at his instance and request, and verdict for the plaintiff, the judgment was arrested, HOLR. Chief Justice, saying, 'if it had been an *indebitatus* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt, and not the son's; but when the money is lent to the son, it is his proper debt,

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and not the father's. But in *Church v. Church*, B. R. 1656, [252] cit. Sir T. Ray. 260, where defendant promised to repay the plaintiff the charges of his son's funeral, the latter was held entitled to recover, though no request was laid in the declaration. Of which case it may be observed that possibly after verdict the Court presumed a request proved; for in *Hayes v. Warren*, 2 Str. 933, though the Court would not presume a request after judgment by default, yet they said they would have presumed it after verdict. However, in *Style v. Smith*, cited by POPHAM, J., 2 Leon. 111, it was determined that if a physician in the absence of a father give his son medicine, and the father in consideration thereof promise to pay him, an action will lie for the money. But the case of *Style v. Smith*, if closely examined, will not perhaps be found so discordant with the principle laid down in *Bret v. J. S. and his Wife* as may be supposed. From the expression, 'in the absence of a father,' used in that case, it may be inferred that the son lived with the father, and that the medicine was administered to the son in the house of the father, while the latter was absent, from whence it results that the physician's debt, though not founded on any immediate benefit to the father, or on his request, was most probably founded on his credit: which credit, if fairly inferred from circumstances by the physician, might operate to charge the father in the same way as his request would operate, the physician having sustained a loss in consequence of that credit. Indeed if any of the cases could be sustained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his son, because he has subsequently promised to pay it; by the same rule the son should be liable for the debt of the father upon a similar promise; for the same moral obligation exists in both cases. Yet in *Barber v. Fox*, 2 Saund. 136, the Court arrested the judgment in an action of assumpsit on a promise made by the defendant, to avoid being sued on a bond of his father, it not being alleged that the defendant's father had bound himself and his heirs: for they refused to intend even after verdict that the bond was in the usual form, and consequently held the promise of the defendant *nudum pactum*, he not appearing to have been liable to be sued upon the bond. And this last case was confirmed in *Hunt v. Swain*, 1 Lev. 165: Sir T. Ray. 127; 1 Sid. 248. See note 2 to *Barber v. Fox*, by Mr. Serj. Williams. Indeed it is clear from *Lloyd v. Lee*, 1 Str. 94, and *Cockshott v. Bennett*, 2 T. R. 763, 1 R. R. 617, that if a contract between two persons be *void*, and not merely *voidable*, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet according to the commonly received notion respecting moral obligations and the force attributed to a subsequent *express* promise, such a person ought to pay. An

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express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. In addition to the cases already collected upon this subject, it may be observed that in *Mitchinson v. Hewson*, 7 T. R. 348, the Court of King's Bench, upon the authority of *Drue v. Thorn*, All. 72, held a husband not liable to be sued alone for the debt of his wife, contracted before marriage, though the objection was only taken in arrest of judgment, and consequently a promise by him to pay the debt appeared upon the record. From whence this principle may be extracted, that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an assumpsit to pay in another right."

Roscorla v. Thomas (1842), 3 Q. B. 234, raised the question of past consideration in another form. The facts of the case appear sufficiently in the judgment of Lord DENMAN, C. J.: "This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count stated that in consideration that the plaintiff, at the request of the defendant had bought of the defendant a horse for the sum of £30, the defendant promised that it was sound and free from vice. And it was objected in arrest of judgment that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail. It may be taken as a general rule that the promise must be co-extensive with the consideration."

Lampleigh v. Brathwait and the principal case were referred to in *Roscorla v. Thomas*, and distinguished. The former of those cases was also discussed and distinguished in *Kennedy v. Brown* ("Action" No. 18, 1 R. C. 789, 800; 13 C. B. (N. S.) 677, 740; 32 L. J. C. P. 137, 148).

In *Kaye v. Dutton* (1844), 7 Man. & Gr. 807, 13 L. J. C. P. 183, there was an agreement, from which it appeared that the plaintiff had joined in a bond as a collateral security for the mortgage advanced to A. on the mortgage of certain premises, and had been compelled to pay a portion of it; that the defendant had undertaken the management of A.'s affairs, had repaid the plaintiff part of the money so paid and agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the mean time to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff

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had a lien on the said premises; that at the defendants' request the plaintiff had released and conveyed his interest to B. & C., reserving a lien on the property as aforesaid; and that in consideration of the above-mentioned payment by the plaintiff, and release and conveyance of his interest to B. and C., the defendant promised to repay him the same with interest out of the proceeds of the premises when sold, and in the mean time to appropriate in liquidation of the same. The defendant did not appropriate the rents. Judgment went for the defendant on the ground that "the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was again no consideration," for the plaintiff did not actually part with anything. TINDAL, C. J., in delivering judgment, observed (7 Man. & Gr. p. 815), "Where the consideration is one from which a promise is by law implied, then no express promise, made in respect of that consideration after it has been executed, differing from that which by law could be implied, can be enforced. But those cases (cited by the defendant, *Roscorla v. Thomas* and others), may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may perhaps be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant *at his request*, under circumstances which would not raise any implied promise." The LORD CHIEF JUSTICE expressly forbore from expressing any opinion on the validity of a subsequent promise made for such a consideration. In *Elderton v. Emmens* (1847), 4 C. B. 479, at p. 496, MAULE, J., observed: "An executed consideration will sustain only such a promise as the law will imply."

Where A. having performed gratuitously services for B. received from him a promissory note, with the understanding that he should accept it not only as a gift for what was past, but also as remuneration for future services to B., it was held that there was no consideration for the note, the past service being gratuitous, and there being no contract binding on A. to perform future services, although he actually performed them. *Hulse v. Hulse* (1856), 17 C. B. 711; 25 L. J. C. P. 177. A similar decision was given in *Pourtales Gorgier v. Morris* (1860), 7 C. B. (N. S.) 588, 29 L. J. C. P. 208.

Perhaps the affirmative of the doctrine that a consideration moving at the request of the promisor will support a subsequent promise is more correctly expressed, and the effect of the *dicta* and decisions summed up in the following statement of the late Lord Justice BOWEN:

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“The fact of a past service raises an implication that at the time it was rendered it was to be paid for; and if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered.” *In re Casey, Stewart v. Casey* (1892), 1 Ch. at p. 115, 61 L. J. Ch. at p. 66.

AMERICAN NOTES.

“A past consideration will not support a promise, for it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise.” *Lawson on Contracts*, § 108; *Boston v. Dodge*, 1 Blackford (Indiana), 19; 12 Am. Dec. 205 (a promise to pay for improvements made by the plaintiff upon government land which the defendant had purchased from the United States after the improvements had been made); *Ludlow v. Hardy*, 38 Michigan, 690; *Osier v. Hobbs*, 33 Arkansas, 215; *Wilson v. Edmunds*, 24 New Hampshire, 517; *Chamberlin v. Whitford*, 102 Massachusetts, 448; *Carson v. Clark*, 1 Scammon (Illinois), 113; *Bartholomew v. Jackson*, 20 Johnson (New York), 28; 11 Am. Dec. 237; *Bulkley v. Landon*, 2 Connecticut, 401; *Allen v. Bryson*, 67 Iowa, 591.

So no obligation arises to pay for friendly services previously rendered. *James v. O'Driscoll*, 2 Bay (So. Car.), 101; 1 Am. Dec. 632; *Bartholomew v. Jackson*, *supra*, — a leading case, where the services (valued at fifty cents) consisted in the removal of a stack of wheat from a field in order to save it from fire. In the former case the Court said “It would be doing violence to some of the kindest and best effusions of the heart to suffer them afterward to be perverted by sordid avarice. Whatever differences may arise among men, let these meritorious and generous acts remain lasting monuments of the good offices intended in the days of good neighbourhood and friendship, and let no after circumstance ever tarnish or obliterate them from the recollection of the parties.”

This doctrine has been applied where a mortgagor of a homestead promised after default to pay rent, the mortgage being void because imperfectly executed by the wife, *Strauss v. Harrison*, 79 Alabama, 321; and so where a son promised to pay his father's debts, *Cook v. Bradley*, 7 Connecticut, 57; 18 Am. Dec. 79; or a father promised to pay his son's, *Freeman v. Robinson*, 38 New Jersey Law, 383; 20 Am. Rep. 399, citing the principal case, and observing: “It has also been approved and made the basis of judicial decision quite generally by the Courts in this country.” So the promise of a husband to carry out his dead wife's wish. *Schnell v. Nell*, 17 Indiana, 29; 79 Am. Dec. 453. So a promise by father to mother on her deathbed that their child should have a certain property will not support a deed thereof. *Peck v. Peck*, 77 California, 106; 11 Am. St. Rep. 241, citing *Lloyd v. Fulton*, 91 United States, 181.

“A promise under a sense of moral obligation either of benefits received

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or of duties of honour, conscience, or friendship, is not made upon a sufficient consideration, and is not binding." Lawson on Contracts, § 100, citing the principal case; *Mills v. Wyman*, 3 Pickering (Massachusetts), 208; *Shepard v. Rhodes*, 7 Rhode Island, 470; 84 Am. Dec. 573; *Cobb v. Cowdery*, 40 Vermont, 25; 94 Am. Dec. 370; *Uplike v. Titus*, 2 Beasley (New Jersey Equity), 151; *Schnell v. Nell*, 17 Indiana, 29; 79 Am. Dec. 453; *Porterfield v. Butler*, 47 Mississippi, 165; 12 Am. Rep. 329, citing the principal case; *Warren v. Whitney*, 24 Maine, 561; 41 Am. Dec. 406; *Gordon v. Gordon*, 56 New Hampshire, 170; *Philpot v. Gruminger*, 14 Wallace (U. S. Supr. Ct.), 570; *Ehle v. Judson*, 24 Wendell, 97; *Schroeder v. Fink*, 60 Maryland, 436; *Turlington v. Slaughter*, 54 Alabama, 195. A different doctrine was held in a few early cases, and was adhered to in *Lycoming v. Union*, 15 Pennsylvania St. 166; 53 Am. Dec. 575.

In *Gray v. Hamil*, 82 Georgia, 375; 6 Lawyers' Rep. Annotated, 72, a partner after dissolution agreed to allow the other partner a certain sum for his services rendered necessary by the promisor's drunkenness while in the firm. This was held valid under the Georgia Code, but it was conceded that it would have been invalid at common law.

This doctrine was applied in *Chadwick v. Knox*, 31 New Hampshire, 226; 64 Am. Dec. 329, an action for services and expenses in procuring a pardon for a convict, but not at his request. The Court said: "It is settled that no man can do another an unsolicited kindness and make it a matter of claim against him; and it makes no difference whether the act was done from mere good-will, or in the expectation of compensation. Unless the party benefited has done some act from which his assent to pay for the service may be fairly inferred, he is not bound to pay. . . . It is a general rule too that a past consideration is not a valid foundation of a contract or promise, unless the act has been done at the request of the party benefited, and of whom payment is claimed." Citing *Reason v. Wirdnam*, 1 C. & P. 434; *Alexander v. Fane*, 1 M. & W. 511; *Parker v. Crane*, 6 Wendell (New York), 647. See *Davidson v. Gas Light Co.*, 99 New York, 566; *Milliken v. Teleg. Co.*, 110 New York, 405.

In the very late case of *Ferguson v. Harris*, 39 South Carolina, 323; 39 Am. St. Rep. 731, it was held that a moral obligation to pay money or perform a duty is a good consideration for a subsequent express promise to do so, even if there was originally no legal obligation to perform, and this was applied to a married woman's note given for materials used in the construction of a house on her separate land. The Court remark: "It is earnestly urged however that a mere moral obligation is not sufficient to constitute a valid consideration for an agreement to pay money, unless such moral obligation rests upon a previous legal obligation, the power to enforce which has been lost by reason of some positive rule of law. It must be admitted that the weight of modern authority elsewhere does not seem to support the rule invoked. . . . The new departure, as it may be called, seems to rest upon a learned note to the case of *Wenall v. Adney*, 3 Bos. & P. 349. It seems to me however that a more correct view of the law is presented in a note to the case of *Comstock v. Smith*, 7 Johns. 86. . . . The remark made by Lord DENMAN in *Eastwood*

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v. *Kenyon*, 11 Ad. & E. 438, that the doctrine for which I am contending ‘would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it,’ is more specious than sound, for it entirely ignores the distinction between a promise to pay money which the promisor is under a moral obligation to pay and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay. It seems to me that the cases relied upon to establish the modern doctrine, so far as my examination of them has gone, ignore the distinction pointed out in the note to *Comstock v. Smith*, 7 Johns. 86, above cited, between an express promise and an implied promise resting merely on a moral obligation, for while such obligation does not seem to be sufficient to support an implied promise, yet it is sufficient to support an express promise.” To this case in 39 Am. St. Rep. 735, is appended a very excellent note on the subject, citing the principal case, and saying that “in this country the prevailing doctrine is in accord with the doctrine announced in the later English cases.”

SECTION II. — *Capacity.*

No. 4. — WARWICK v. BRUCE.

(BRUCE v. WARWICK, EX. CH. IN ERROR.)

(1813, 1815.)

RULE.

At common law the contract of an infant is not void *ab initio*, but is voidable by him at his option. And where the contract has been in part executed by the infant, and is for his benefit, he may sue upon it.

Warwick (an Infant), by J. Monteith, his next Friend v. Bruce.

(Bruce v. Warwick, Ex. Ch. in error.)

2 M. & S. 205-210; 6 Taunt. 118-120 (s. c. 14 R. R. 634).

Contract. — Infant. — Consideration in part executed.

Defendant on the 12th of October agreed to sell to plaintiff (an [205] infant) all the potatoes then growing on three acres at so much per acre, to be dug up and carried away by the plaintiff, and plaintiff paid £40 to defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue. *Held*, that he was entitled to recover for this breach of the agreement.

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ASSUMPSIT; the plaintiff declares that on the 12th of October, 1812, &c., at the request of the defendant, he agreed to buy of the defendant, and the defendant agreed to sell to him all the potatoes then growing on three acres and a half of land of the defendant, at the rate or price of £25 per acre, and so in proportion for the half acre, amounting to the sum of £87 10s., to be dug up and carried away by the plaintiff, and to be paid for by him as hereinafter mentioned; and in consideration thereof, and also in consideration that the plaintiff, at the request of the defendant, then and there paid to the defendant the sum of £40 in part payment of the said price, and then and there promised the defendant to dig up and carry away the potatoes, and to pay the defendant the residue of the price agreed on, on the first half of the potatoes being taken and cleared from the land, the defendant then and there undertook and promised the plaintiff to suffer and permit him to dig up and carry away the potatoes. And then the plaintiff avers that he did afterwards dig up a part of the potatoes, and carry away a part of those which were so dug, and was ready and willing, and offered to dig up and carry away the residue and to pay the defendant the residue of the price agreed on; but the defendant did not nor would suffer him to dig up or carry away any more; on the contrary, the defendant afterwards took and carried away a great part of the potatoes so dug as aforesaid, and converted *and disposed thereof, and of the residue which were not dug up by the plaintiff, to his own use. Whereby the plaintiff was put to great trouble and expense in the digging up a part of the potatoes, and also lost all the profits which might and would otherwise have accrued to him from the performance of the said promise of the defendant, &c. There were three other special counts upon this agreement, and the common money counts. Plea, general issue, and notice of set-off. At the trial before Lord ELLENBOROUGH, Ch. J., at the Middlesex sittings after last Term, it was objected, first, that this contract (being by parol) was within the fourth section of the Statute of Frauds; and, secondly, that the plaintiff being an infant could not sue upon it. His Lordship overruled the first objection, but upon the last he directed a nonsuit, giving the plaintiff leave to move to set it aside.

The Attorney-General accordingly obtained a rule *nisi* for that purpose, and mentioned the case of *Teed v. Elworthy*, 14 East, 210.

Upon the rule coming on, Lord ELLENBOROUGH, C. J., after re-

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ferring to his report, said, that at the trial he had not sufficiently adverted to the distinction between a void contract and one which was voidable only by the infant, and that his present impression was that this was of the latter kind; and he mentioned a case of *Holt v. Ward*, 2 Str. 937, which was an action by an infant for a breach of promise of marriage; and after several arguments it was held that it would lie; and although the argument turned much on the peculiar nature of that contract, *yet the [* 207] Court seemed to have decided it on the general reason of the law with regard to infants' contracts.

Spankie and D. F. Jones, who showed cause, said, that *Holt v. Ward*, according to the pleadings, went no farther than to show that an infant after he comes of age may sue on a contract made with him while an infant, and which is for his benefit, and that a promise of marriage is a contract for his benefit; but they endeavoured to distinguish the present as being a mercantile contract; and therefore in *Whyvill v. Champion*, Str. 1083, it was ruled that the law would not suffer an infant to trade, which might be his undoing; and for the same reason also a commission of bankruptcy shall not be taken out against him. *Ex parte Sydebotham*, 1 Atk. 146; *Ex parte Moule*, 14 Ves. 603. And in Com. Dig. *Enfant*, c. 2, it is laid down, that regularly a contract by an infant, if it be not for necessities, shall be void. It is a rule, indeed, that infancy is a personal privilege of the infant, and not to be set up by others who have contracted with him in avoidance of their contract; but that is only where the contract is upon a consideration executed, or where, as Lord MANSFIELD observed in *Zouch v. Parsons*, 3 Burr. 1808, the transaction shows a semblance of benefit to the infant sufficient to make it voidable only; but where that is left in doubt, the Court will interpose in order to protect him. Now here the contract is not upon a consideration fully executed, nor does it bear upon the face of it any such semblance of benefit to the infant, but, on the contrary, is open to all the objections of being a trading contract. In *Seehrogham v. Stuartson*, 3 Bac. Abr., *Infaney*, I. 3, where to trespass and *assault the defendant [* 208] pleaded a license from the plaintiff, an infant, for a sum of money, the Court, upon demurrer, held the contract to be absolutely void. Upon the other objection they insisted that this was a contract or sale of an interest in or concerning land, and distinguished it from *Parker v. Stanyland*, 11 East, 362; 10 R. R. 521,

because there the crop at the time of sale, though it was then in the ground, had reached its full growth, and was to be taken up immediately, and so the land was considered as nothing more than a warehouse; but here the contract was at a season when the potatoes had yet to grow; and upon this distinction it was resolved in *Emmerson v. Heelis*, 2 Taunt. 38; 11 R. R. 520, that a sale of growing turnips was "a sale of an interest in land;" and the same was held in *Crosby v. Wadsworth*, 6 East, 602; 8 R. R. 566.

The Attorney-General, *contra*, was stopped by the Court.

LORD ELLENBOROUGH, Ch. J.:—

As to the last objection, if this had been a contract conferring an exclusive right to the land for a time for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*. But here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel. It falls, therefore, within the case of [*209] *Parker v. Stangland*; and that *disposes of the point on the Statute of Frauds. As to the other point, it occurred to me at the trial on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the cases of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants where they have given the fair value for any article of produce that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in *Strange*.

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DAMPIER, J: —

The question in these cases does not so much depend upon whether the consideration is executed, as in what manner the interests of the infant will be affected by the contract. In *Knight v. Stone*, Sir W. Jones, 164; s. c. *Noy*, 93, the Court were of opinion that an infant might submit to a reference, because it might be to his benefit; and in **Holt v. Ward*, Str. 939, [*210] it is laid down, that where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity of considering it when he comes of age; and it is good or voidable at his election. But though the infant has this privilege, yet the party with whom he contracts has not; he is bound in all events.

Rule absolute.

Bruce v. Warwick. In Error.

1815. April 19. — A writ of error having been [6 Taunt. 118] brought to reverse the above judgment of the Court of King's Bench,

A. Moore, for the plaintiff in error, contended that it appeared by the record that this was a trading contract, in which the plaintiff, being an infant, could not by law engage; for an infant could not by law be a trader, it not being for his benefit that he should engage in the risks of trade. No authority could be found, that an infant was competent to engage in trade, though he admitted that upon the discussion of this case, the Court below had held that he was competent so to do. *Ex parte Sydebotham*, 1 Atk. 146. Lord HARDWICKE held that an infant could not be a bankrupt, and decreed a commission against him to be superseded; upon the ground, as it may be presumed, that he was incapable of being a trader. *Ex parte Moule*, 14 Ves. 602, Lord ELDON, Chancellor, seems to have doubted whether a trading during infancy was sufficient to maintain a commission, and he dwells much on the trading, though far less in degree, which took place after the bankrupt was of full age. *Whywell v. Champion*, 1 Str. 1083. LEE, C. J., held that goods sent to an infant who had set up a shop in the country, could not be recovered for. For the law will not suffer him to trade, which may be his undoing. If no persons can enforce trading contracts against him, and he can enforce his trading contracts against those with whom he deals, the consequences

would be, that he might obtain goods on credit to any extent, and plead infancy as a defence to paying for those goods, and at the same time may sell those same goods to others, and en-
[* 120] force payment for them, or may *contract to sell them to others, and refuse with impunity to complete his contract.

LITTLETON, s. 259, says, if any within the age of 21 years be bay-life or receiver to any man, &c., all serve for nothing and may be avoided; and Lord COKE, Co. Litt. 172, a., remarks thereon, One under the age of 21 years shall not be charged in any such account. And in another place, Co. Litt. 3, b., he says, an infant or minor is not capable of an office of stewardship of the Court of a manor either in possession or reversion. If his infancy would be no bar to his maintaining an action against a lord who had contracted to sell him a stewardship and refused, for not fulfilling his contract, the judgment would award him a compensation for the loss of that, which, if he had obtained, he would be incompetent to perform.

Lawes, *contra*, was stopped by the Court.

GIBBS, C. J. The court are all of opinion that the judgment of the Court of King's Bench is perfectly right. It has been urged for the plaintiff in error, that it is incumbent on the defendant in error to show that an infant can enter into a trading contract. The general law is that the contract of an infant may be avoided or not, at his own option. As to the case put, the infant could maintain no such action; for he cannot perform the duties of a steward, and the law would not compel the lord to make an unavailing appointment. If he had paid money for such an appointment, we doubt not that he might recover it back. On the whole we are of opinion, that this is in the same case as other contracts made by an infant, which he may either avoid or enforce at his pleasure.

Judgment affirmed.

ENGLISH NOTES.

At common law the contract of an infant which is clearly prejudicial to him has been treated as absolutely void. *Baylis v. Dineley* (1815), 3 M. & S. 477; *Reg. v. Lord* (1848), 12 Q. B. 757, 17 L. J. M. C. 181. In the latter case, on the conviction of a servant (an infant at the time of entering into the service) for unlawfully keeping away from his master's employment, the Court said: "An agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable and wholly void. The con-

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viction must be quashed.” This principle was followed in *Meakin v. Morris* (1884), 12 Q. B. D. 352, 53 L. J. M. C. 72, 32 W. R. 661; and in *Corn v. Matthews* (1893), 1 Q. B. 310, 62 L. J. M. C. 61, 68 L. T. 480; which decide that an apprenticeship contract containing a clause empowering the master to suspend wages during a “turn-out” is unreasonable, and wholly void. Where an indenture of apprenticeship contained an unreasonable clause, the Court has held that it is not binding either on the infant or on a parent who was a party to it; and therefore refused to enforce it against a third party who induced the infant to break the engagement. *De Francesco v. Barnum* (1890), 45 Ch. D. 430, 63 L. T. 438, 39 W. R. 5. Where the counsel for an infant plaintiff compromised the action on terms of non-payment of costs, the compromise has been held not to be binding on the infant. *Rhodes v. Swithenbank* (1889), 22 Q. B. D. 577, 58 L. J. Q. B. 287, 60 L. T. 856, 37 W. R. 457. An agreement by which an infant in consideration of a railway company allowing him to travel on special terms, waived his right of claiming any damages for accidents that might happen on the line, was held to be void. *Flower v. London & North-Western Railway Co.* (C. A. 1894), 2 Q. B. 65, 63 L. J. Q. B. 547, 70 L. T. 829, 42 W. R. 519.

On the other hand, contracts that are evidently for the benefit of the infant have been held binding on him; for instance, a beneficial lease. *Maddon v. White* (1787), 2 T. R. 159, 1 R. R. 453; an infant’s contract of apprenticeship, or a contract to give his services for wages, if not unreasonable, *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229, 47 L. J. M. C. 22, 37 L. T. 461.

In *Walter v. Everard*, 1891, 2 Q. B. 369, 60 L. J. Q. B. 738, 65 L. T. 443, 39 W. R. 676, an apprentice, an infant, at the date of the deed, was held liable for premiums, the apprenticeship being considered beneficial to him.

In *Evans v. Ware*, 1892, 3 Ch. 502, 62 L. J. Ch. 256, 67 L. T. 285, an infant agreed, in consideration of his employment, not to enter after leaving his master’s service, into the service of any of the master’s customers within two years. He left the master soon after attaining majority, and broke his agreement. He was restrained by injunction.

In *Clements v. London & North-Western Railway Co.* (No. 2), 1894, 2 Q. B. 482, 63 L. J. Q. B. 837, 70 L. T. 896, 42 W. R. 663, the Court of Appeal held that an infant employee of a railway company who had contracted himself out of the Employers’ Liability Act by becoming the member of an insurance society, the funds of which were augmented by the company to the extent of five-sixths of the premiums payable by the members, was bound by the agreement, it being for his benefit.

Contracts for necessities have been always held binding on infants.

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This principle is specially confirmed by section 1 of the Infant's Relief Act, 1874 (37 & 38 Vict. c. 62). Baron PARKE explained the term "necessaries" in *Peters v. Fleming* (1840), 6 M. & W. 42, at p. 46 thus: "From the earliest time down to the present the word 'necessaries' is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree, and station in life in which he is." The question of necessaries is a mixed question of law and fact. In *Ryder v. Wombwell* (1868), L. R., 4 Ex. 32, 38 L. J. Ex. 8, 19 L. T. 491, 17 W. R. 167, the Exchequer Chamber held that it is for the Court to say whether from the station and circumstances of the infant, and the nature of the articles in dispute, the things supplied are *primâ facie* such as a jury may reasonably find to be necessaries, or whether the plaintiff has tendered sufficient evidence to show that they are necessaries in the particular case, though not generally so. The Court takes judicial notice of the ordinary customs and usages of society. The jury have then to say whether the articles are in fact necessaries to the infant on the evidence before them. But in the case in point, the claim being for the price of expensive solitaires, or shirt-sleeve studs set in diamonds, the Court held,—there being no evidence that the articles were necessaries,—that the question ought not to have been left to the jury. Evidence that the infant is already supplied with articles of the same description has been admitted in the following cases: *Brayshaw v. Eaton* (1839), 7 Scott, 183, 5 Bing. N. C. 231, 3 Jur. 222; *Barnes v. Toye* (1884), 13 Q. B. D. 410, 53 L. J. Q. B. 567, 51 L. T. 292, 33 W. R. 15; and *Johnstone v. Marks* (1887), 19 Q. B. D. 509, 57 L. J. Q. B. 6, 35 W. R. 806. It seems, however, that the possession of an income by an infant to keep himself supplied with necessaries for ready money does not prevent him from contracting for necessaries on credit. *Burghart v. Hall* (1839), 4 M. & W. 727. The analogy of the wife's contract for necessaries (see *Debenham v. Mellon* (1880), No. 16 of "Agency," 2 R. C. 441, 5 Q. B. D. 394, 6 App. Cas. 24, 49 L. J. Q. B. 497, 50 L. J. Q. B. 155), does not necessarily apply. The question there is not of capacity but of authority. The infant is not bound by a deed (*Martin v. Gale* (1876), 4 Ch. D. 428, 46 L. J. Ch. 84, 36 L. T. 357, 25 W. R. 403), or a negotiable instrument (*In re Soltkykoff, Ex parte Margrett*, 1891, 1 Q. B. 413, 60 L. J. Q. B. 339, 39 W. R. 337), although given as security for payment of the price of necessaries, for which he may be sued independently.

With the exceptions above dealt with, contracts of infants were voidable by the infant at common law. They were divisible into two classes; viz. those which the infant had to repudiate in order to shake off liability, and those he had to ratify in order to incur liability.

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CONTRACTS WHICH HAD TO BE REPUDIATED. They are contracts which attach liability to permanent property. Such as marriage settlements, partnerships, shares in companies, interests in land, &c., &c. These contracts are left intact by the Infants' Relief Act, 1874. They are still voidable; that is, binding on the infant until he repudiates, or unless he repudiates within a reasonable time after attaining majority. These contracts may be considered in detail.

Marriage Settlements. In *Field v. Moore* (1855), 7 De Gex M. & G. 691, 25 L. J. Ch. 66, the LORDS JUSTICES in Chancery decided that the Court had no power, any more than the infant had, to make a binding settlement for their infant ward. But, by the Infants' Marriage Settlement Act, 1855 (18 & 19 Vict. c. 43), which was passed after the date of the settlement in question in the case last mentioned, infants may, with the sanction of the Court, make valid settlements of realty and personalty on marriage. If not made with the sanction of the Court, they are voidable. The infant may confirm the settlement on attaining majority. *Daries v. Daries* (1870), L. R., 9 Eq. 468, 39 L. J. Ch. 343. There a female infant, on her marriage, settled two reversionary interests in personalty on the trusts of the settlement. She survived her husband, and while a widow one fund fell into possession and was paid to the trustees to be held upon the trusts of the settlement. Before the other fund fell in, she became insane. It was held, that she had confirmed the settlement *in toto*; and the second fund would be subject to the trusts of the settlement. In *Duncan v. Dixon* (1890), 44 Ch. D. 211, 59 L. J. Ch. 437, 62 L. T. 319, 38 W. R. 700, the Court held that the Infants' Relief Act did not affect marriage settlements of infants, which remain voidable. Should it be desired to shake off liability under such a settlement, he must repudiate it within a reasonable time after attaining majority. *Carter v. Silber*, 1892, 2 Ch. 278, 61 L. J. Ch. 401, 66 L. T. 473. See also *Edwards v. Carter*, 1893, A. C. 360, 63 L. J. Ch. 100, 69 L. T. 153, and *In re Jones, Farrington v. Forrester*, 1893, 2 Ch. 461, 62 L. J. Ch. 996, 69 L. T. 45.

Shares in Companies. An infant will not be put on the list of contributories. On an order for winding up (pending the infancy), the name of the transferor will be substituted for that of the infant. *Capper's Case, In re China Steamship and Labuan Coal Co.* (1868), L. R., 3 Ch. 458; *In re Asiatic Banking Corporation, Symon's Case* (1870), L. R., 5 Ch. 298, 39 L. J. Ch. 461; *In re Royal Copper Mines of Cobre Co., Weston's Case* (1870), L. R., 5 Ch. 614, 39 L. J. Ch. 753; *In re Contract Corporation, Baker's Case* (1872), L. R., 7 Ch. 115, 41 L. J. Ch. 275. But after the infant has attained 21 before an order is made for winding up, he is liable to be sued for calls on the shares and

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to be put on the list of contributories unless the infant has repudiated the shares within a reasonable time of attaining majority. *In re Norwegian Charcoal Iron Co., Mitchell's Case* (1870), L. R., 9 Eq. 363, 39 L. J. Ch. 199; *In re Blakely Ordnance Co., Lumsden's Case* (1869), L. R., 4 Ch. 31; *In re Constantinople and Alexandra Hotels Co., Ebbett's Case* (1870), L. R., 5 Ch. 302, 35 Beav. 349, 39 L. J. Ch. 679.

Partnerships. An infant is not liable for the firm's debt during infancy, but he cannot claim to share profits without contributing to the loss. On coming of age, he should repudiate, or he will have to pay the debts contracted since his majority. *Goode v. Harrison* (1821), 5 B. & Ald. 147.

Interests in Land. In *Evelyn v. Chichester* (1765), 3 Burr. 1717, an infant lessee continuing in possession of the premises after majority, was held liable for arrears of rent incurred during his infancy. In *Lempriere v. Lange* (1879), 12 Ch. D. 675, an infant who had taken the lease of a furnished house by misrepresenting his age, was held not liable for *use and occupation*: and the lease was avoided. In *Whittingham v. Murdy* (1889), 60 L. T. 956, an infant bought a plot of freehold land from a building society and paid the instalments for four years and a half after coming of age. He was held bound by his contract.

Contracts to be ratified. Such contracts are difficult to bring under any one designation, but are best described as contracts to do single acts, such as a promise to marry, a contract of sale, hire, &c. Lord TENTERDEN's Act (9 Geo. IV. c. 14) required ratification of such contracts to be in writing. If an infant paid part or the whole of the consideration, he could enforce it against the other party. *Warwick v. Bruce* (principal case, *ante*); and if the other party wholly or partially executed his part, the sum so paid by the infant could not be recovered back. For instance, a premium paid for a partnership (*Ex parte Taylor* (1858), 8 De G. M. & G. 254), or for a lease (*Holmes v. Blogg* (1817), 8 Taunt. 35, 508, 2 Moore. 552, 19 R. R. 445), could not be recovered back. In *Valentine v. Canali* (1890), 24 Q. B. D. 166, 59 L. J. Q. B. 74, 61 L. T. 731, 38 W. R. 331, it was held that, notwithstanding the Infants' Relief Act, 1874 (37 and 38 Vict. c. 62), an infant could not recover the amount paid by him for furniture contained in a house occupied by him.

The Infants' Relief Act, 1874, sect. 1, renders all contracts for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants absolutely void. By section 2, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during

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infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." A contract made by way of compromise is none the less a ratification. *Smith v. King* (1892), 2 Q. B. 543, 67 L. T. 420, 40 W. R. 542. There a defendant who was sued for a debt contracted during infancy compromised the action by giving a bill for a part of the alleged debt. It was held that he could not be sued upon the bill by a plaintiff who had notice of the circumstances.

A promise of marriage made during infancy is void by section 1, and the infant cannot be sued on its ratification after coming of age. *Corhead v. Mullis* (1878), 3 C. P. D. 439, 47 L. J. C. P. 761, 39 L. T. 349. It is for the jury to decide whether the contract alleged to have been made after majority is ratification of the old contract or a new contract. *Northcote v. Doughty* (1879), 4 C. P. D. 385; *Ditcham v. Worrall* (1880), 5 C. P. D. 410, 49 L. J. C. P. 688, 43 L. T. 286, 29 W. R. 59; *Holmes v. Brierley* (1888), W. N. 158. A new contract of service upon the terms of an engagement contracted during infancy has been held to be implied from continuance of the service for four years after coming of age. *Brown v. Harper* (1893), 68 L. T. 488.

By the Infants' Loan and Betting Act, 1892 (55 Vict. c. 4), sect. 5, all agreements and instruments (even negotiable ones) made for the payment of money advanced during infancy are absolutely void.

An infant cannot be adjudicated a bankrupt. *Ex parte Jones, In re Jones* (1881), 18 Ch. D. 109, 50 L. J. Ch. 673, 29 W. R. 747.

An infant will not be allowed to take advantage of his own fraud. If by misrepresenting his age he has obtained money or other property, he is not liable as on a contract, *Lamprière v. Lange* (*supra*), but he must restore the money or property. *Clarke v. Cobley* (1789), 2 Cox, 173, 2 R. R. 25. So where an infant beneficiary induces the trustees by such misrepresentation to pay over a fund to him, he cannot afterwards charge them with a breach of trust. *Cory v. Gerteken* (1816), 2 Madd. 40, 17 R. R. 180; *Overton v. Bannister* (1844), 3 Hare, 503.

An infant may exercise a power, although coupled with an interest, where an intention appears that it should be exercised during infancy. *In re Cardross's Settlement* (1878), 7 Ch. D. 728, 47 L. J. Ch. 327.

In *Taylor v. Johnstone* (1880), 19 Ch. D. 603, 51 L. J. Ch. 879, a gift by an infant of twenty years of age, of business habits, made some time before his death, was upheld, in absence of proof of undue influence.

AMERICAN NOTES.

Formerly a distinction was recognized in this country between void contracts and voidable contracts of an infant. Some were deemed absolutely

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void without disaffirmance at majority, while others were deemed binding unless so disaffirmed. It was held at an early day that where the Court can see that a contract is for the benefit of an infant it is binding; where it can see that it is to his prejudice it is void; where it is uncertain, it is only voidable. This rule is approved by STORY, *U. S. v. Bainbridge*, 1 Mason, 82; and by Kent, 2 Commentaries, 236; and lately in *Grew v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. See Browne on Domestic Relations, 107; Lawson on Contracts, § 130. The latter writer is of opinion that there are serious difficulties in the way of a Court's determining whether a contract was for the benefit or to the detriment of an infant, and that it is better to leave it to him to say whether it shall bind him or not.

But the modern doctrine pronounces all an infants' contracts, except those specially excepted and those void as between adults, voidable only. *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496; *Owen v. Long*, 112 Massachusetts, 403; *Curtin v. Patten*, 11 Sergeant & Rawle (Pennsylvania), 305; *Hinely v. Margaritz*, 3 Barr (Pennsylvania), 428; *Patchin v. Cromach*, 13 Vermont, 330; *Vaughn v. Parr*, 20 Arkansas, 600; *Shropshire v. Burns*, 46 Alabama, 108; *Fetrow v. Wiseman*, 40 Indiana, 148; *Fonda v. Van Horne*, 15 Wendell (New York), 631; 30 Am. Dec. 77; *Scott v. Buchanan*, 11 Humphreys (Tennessee), 468; *Cole v. Pennoyer*, 14 Illinois, 158; *Cummings v. Powell*, 8 Texas, 80; *Mustard v. Wohlford's Heirs*, 15 Grattan (Virginia), 329; 76 Am. Dec. 209; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marshall (Kentucky), 236; *American Mort. Co. of Scotland v. Wright* (to appear, Alabama). In *Englebert v. Pritchett* (Nebraska), 26 Lawyers' Rep. Annotated, 177, the Court said: "The reported decisions, especially the older ones, abound with grave, learned, and lengthy discussions of the question as to whether the contracts of an infant are void or voidable; and there are respectable authorities which hold that certain contracts of an infant made under certain circumstances, are absolutely void but we think that the better rule, and the one supported by the weight of authority, is that all contracts of an infant, except those for necessities, are voidable by the infant, at his election, within a reasonable time after he becomes of age." Citing *Irvine v. Irvine*, 9 Wallace (U. S. Supr. Ct.), 617.

An infant's deed is voidable only. *Dolph v. Hand*, 156 Pennsylvania State, 91; 36 Am. St. Rep. 25; *Logan v. Gardner*, 136 Pennsylvania State, 588; 20 Am. St. Rep. 939; *Searcey v. Hunter*, 81 Texas, 641; 26 Am. St. Rep. 837. The different views are discussed by STRONG, J., in *Irvine v. Irvine*, 9 Wallace (U. S. Supr. Ct.), 627. See *Craig v. Van Bebber*, 100 Missouri, 584; 18 Am. St. Rep. 569, and note, 573, 582. But his deed without consideration was held void, in *Swofford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; *Robinson v. Coulter*, 90 Tennessee, 705; 25 Am. St. Rep. 708; *Engelbert v. Pritchett*, *supra*.

An infant's mortgage with a power of sale is voidable only. *Askey v. Williams*, 74 Texas, 294; 5 Lawyers' Rep. Annotated, 176; *Tucker v. Moreland*, 10 Peters (U. S. Supr. Ct.), 58. So of his bond for the purchase price of land. *Smith v. Henkel*, 81 Virginia, 524.

But an infant's power of attorney to sell lands is absolutely void. *Lawrence v. McArter*, 10 Ohio, 37; *Pyle v. Cravens*, 4 Littell (Kentucky), 18; *Faichanks*

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v. Snow, 145 Massachusetts, 153; 1 Am. St. Rep. 446; *Fonda v. Van Horne*, 15 Wendell (New York), 651; 30 Am. Dec. 77; *Knox v. Flack*, 22 Pennsylvania State, 337.

The principal case is cited in Schouler on Domestic Relations, p. 575, and the subject is there fully discussed, the author coming to the conclusion that "The strong tendency of the modern cases is to regard all contracts of infants as voidable only, and thus almost to obliterate the ancient distinction of void and voidable contracts altogether." (P. 536.)

In *Johnson v. Northwestern &c. Ins. Co.*, 56 Minnesota, 365; 26 Lawyers' Rep. Annotated, 187, it was held that where an infant, seventeen years old, obtains a policy of insurance, upon which he pays the premium, and makes several semi-annual payments during his minority, but disaffirms the contract immediately upon his becoming of full age, and offers to surrender the policy to the insurance company, and demands the return of the money so paid, he can, in case of refusal, maintain an action for its recovery. The Court said: —

"But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890, in *Valentini v. Canali*, L. R., 24 Q. B. Div. 166. Some *obiter* remarks of the CHIEF JUSTICE in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved, — a fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corpe v. Overton*, 10 Bing. 252 (decided by the same Court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In Chitty on Contracts (vol. 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake, a most accurate writer, in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent Com. 240), and Reeve in his work on Domestic Relations (chapters 2 and 3, title, 'Parent and Child'), state the law in exact accordance with what we may term the 'English rule.' Parsons, in his work on Contracts (vol. 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, 'and enjoys the benefit of it.' At least a respectable minority of the American decisions are in full accord with what we have termed the 'English rule.' See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53; *Breed v. Judd*, 1 Gray, 455. But many — perhaps a majority — of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of

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such a nature that they could not be restored, still he might recover back what he had paid. The problem with the Courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities — at least the latter ones — have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the ‘English rule’ seems to be generally based upon the idea that the Courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. . . . But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill, 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251, really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by Courts and juries so as to work out substantial justice.”

To this last line of cases may be added *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152.

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MARTIN v. FITZGIBBON.

(C. A. 1881.)

RULE.

By the general principles of equity the contract of a married woman could only be made effectual to bind her separate estate as to which she was not, at the date of the contract, restrained from anticipation.

Pike v. Fitzgibbon.

Martin v. Fitzgibbon.

17 Ch. D. 454–467 (s. c. 50 L. J. Ch. 394; 44 L. T. 562; 29 W. R. 551.)

Contract of Married Woman. — Separate Estate. — Restraint on Anticipation.

[454] *Held*, by MALINS, V. C., that the general engagements of a married woman entitled to separate estate will be enforced by a Court of Equity

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against such separate estate as she has at the time when judgment is given, including (if her husband be then dead) estate limited to her separate use without power of anticipation.

Held, on appeal, that they can be enforced only against so much of the separate estate to which she was entitled free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation.

The action of *Martin v. Fitzgibbon* was commenced shortly after the decision of Vice Chancellor MALINS in *Pike v. Fitzgibbon*, 14 Ch. D. 837; 49 L. J. Ch. 493, whereby it was declared that such of the separate property of Lady Louisa Fitzgibbon as was immediately before the death of her husband on the 3rd of January, 1880, and was at the date of this judgment vested in her, or in any other person or persons in trust for her, including any separate property as to which during coverture she was restrained from anticipation, was chargeable with the amount due to the plaintiffs under the covenants contained in certain indentures of the 20th of January, 1875, and the 17th of June, 1875, respectively, and with the plaintiffs' costs of the action. The plaintiffs in *Martin v. Fitzgibbon* were bankers with whom Lady Louisa Fitzgibbon had kept a separate account which had during her coverture become overdrawn. This overdrawing, as the plaintiffs alleged, had been allowed on the ground that Lady Louisa was known by them to have considerable estates settled to her separate use, and had agreed to repay the advances out of her separate estate. Mr. Fitzgibbon, the husband of Lady Louisa, died on the 3rd of January, 1880. The main object of the action was to attach the life interest of Lady Louisa Fitzgibbon in considerable estates devised by the will of Earl Clare, under which Lady Louisa, in 1873, became equitable tenant for life in possession for her separate use, with a restraint on anticipation.

The action of *Martin v. Fitzgibbon* was heard before Vice-Chancellor MALINS on the 8th of February, 1881.

MALINS, V. C., after stating the facts of the case, [455] continued:—

When I gave my judgment in *Pike v. Fitzgibbon*, 14 Ch. D. 837; 49 L. J. Ch. 493, I considered it clearly settled that the separate property of a married woman is liable for her general engagements.

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I then referred to the judgments of the LORDS JUSTICES in *Picard v. Hine*, L. R., 5 Ch. 274, and to the decree which declared that the separate property of Mrs. Hine vested in her, or in any other person in trust for her at the date of the decree, was chargeable with the payment of the sums which she had contracted to pay. That decree is directed, not to the property which she had at the time of the contract, but to the property which she had at the time of the decree, and I followed that in *Pike v. Fitzgibbon*. I hold it to be clear that all separate property which she has at the time of the judgment, whether she had it at the time of the debt being contracted or not, is liable to fulfil her general engagements.

A distinction was attempted to be drawn in *Pike v. Fitzgibbon*, and was more strongly urged to-day, between property which was settled to her separate use without power of anticipation, and property as to which there was no restraint on anticipation. I entertain no doubt as to the law on this point. The lady could not during coverture bind the income of the Irish estates, which were settled on her for life with a restraint on anticipation. But she was entitled to property for her separate use, and therefore could contract debts. What is the consequence? That all the property which she has when the judgment is given is liable to pay those debts. All I have to look at is — what property has she now? I am not treating the income of the Irish estates as bound by a specific engagement, but I hold that this, being property which she is now at liberty to dispose of, is bound by her general engagements to pay her debts out of any property she may afterwards have.

The judgment of the VICE-CHANCELLOR accordingly de- [* 456] clared that all the property of * Lady Louisa then vested in her, or in any person or persons in trust for her, and which immediately before the death of her husband stood limited to her separate use during coverture, including her life interest in the Irish estates devised by the will of Earl Clare, was chargeable with the payment of the moneys due to the plaintiffs. An inquiry was directed, what were the particulars of the property comprised in or subject to the above declaration, and a receiver was appointed of the aforesaid property, including any portion of the rents and profits of the Irish estates which but for this judgment would be payable to Lady Louisa.

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Lady Louisa Fitzgibbon appealed from this judgment so far as it affected property subject to a restraint on anticipation. She also appealed from those parts of the judgment in *Pike v. Fitzgibbon*, by which it was declared that any separate property as to which she was restrained from anticipation was chargeable with the amounts due to the plaintiffs under the covenants referred to in the judgment, and the consequential directions.

The two appeals came on to be heard together on the [457] 25th of March, 1881.

Glasse, Q. C., Davey, Q. C., and Ingle Joyce, for the appellant: —

The VICE CHANCELLOR has carried the doctrine as to a married woman's engagements further than it has ever been carried before. There is no jurisdiction to attach property which at the time of the engagement was subject to a restraint on anticipation. An express assignment of it would be clearly void, and a general engagement cannot be put on a higher footing. None of the authorities support the decision. *Johnson v. Gallagher*, 3 D. F. & J. 494; 30 L. J. Ch. 298; *Roberts * v. Watkins*, 46 [* 458] L. J. Q. B. 552; *Re Sykes's Trusts*, 2 J. & H. 415. A married woman's power of contracting debts to be paid out of her separate estate only extends to separate estate which she can alienate. *Owens v. Dickenson*, 1 Cr. & Ph. 48. The decision in *Atwood v. Chichester*, 3 Q. B. D. 722; 47 L. J. Q. B. 300, is in our favour. There is no authority for affecting any separate estate but what the married woman had at the time of the engagement.

Higgins, Q. C., and Begg, for the plaintiffs in *Pike v. Fitzgibbon*, and

Kay, Q. C., Higgins, Q. C., and T. Stevens, for the plaintiffs in *Martin v. Fitzgibbon*: —

We contend that under the general engagements of a married woman all property which is separate estate, and which at the date of the judgment is free from any restraint on anticipation, can be attached. The form of the decree in *Picard v. Hine*, L. R., 5 Ch. 274, shows this, and *Davies v. Jenkins*, 6 Ch. D. 728; 46 L. J. Ch. 761, supports that view. The separate estate is made liable without any express reference being made to it. *Mayd v. Field*, 3 Ch. D. 587; 45 L. J. Ch. 699; *Collett v. Dickenson*, 11 Ch. D. 687; *London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572; 42 L. J. Ch. 49; *Murray v. Barlee*, 3 My. & K. 209; 3 L. J. Ch. 184; *Morrell v. Cowan*, 6 Ch. D. 166; 7 Ch. D. 151; *Oliver v.*

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Carew, 1 J. & H. 199 ; 28 L. J. Ch. 685. There is then no reason why the claim should be confined to separate estate which the married woman has at the time of the engagement. A Court of Equity treats a married woman as capable of contracting debts ; it does not make them a charge on her separate property, but gives execution against it. She is treated as a *feme sole* in respect of separate estate. *Hulme v. Tenant*, 1 Bro. C. C. 15 ; *Johnson v. Gallagher*, 3 D. F. & J. 494, 516 ; 30 L. J. Ch. 298. If the engagements are only enforceable against separate estate which she had when they were entered into, inextricable confusion would result. Some of

her engagements would be enforceable only against one [* 459] part of her estate and others against * another part, and it

would be necessary to arrange the creditors in classes. A married woman can assign her separate property so as to defeat her creditors, and it is only reasonable that the creditors should have the benefit of attaching whatever property she has when they come to enforce their demands. Property subject to a restraint on anticipation still is separate property ; the married woman has then power to contract debts, and when the restraint is removed the debts may be enforced against it. The decision of the VICE CHANCELLOR has been followed in *Flower v. Buller*, 15 Ch. D. 665 ; 49 L. J. Ch. 784. *Godfrey v. Harben*, 13 Ch. D. 216 ; 49 L. J. Ch. 3, is a strong authority for the extended view of the effect of the general engagements of a married woman. In *Roberts v. Watkins*, and *Re Sykes's Trusts*, the married woman had not any separate estate except what was subject to a restraint on anticipation.

[*Vaughan v. Vanderstegen*, 2 Drew. 165 ; 23 L. J. Ch. 793 ; *London and Provincial Bank v. Bogle*, 7 Ch. D. 773, and *Wright v. Chard*, 4 Drew. 673 ; 1 De G. F. & J. 567 ; 29 L. J. Ch. 415, were also referred to.]

W. Barber, and Beddall, for trustees.

JAMES, L. J. : —

In this case, had it not been for the elaborate judgment of the VICE CHANCELLOR and the very elaborate and ingenious arguments which have been for so many hours addressed to us, I should have thought that the question was absolutely free from doubt, and incapable of effectual argument in respect of that which is the real and substantial matter of the appeal, that is, as to whether there can be any charge against the estates of which the lady was tenant for life, with a restraint upon anticipation. Twist it

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in any way you like the conclusion which the VICE CHANCELLOR arrived at, and which we are asked to arrive at, is that a married woman restrained from anticipation can anticipate. That is the result, if it is put into plain English, because whether it is done by deed or by letter, or by the creation of a debt which in the result operates to charge the property, it is an anticipation of the * property, by which the lady deprives herself [* 460] of something which she otherwise would receive. That this is anticipating her future income would seem to me to be too plain a proposition to be seriously contested. Another point also has been raised, of which we must dispose, and which has arisen, as it seems to me, from a misapprehension of some of the cases. It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a Court of Equity to contract debts to be paid and satisfied out of any estate settled to her separate use which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion there is no authority for that contention, which appears to arise entirely from a misapprehension of the case of *Picard v. Hine*, and one or two other cases which follow it, in which this point was never suggested. The language of the decree in *Picard v. Hine*, which gave the plaintiff a charge upon the separate estate remaining, was intended to give effect to the rule that the creditor had a claim against the estate, but not a charge upon it so as to prevent the operation of an intermediate alienation, and therefore the inquiry was directed what separate estate remained, meaning only what part remained of that separate estate in respect of which the married woman had at the time of contracting the debt a *jus disponendi*. That is evidently what was before the Court, no such point having been suggested as that she had acquired the general power of contracting debts to be paid out of

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any separate estate she might afterwards acquire. The misconception has arisen from not attending to what were the facts of the cases in which that inquiry was directed. I desire [* 461] to have * it distinctly understood as my opinion, and the opinion of my colleagues, and therefore as the decision of this Court, that in any future case the proper inquiry to be inserted is what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court. That is all that the Court can apply in payment of the debt. The decision in *Johnson v. Gallagher* was that the debt of the married woman, although she had separate estate, did not prevent her disposing of that separate estate any more than the contracting a debt prevents a man from disposing of any part of his estate.

I am of opinion that the decree in *Pike v. Fitzgibbon*, must be varied by substituting in the declaration the word "excluding" for "including" before the words "any separate property." It is stated that the appellant has not since the date of her engagements acquired any property settled to her separate use without a restraint on anticipation, and she therefore has not by her appeal asked to vary the judgment as regards subsequently acquired property. It is, therefore, sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce.

BRETT, L. J. :—

I am of the same opinion, and I think it right to state with deference the reasons which have led me to that conclusion. At common law, for reasons of high social policy, a married woman is not allowed to make any contract binding upon herself or upon any property of hers; in fact, the common law did not recognise that she had any property or could do any act binding herself. It seems to me, after having read the cases referred to and listened to the arguments, that it is not true to say that equity has recognised or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever [* 462] said * that what is now called a contract is a binding

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contract upon a married woman. What equity seems to me to have done is this, it has recognised a settlement as putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate. The decisions appear to me to come to this, that certain promises (I use the word "promises" in order to show that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise which it is sought to enforce. It was contended by Mr. Higgins that if the law as it exists up to this time does not affect separate estate coming into existence after the promise, the Court ought now to hold that it does, and so to make new law. That is a proposition to which I have the strongest objection. It seems to me that the days are at an end when any Court in this country ought intentionally to make new judicial legislation. The decisions which seem to me to support the proposition which I have stated do not apply to any other estate than that which is described in that proposition. I therefore venture to differ from so much of the judgment of the VICE CHANCELLOR as says that the proposition applies to separate property coming into existence after the time of the engagement, even though it be not subject to a restraint on alienation. It seems to me that the after-acquired property is a different estate from the other, and no decision of Courts of Equity has ever held that the doctrine which is applicable to the one estate should be applied to the other, and I should decline, unless obliged, to go further in that direction. Moreover, it seems to me that even if we could go further, the terms of this new estate, where there is no power of anticipation, would take that estate out of the principle applicable to the other, and that to hold that such an estate is subject to these liabilities would be in fact to strike out the words "without power of anticipation." The *cases of *Roberts v. Watkins* and *Re* [*463] *Sykes's Trusts* are adverse to the case of the plaintiffs, and with those decisions I entirely agree.

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COTTON, L. J. : —

In this case the VICE CHANCELLOR directed an inquiry as to property held to the separate use of the lady, whether she was entitled to it at the time the contracts relied on by the plaintiffs were entered into or not, including property which was settled to her separate use without power of anticipation. The only part of the decree against which there is an appeal is that part of the decree which gives the plaintiffs a right to have their debts paid out of that portion of the separate estate as to which there is a restraint on anticipation. It is unnecessary to correct the form of the decree as regards the other part, but we must decide the question involved in it, as it has a material bearing on the principle of the other part of the judgment, against which there is an appeal. It would be most strange, if, as regards the property as to which there was a restraint on anticipation, the plaintiffs could prevail. Their contention must amount to this, that the married woman under the trusts of the will was prevented only from doing any act which would prevent her from enjoying during the coverture the income of this property, and that she could do acts even during coverture which might intercept the income of the property after the death of her husband. The express terms of the trust are that she shall have no power while under coverture to dispose of the property by way of anticipation; would not a disposition to take effect after the death of her husband be an anticipation just as much as if it was to take place in the year after that in which the disposition was made? It is almost a *reductio ad absurdum* to say that although she could not anticipate by an express charge on the property, yet she could dispose of it by way of anticipation by contracting during the coverture a debt not directly charging the property but giving the plaintiffs a right to claim it. I think that the ingenious and able argument on the part of the plaintiffs has proceeded on one or two fallacies in the use of language. As I understand their argument it is this, that a Court of [* 464] Equity *deals with a married woman who has separate estate as if she were a *feme sole*. Now, is that correct? First of all, there is one clear and absolute distinction. Can a *feme sole*, or can a man, be restrained from anticipating, or disposing by way of anticipation, of any property to which she or he is entitled? No. A married woman under coverture can; but

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how and why? Simply as regards property settled to her separate use, and because equity can modify the incidents of separate estate, which is the creation of equity, and thus the position of a married woman having separate property differs materially from that of a *feme sole*. Is it true that she is regarded in equity as a *feme sole*? She is regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and there is the fallacy. She, in my opinion, is regarded as a *feme sole* only as regards property which, under the trust, she is entitled to deal with as if she were a *feme sole*, but as regards property which she is restrained from anticipating, she is not, as regards persons other than her husband, in the position of a *feme sole*. As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a *feme sole*, that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world she is not regarded as a *feme sole* in respect of property subject to a restraint upon anticipation. The judgment of Lord Justice TURNER in *Johnson v. Gallagher*, 3 D. F. & J. 494; 30 L. J. Ch. 306, shows the doctrine and principle to be, that as regards property settled to her separate use, and which she has the power of dealing with as a *feme sole*, she is treated, for the purposes of assignment or for the purposes of her general engagements, as if she were a *feme sole*, but as regards that property only. His Lordship says, 3 D. F. & J. 509; 30 L. J. Ch. 306: "Courts of Equity, on the other hand, have through the medium of trusts, created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has, in Courts of Equity, power to alienate, to contract, and to enjoy, in fact, to use the language of all the cases from the earliest to the *latest, she is considered in a Court of Equity as a [* 465] *feme sole* in respect of property thus settled or secured to her separate use." That is to say, as regards property which, under the trusts, she can dispose of and alienate she is considered as a *feme sole*. That must of necessity mean that she is treated as a *feme sole* as regards that property as to which, at the time of entering into her contracts, she is so circumstanced. Looking to

these words in the judgment, which clearly apply only to property as to which there is no restraint on anticipation, and looking at the terms of the concluding sentence, it does not mean that a married woman having separate estate is treated as a *feme sole*, but only that she is treated so as regards her power of dealing with the property to which she is entitled to her separate use without any restraint on anticipation, and as regards the consequences on that property of her general dealings she is to be considered as if she were a *feme sole*. That, I think, gets rid of the argument of the plaintiffs, for if a married woman having separate property is to be considered as a *feme sole*, so that her engagements can be made available not only as against the separate property she has at the time of the engagement but against that which she has at the time when the judgment is sought to be enforced, I do not see why, after the determination of the coverture, all property held in trust for her, whether settled to her separate use or not, should not be made available in a Court of Equity. It was said that the right would exist only as against subsequently acquired separate estate, because separate estate is a creation of a Court of Equity. But why is not other trust property, when she is discovert, exactly in the same position? The separate estate and the restraint on anticipation no doubt exist during discoverture in this way, that upon a subsequent coverture they will revive and be operative, but at the time the restraint on anticipation is inoperative and she can dispose of the property, not under the trusts which secure it to her separate use, but simply because she is a *feme sole*, and all restraints upon anticipation or alienation are bad. If the contention on the other side is to prevail, not only this property but all her property, which can only be reached by the aid of a Court of Equity, ought to be included in the inquiry. In my opinion that [*466] fallacious use of the expression that a married *woman having separate estate is regarded as a *feme sole* has given rise to a great part of the argument on behalf of the plaintiffs.

Another point made by the plaintiffs is that here is an equitable execution and that it ought to apply to everything which the Court of Equity can reach at the time. The answer to that is, that the engagement of a married woman is one which a Court of Equity treats her as having power to make solely as against the property which at the time was settled to her separate use

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with no restraint on anticipation, and as regards any property subsequently coming in, although it might be reached by a Court of Equity by way of equitable execution, it is property which, at the time of the contract in question, was not the estate of the married woman, and therefore not property to be made available in a Court of Equity in respect of an engagement which as against that property is no contract at all.

As regards the case of *Godfrey v. Harben* which was pressed upon us, that to some extent favours the contention of the respondents. I think it better not to give any opinion on the point there decided, as it may come to the Court of Appeal, but that case went very much further than the case it was supposed to follow. As I understand that case, the decision was that the power of appointment by will connected with the separate life estate, when exercised, made the appointed property separate property. In the case of the *London Chartered Bank of Australia v. Lemprière* there was power to appoint by deed or will, which makes a great difference between that case and the case before Vice-Chancellor HALL. However, I express no opinion upon that case, except to point out that distinction, leaving the case entirely free if and when it comes before the Court of Appeal.

JAMES, L. J. : —

I may say, as regards the two cases of *Flower v. Buller*, 15 Ch. D. 665; 49 L. J. Ch. 784, and *Roberts v. Watkins*, that in the former case Mr. Justice DENMAN must be understood as merely following what he *thought was the decision of [*467] Vice-Chancellor MALINS, and the judgment of Lord Justice LUSH in the latter case seems to me from beginning to end to be expressed with absolute accuracy.

ENGLISH NOTES.

At common law a married woman could neither hold property nor bind herself by contract. The creation of a separate estate by the Court of Chancery was logically accompanied by a contractual capacity, but only a capacity *sub modo*, and limited in its effect to binding her separate estate if she contracted with that intention. The Married Woman's Property Act, 1882, which repealed the Acts of 1870 and 1874, enacted: — Sect 1. (1) That a married woman shall be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee; (2) She may con-

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tract with respect to and render herself liable to the extent of her separate property. (3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. (4) Every such contract shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. (5) A married woman trading apart from her husband may be made a bankrupt in respect of this separate property. (She cannot be imprisoned under the Debtor's Act, 1860.)

Section 2 defines separate property as "all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged or which she carries on separately from the husband, or by the exercise of any literary, artistic, or scientific skill."

By sect. 3, a loan by the wife to her husband is, in the case of the latter's bankruptcy, to rank after all his other creditors for valuable consideration have been satisfied.

By sect. 4, property over which she exercises a general power of appointment is rendered liable for her debts, &c.

By act 5, if married before January 1, 1883, property to which title accrued after that date is her separate property. See sections 6, 7, 8, 9, and 10 as to the further meaning of separate property.

By sect. 11, a married woman may insure her life or the life of her husband for her benefit, a policy of life assurance expressed to be for the benefit of wife and children, or of husband and children, creates a trust in favour of the objects named.

Sect. 12 provides remedies for protection of her property and person against her husband as well as strangers. The remedy may be civil or criminal, but she cannot sue her husband for a tort.

Sect. 13. Her separate property is chargeable for ante-nuptial debts; as between her and her husband, such property shall be deemed to be primarily liable for such debts, &c.

Sect. 14. A husband is liable for ante-nuptial debts to the extent of property acquired by him in right of his wife.

Sect. 15. He may be sued jointly with his wife for such ante-nuptial debts; if in any such action or in any action against the husband alone, it is not found that the husband is liable in respect of property of the wife so acquired by him, he shall have judgment for costs of defence; if he is liable, the judgment to the extent of his liability shall be joint against him and the separate estate; and as to the residue, the judgment shall be a separate judgment against the separate estate.

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Sect. 19. Property settled and property subject to restraint on anticipation are not affected; but a woman's own property settled subject to restraint will not be protected against ante-nuptial debts.

Amongst the many decisions on this Statute, the following are the most important in connection with the subject in hand: A married woman must have had some separate property at the date of the contract; if that were not the case, her future acquired property could not, under the Act of 1862, have been charged. *Palliser v. Gurney* (1887), 19 Q. B. D. 519, 56 L. J. Q. B. 546, 35 W. R. 760; *Everett v. Paxton* (1891), 65 L. T. 383, and *Stogdon v. Lee* (1891), 1 Q. B. 661, 60 L. J. Q. B. 669, 64 L. T. 494, 39 W. R. 467. Mere possession of three or four pounds did not enable her to covenant for the payment of £400. *Braunstein v. Lewis* (1891), 65 L. T. 449. Nor did the possession of a mere contingent interest which became subsequently vested, confer contractual capacity. *In re Shakespear, Deakin v. Lakin* (1885), 30 Ch. D. 169, 55 L. J. Ch. 44, 53 L. T. 145, 33 W. R. 744. Property, the title to which accrued before the Act, does not become separate property by falling into possession after the Act. *Reid v. Reid* (1886), 31 Ch. D. 402, 55 L. J. Ch. 294, 54 L. T. 100, 34 W. R. 332. Execution can be issued only against property free from restraint on anticipation. *Draycott v. Harrison* (1886), 17 Q. B. D. 147, 34 W. R. 546; *Scott v. Morley* (1888), 20 Q. B. D. 120, 57 L. J. Q. B. 43, 57 L. T. 919, 36 W. R. 67. It was assumed that, on the termination of the coverture, her debts contracted during the coverture with respect to her separate property became her personal debts. See *Harrison v. Harrison* (1888), 13 P. D. 180, 58 L. J. P. 28, 60 L. T. 39, 36 W. R. 748; *Leak v. Duffield* (1889), 24 Q. B. D. 98, 59 L. J. Q. B. 89, 38 W. R. 93. If not, the doctrine of the principal case applied, viz., that the creditor had to proceed against property (so far as it could be identified) which was her separate estate during the coverture and was free from restraint on anticipation. *Pelton v. Harrison* (1891), 2 Q. B. 422, 60 L. J. Q. B. 742, 65 L. T. 514, 39 W. R. 689.

The doctrine of the principal case is, to a certain extent, modified by the Married Woman's Property Amendment Act, 1893 (56 & 57 Vict. c. 63). By this enactment, possession of property by the married woman at the date of the contract is not necessary in order to render her subsequently acquired property liable. The Court may also (in their discretion) order payment of costs of an action instituted by her out of property subject to restraint on anticipation. On the termination of coverture the married woman is liable for debts contracted during the coverture. It is also enacted by this Act (overriding a decision, *In re Price, Stafford v. Stafford* (1885), 28 Ch. D. 709, 54 L. J. Ch. 509, 52 L. T. 430, 33 W. R. 20), that a will made

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by a married woman will pass property acquired by her after she becomes covert, without the necessity of re-execution.

It has been held under the Act of 1893 that a married woman cannot be made to pay the costs of unsuccessful interlocutory proceedings taken or appeals brought by her in an action in which she is defendant. *Hood Barrs v. Cathcart*, C. A. 1894, 3 Ch. 376. But she may be made to pay the costs of a counter claim. *Hood Barrs v. Cathcart* (No. 4), 1895, 1 Q. B. 873.

AMERICAN NOTES.

The principal case is largely cited by Pomeroy and Beach in their treatises on Equity Jurisprudence. The rights and liabilities of married women have been greatly enlarged by legislation in this country during the last half century, and the laws of the different States differ very essentially. In the State of New York the wife can acquire and hold, deal with, and contract in respect to property precisely as if single, and her liability corresponds. Many other States do not go to the same extent. Mr. Pomeroy, citing the principal case (p. 1675, note 1), says: "By parity of reasoning, in those States where the separate estate is regarded as a restraint upon alienation, and the wife can only dispose of it when and in the manner affirmatively permitted by the instrument creating it, it should also follow that her separate property is only liable for her contracts when and to the extent as affirmatively provided for in such instrument." And in note 2: "This view has not been adopted by some of the American Courts, at least in regard to the liability of the wife's legal separate estate under the Statutes." And in note 3: "Since the modern decisions that the wife may alien her separate real estate by an informal instrument, there seems to be no reason why the *corpus* of the land held to her use should not be liable to be taken and sold under a decree in satisfaction of all her engagements, whenever necessary. The early English rule, as given in the text, is followed in some of the American States, especially in those which treat the wife's power of alienation as only limited and partial. In those States where the wife's contracts are enforced in equity against her legal statutory separate property, land which she thus owns in fee is generally liable to be sold under the decree, and the proceeds applied in satisfaction of the demands." Mr. Pomeroy gives an elaborate classification of the States in respect to their present rulings upon the married woman's rights and liabilities. The subject is also learnedly discussed in a note, 55 Am. Dec. 599. There can be no doubt that where the statutes allow suits against a married woman as if she were single, a personal judgment against her is valid. *Labaree v. Colby*, 99 Massachusetts, 559; *Corn Ex. Ins. Co. v. Babcock*, 42 New York, 613; 1 Am. Rep. 601; *Patrick v. Littell*, 36 Ohio State, 79; *Wilson v. Herbert*, 41 New Jersey Law, 454. And such judgment may be enforced against any property that she may have. *Andrews v. Monlows*, 8 Hun (New York Supr. Ct.), 65. Even against property acquired after judgment. *Van Metre v. Wolf*, 27 Iowa, 341. But statutes which merely authorize her to make contracts binding her separate estate, and do not authorize suits by or against her in respect thereto, do not authorize personal judgments. In such cases the

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only remedy is *in rem* against the particular separate property. Note 55 Am. Dec. 608. Compare *Randall v. Bourguardez*, 23 Florida, 264; 11 Am. St. Rep. 379, with *Shupp v. Hoffman*, 72 Maryland, 359; 20 Am. St. Rep. 476; *Spencer v. Parsons*, 89 Kentucky, 577; 25 Am. St. Rep. 555; *Nave v. Adams*, 107 Missouri, 414; 28 Am. St. Rep. 421.

No. 6. — **MOLTON v. CAMROUX.**

(EX CH. 1849.)

RULE.

A CONTRACT entered into by a person of unsound mind, although generally voidable, is not void.

A contract entered into *bonâ fide* and in the ordinary course of business by A. who is of unsound mind but not known by the other contracting party (B.) to be so, cannot, after being executed, be avoided on the ground of the insanity in an action by A. or his representatives against B.

Molton and Wife, Administratrix of Thomas Lee, deceased, v. Camroux.¹

4 Exch. 17-20 (s. c. 18 L. J. Ex. 356).

Contract. — Capacity. — Lunacy.

A lunatic purchased certain annuities for his life, of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of life assurance business, and fair and *bonâ fide* on the part of the society. *Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

Assumpsit by the plaintiff and wife, in right of his wife as administratrix of Thomas Lee, against the defendant as secretary of the Loan Fund Life Assurance Society for money had and received. Plea — *Non assumpsit*.

At the trial, before POLLOCK, C. B., at the London sittings after Michaelmas Term, 1846, the jury found certain facts, and returned a verdict for the plaintiff. The facts were afterwards turned into a special verdict.²

¹ Before PATTESON, J., COLERIDGE, J., WIGHTMAN, J., COLTMAN, J., MAULE, J., CRESSWELL, J., ERLE, J., and WILLIAMS, J.

² The statement of the case is here taken from the report in the Law Journal.

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The action was brought to recover from the assurance society two sums of £350 and £5 6s. 2*d.* which had been paid by the deceased, Thomas Lee, to the society under the circumstances herein-after mentioned. On the 29th of August, 1843, the said Thomas Lee made proposals to the National Loan Fund Life Assurance Society for the purchase of two annuities upon his life; the first was for an annuity of £21 12s. 10*d.*, the consideration for which was the payment by T. Lee to the society of £350; the other was for the purchase of a deferred annuity of £30, to commence on his attaining the age of sixty years, namely in 1864. Both these proposals having been assented to and accepted by the society, policies containing these terms were prepared and executed by the society and by Thomas Lee on the same day, and the sums of £350 and £5 6s. 2*d.* were then paid to the society. No memorial of the proposals, the policies, or the annuities had been enrolled in Chancery. On the 29th of August, 1843, and at the time of the proposal of the acceptance of the grant of the annuities and the payments as afore-said, Thomas Lee was a lunatic and of unsound mind, so as to be incapable of managing his affairs, but of this the society had not at that time any knowledge. The purchases of the annuities were transactions in the ordinary course of the affairs of human life, and the grants thereof were fair transactions and of good faith on the part of the society and in the ordinary course of their business; and T. Lee at the time of the proposal, &c., appeared to the society to be of sound, although he was in fact of unsound, mind. No commission of lunacy has been issued against T. Lee, and no payment has been made by the society on account of the annuities, although they have been ready and willing to pay the sum of £21 10s. as one year's annuity, payable on the 29th of August, 1844.

The Court of Exchequer gave judgment for the defendant, upon which judgment a writ of error was brought; and, after argument upon the writ of error, the Court took time for consideration.

[18] The judgment of the Court was now (May 29) delivered by —

PATTESON, J. This was an action for money had and received, by the administratrix of the grantee of two annuities, against the secretary of a company who had granted them, to recover back the consideration money.

The first ground was, that no memorial of the annuity had been

enrolled. The case of *Davis v. Bryan*, 6 B. & C. 651; 5 L. J. K. B. 237, decided that it was the duty of the grantee to procure the memorial, and that he cannot take advantage of his own neglect to treat the grant as void. The same doctrine was held in *Cowper v. Godmond*, 9 Bing. 748; 2 L. J. (N. S.) C. P. 162, and in *Churchill v. Bertrand*, 3 Q. B. 568; 11 L. J. (N. S.) Q. B. 270, though the points there determined were not precisely the same. We are asked, sitting in a Court of error, to review those cases, but we are of opinion that the doctrine laid down in them is perfectly correct, and that this ground of error entirely fails.

The second ground was, that the contracts for the annuities were void, by reason of the grantee not being of sound mind and incapable to contract. The special verdict finds “that, at the time of the granting of the annuities, and payment of the consideration money, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the society had not at the time any knowledge; That the purchasing of the annuities was in the ordinary course of business; that they were fair *and *bonâ fide* transactions; and that the grantee appeared [* 19] to the society to be of sound mind, though he was then in fact of unsound mind.” This does not show such a state of mind in the grantee as to render him necessarily incapable of knowing the nature of his act, and it negatives all knowledge by the society of his state of mind, or any suspicion whatever of fraud or unfairness of any kind.

The question, therefore, is broadly raised, whether the mere fact of unsoundness of mind, which was not apparent, is sufficient to vacate a fair contract executed by the grantee, by payment of the consideration money, and intended *bonâ fide* to be executed by the grantor, by the payment of the annuity. The old doctrine was, that a man could not set up his own lunacy, though such as that he did not know what he was about in contracting; and the same doctrine was applied to drunkenness. It is true that there are some exceptions in the old authorities, and the doctrine is not laid down uniformly with perfect distinctness; but in general, it was as above stated. Modern cases have qualified it, and enabled a man, or his representatives, to show that he was so lunatic, or drunk, as not to know what he was about when he made the promise, or sealed an instrument. This special verdict hardly shows any such state of mind; but, even if it did, the modern cases show

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that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part; and the parties cannot be restored altogether to their original position. The cases which are apparently the strongest for the defendant are those of contracts of marriage decided in the Ecclesiastical Courts; but all those cases are such that the other contracting party must have known, or have had the greatest reason to believe, that the unsound state of [*20] mind existed, *although they do not appear to have been decided on that precise ground.

The authorities on the subject were cited at the bar and in the judgment of the Court below, so fully, that it is not necessary for us to go through them. We are of opinion that they fully establish the limited doctrine above mentioned; and that according to the facts stated in this special verdict, the contract in question was not void at law, so as to enable the representatives of the grantee to maintain this action for money had and received.

Judgment affirmed.

ENGLISH NOTES.

The contract of a lunatic came up again in *The Imperial Loan Company v. Stone* (C. A. 1892), 1 Q. B. 599, 61 L. J. Q. B. 449, 66 L. T. 556. There the action was on a promissory note given by the defendant as surety. The defence was insanity at the time of making the note. The jury found the insanity, but disagreed as to the knowledge of the plaintiff's agent of the state of the defendant's mind. It was held that the verdict was not a verdict in favour of the defendant; and a new trial was ordered.

A lunatic is liable, as on an implied contract, for necessities supplied to him in good faith. *Bagster v. Earl of Portsmouth* (1826), 5 B. & C. 170, 2 C. & P. 178, 7 D. & R. 614. In the case of *In re Wearer* (1882), 21 Ch. D. 615, 48 L. T. 93, 31 W. R. 224, the question was raised, but not decided, whether a person who supplied a lunatic with necessities knowing him to be a lunatic could maintain an action as on an implied contract. The affirmative of this question is supported by the case of *In re Rhodes, Rhodes v. Rhodes* (C. A. 1890), 44 Ch. D. 94, 59 L. J. Ch. 298, 62 L. T. 342, 38 W. R. 385.

In *Manning v. Gill* (1872), L. R. 13 Eq. 485, 41 L. J. Ch. 736, a voluntary conveyance of property made by an insane person under a misapprehension that conviction for felony would cause forfeiture, was annulled.

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Lunacy (where there is no likelihood of recovery) is a good ground for applying to the Court to dissolve a partnership either at the instance of a partner, *Jones v. Lloyd* (1874), L. R., 18 Eq. 265, 43 L. J. Ch. 826, or of the lunatic, *Fisher v. Melles* (1890), L. R., 18 Eq. 268 n. See the Partnership Act 1890, sect. 35, and Lunacy Act 1890, sect. 119.

Insanity revokes agency, but third parties dealing with the agent in ignorance of the principal's insanity can maintain an action on the contract. *Drew v. Naun* (1879), 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. 671, 27 W. R. 810. A husband is liable for necessities supplied to his wife during the period of his lunacy. *Read v. Legard* (1851), 6 Ex. 636, 20 L. J. Ex. 309; the presumption does not extend beyond necessities in the strict sense; and does not, for instance, extend to expenses such as for repairs to his house or property, although they are necessary for maintaining the property. *Richardson v. Dubois* (1870), L. R., 5 Q. B. 51, 39 L. J. Q. B. 69, 21 L. T. 635, 18 W. R. 62.

Partial delusion does not necessarily amount to insanity, unless the Judge or jury find that the person was not able to manage the affair in hand. *Jenkins v. Morris* (1880), 14 Ch. D. 674, 42 L. T. 817. There a person granted the lease of a farm under a delusion that it was impregnated with sulphur. The lease was upheld.

Contracts of drunken persons are, like those of lunatics, voidable. *Mathews v. Baxter* (1873), L. R., 8 Ex. 132, 42 L. J. Ex. 73, 28 L. T. 169, 21 W. R. 389.

For capacity of corporations to contract, see *Ashbury, &c. Co. v. Riche*, No. 6 of "Agency," 2 R. C. 304 (L. R., 7 H. L. 653, 44 L. J. Ex. 185).

AMERICAN NOTES.

It is believed that the American doctrine is in harmony with that of the principal case. Mr. Lawson states the American doctrine with exactness, citing the principal case, as follows: "It seems doubtful, even in the case of executory contracts, whether the transaction can be avoided on the ground of lunacy as against a contracting party who had no reason to suppose that he was dealing with an insane person. But it may be safely said that when such person is not under a conservator or guardian duly appointed by law, and is apparently of sound mind, and the other contracting party has no reason to believe otherwise, the contract cannot be avoided if it is fair, and has been so far performed that the other party cannot be restored to his former position." *Behrens v. McKenzie*, 23 Iowa, 333; 92 Am. Dec. 428, citing the principal case; *Rusk v. Fenton*, 14 Bush (Kentucky), 490; 29 Am. Rep. 413, citing the principal case; *Sims v. McLure*, 8 Richardson Eq. (So. Car.), 286; 70 Am. Dec. 196; *Eaton v. Eaton*, 37 New Jersey Law, 108; 18 Am. Rep. 716, citing the principal case; *Scanlon v. Cobb*, 85 Illinois, 296; *Burnham v. Kidwell*, 113 Illinois, 425; *Young v. Stevens*, 48 New Hampshire, 133; 97 Am. Dec. 593, citing the principal case; *Lancaster Bank*

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v. Moore, 78 Pennsylvania State, 407; 21 Am. Rep. 21; *Lincoln v. Buckmaster*, 32 Vermont, 658; *Fay v. Burditt*, 81 Indiana, 433; 42 Am. Rep. 112, citing the principal case; *Carr v. Holliday*, 5 Fredell Equity (No. Car.), 167; *Langley v. Langley*, 45 Arkansas, 392; *Cribben v. Maxwell*, 34 Kansas, 8; 55 Am. Rep. 233; *Mut. Ins. Co. v. Hunt*, 79 New York, 541, citing the principal case; *Shoulters v. Allen*, 51 Michigan, 531; *Müller v. Finley*, 26 Michigan, 249; 12 Am. Rep. 306; *Hughes v. Jones*, 116 New York, 67; 15 Am. St. Rep. 386; *Pearson v. Cox*, 71 Texas, 246; 10 Am. St. Rep. 740; *Odom v. Riddick*, 104 North Carolina, 515; 17 Am. St. Rep. 686, citing the principal case. In a note, 15 Am. Dec. 367, the editor says: "It is generally held that if there has been no unfairness or imposition, or undue advantage taken, and the insanity was unknown to the other party, the contract will only be avoided upon condition that the party seeking relief will do complete equity by restoring what he has received," citing the principal case, and *Eaton v. Eaton*, 37 New Jersey Law, 108; *Lincoln v. Buckmaster*, 32 Vermont, 659, and other cases.

In *Seaver v. Phelps*, 11 Pickering (Massachusetts), 304; 22 Am. Dec. 372, the contrary was held; but Mr. Lawson says this case "is not law, and the rule as stated in the text is sustained by a great majority of the adjudications, and seems to be as well settled as any rule of law can be."

A few cases hold, that if the insane person got no benefit the contract may not be enforced; and if executed, he may recover what he paid or parted with, although the other acted innocently. *Van Patton v. Beals*, 46 Iowa, 62; *Northwestern M. F. Ins. Co. v. Blankenship*, 94 Indiana, 535; *Lincoln v. Buckmaster*, 32 Vermont, 658.

So a few cases hold that an insane person's deed is absolutely void. *Van Dusen v. Sweet*, 51 New York, 378; *Rogers v. Bluckwell*, 49 Michigan, 192; *Rogers v. Walker*, 6 Pennsylvania State, 371; 47 Am. Dec. 470; *Dexter v. Hall*, 15 Wallace (U. S. Supr. Ct.), 9; *Somers v. Pumphrey*, 24 Indiana, 231; *Farley v. Parker*, 6 Oregon, 105; 25 Am. Rep. 504. In the last case the Court said: "The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind, and therefore cannot make a contract." In *Dexter v. Hall*, *supra*, the Court said: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding and acting in the ordinary affairs of life can make an instrument the efficacy of which consists in the fact that it expresses his intention, or more properly, his mental conclusions." In *Rogers v. Walker*, *supra*, GIBSON, C. J., said: "The direction that the plaintiff might, by her committee, recover back the land conveyed by her when insane, without restoring the purchase-money or compensating the defendant for improvements, was entirely proper." Citing *Thompson v. Leach*, 2 Salk. 427. In *Gibson v. Soper*, 6 Gray (Massachusetts), 279; 66 Am. Dec. 414, the Court said: —

"The position taken by the tenant is that the grantor or his guardian or heirs cannot avoid the grant, unless he or they place the grantee, in all respects, in the condition in which he was before the deed. It seems to us, upon careful consideration, that such is not the rule of law; that the restitution of the consideration of the deed or purchase-money is not a condition precedent to the recovery of the land.

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“Upon strict principles of law this is clear. The estate is shown to have been in the demandant within the twenty years. The tenant says he holds a deed from the demandant. But the demandant is shown to have been incapable of making a valid deed. It wants the consenting mind. The tenant must then show ratification, — ratification by some act of the grantor upon his restoration to sound mind, or possibly by his guardian. But the grantor has remained insane ever since the deed, as incapable of confirming as of making it. The guardian has done nothing to ratify or confirm the grant. The estate is still in the demandant; for if it has passed, it has passed by the deed of an insane man, never ratified or confirmed. That, in law, was impossible. The Courts have certainly gone far enough in saying such an instrument was capable of being ratified or affirmed by acts *in pais*. They have never said that though the grantor was incapable of making a deed, it should be valid against him, however insane, unless he ascertained what was the consideration paid to him, had the means of restoration, and offered to restore; and all this as a condition precedent to the recovery of that which he never had conveyed.

“No considerations of policy or equity require the adoption of such a rule. To say that an insane man, before he can avoid a voidable deed, must put the grantee *in statu quo*, would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the deed was made the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater.

“One of the obvious grounds on which the deed of an insane man or an infant is held voidable is not merely the incapacity to make a valid sale, but incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price, and rendered the restoration of the consideration impossible. For example, one buys of an insane man his farm; he gives a note, good only because it has a good indorser; the insane grantor omits to have the indorser notified, and loses its value. Must he, before he can recover the estate, put the grantee *in statu quo*?

“Upon the first impression it may seem equitable that such restoration should be made before the insane or infant grantor should recover his estate; but it is an impression which a little reflection removes. The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the same to the obligation from which the insane may be loosed. It does not mean to put them on an equality; on the other hand, it intends that he who deals with infants or insane persons shall do it at his peril. Nor is there, practically, any hardship in this; for men of sound minds seldom unwittingly enter into contracts with infants or insane persons.

“If the law required restitution of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly; and the great purpose of the law, in avoiding such

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contracts, the protection of those who cannot protect themselves, defeated. The insane grantor could not avoid the deed of his estate because the same folly which induced the sale had wasted the proceeds, the result against which it is the policy of the law to guard.

“Whether the grantee, whose deed is avoided on this ground, may recover back the price, and under what circumstances and to what extent, presents a quite different question into which it is not necessary to enter. The only question before us is whether its restoration is a condition precedent to the recovery of the estate in a writ of entry, upon proof that the grantor was insane when the deed was made, and in the absence of all evidence of ratification?

“Doubtless, if the grantor, having been restored to sound mind, or the infant upon coming of age, still retains and uses the consideration of the deed without offer to restore, or seeks to enforce the securities, or avails himself of the contract which constituted such consideration, such conduct may furnish satisfactory, and it may be conclusive, evidence of a ratification. And this is the extent, we think, to which the cases have gone, upon which the tenant specially relies. *Allis v. Billings*, 6 Met. 415; 39 Am. Dec. 744, and *Arnold v. Richmond Iron Works*, 1 Gray, 431.”

The contrary reasoning is well expressed in *Lancaster Bank v. Moore*, *supra*: “Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with the particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price.”

The case of *Van Dusen v. Sweet*, *supra*, is distinguishable by the fact, that although the deed was executed before the grantor had been judicially declared insane, yet the inquisition found that he was insane when it was executed. This was a decision by the Commission of Appeals, and is of less authority than one by the Court would be.

In *Odom v. Riddick*, *supra*, it was held that the deed of a lunatic would not be set aside, even if the grantee knew of the insanity, provided there was no fraud nor undue influence, a fair price was paid, and the transaction was made under advice of the grantor's counsel.

In the late case of *Dewey v. Allgire*, 37 Nebraska, 6; 40 Am. St. Rep. 468, founded on *Gibson v. Soper*, *supra*, it was held that the deed of an insane person may be avoided as against his grantee without notice, and as against an innocent purchaser from such grantee without restitution of the consideration paid by the last purchaser. Reliance is also placed on *Crawford v. Scorell*, *supra*, and on *Hovey v. Hobson*, 53 Maine, 451; 89 Am. Dec. 705, which cites the principal case, but recognizes the difference between the English and the American doctrine, and also cites *Chew v. Bank of Baltimore*, 14 Maryland, 318, as saying, “The doctrine in this country is the other way, and as we think

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is sustained by better reasoning than the English rule as announced in some of their decisions."

The principal case was distinguished in *Crawford v. Scorell*, 94 Pennsylvania State, 48; 39 Am. Rep. 766, where a deed of an insane grantor was set aside the grantee having knowledge of his insanity at the time of the grant.

It seems however that if the parties can be restored to their original position, the contract will be set aside, notwithstanding the ignorance and good faith of the party of sound mind, and the fact that the contract has been executed. In *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 434, it was said: "In the next place a distinction is to be borne in mind between contracts executed and contracts executory. The latter the Courts will not in general lend their aid to execute, where the party sought to be affected was at the time incapable, unless it may be for necessities. If on the other hand the incapacity was unknown, no advantage was taken, the contract has been executed, and the parties cannot be put *in statu quo*, it will not be set aside. The latter rule is said to be the tendency of the more recent American authorities, while formerly the leaning in this country was in favour of the doctrine that the contracts of a lunatic, whether executed or unexecuted, were *per se* void, unless for necessities. Wharton & Stille's Med. Jur. § 11; *La Rue v. Gilykson*, 4 Pa. St. 375; 45 Am. Dec. 700; *Beals v. See*, 10 *ibid.* 56; 49 Am. Dec. 573. If the rule above stated as to executed contracts obtains as an exception to the general rule that the contract of a lunatic is void *per se*, we submit that it must be upon the ground that the property which is the subject of the contract cannot be restored, and that it is impossible to place the parties *in statu quo*. For certainly it would seem that, if the contract is voided upon the ground that the party had not a contracting mind, and the wrong cannot be made right, — the property restored, the parties placed *in statu quo*, — it can make but little difference in a court of conscience whether the question arises upon an executed or executory contract. If the Court cannot, because of the circumstances surrounding the case, administer justice, — set aside the contract and restore the parties to their original position, — does it therefore follow that it will not do so upon an executed contract where no such obstacles exist? It seems to us not. In the case of an application to set aside a deed, where the grantee was insane, ordinarily the property can be restored and the parties placed as they were; and hence it is said fairness, innocence, and fullness of consideration are necessary to validate it." But the same Court held, in *Ashcraft v. De Armond*, 44 Iowa, 229, that a court of equity would not set aside a deed to a purchaser in good faith and for a sufficient consideration, and without knowledge of the grantor's incapacity.

No. 7. — *Adams and Others v. Lindsell and Another*, 1 Barn. & Ald. 681. — Rule.

SECTION III. — *Consent.*

No 7. — ADAMS *v.* LINDSELL.

(1818.)

No 8. — STEVENSON *v.* McLEAN.

(1880.)

RULE.

WHERE an offer is sent by letter the person making the offer is conclusively presumed to continue making the offer, during such period as is determined by, or is reasonable having regard to, the terms of the offer, or until notice of recall of the offer has reached the person to whom it is made.

Adams and Others v. Lindsell and Another.

1 Barn. & Ald. 681-683 (s. c. 19 R. R. 415).

Contract. — Offer. — Acceptance. — Revocation.

[681] A. by letter offers to sell to B. certain specified goods, receiving an answer by return of post; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived if the original letter had been properly directed, A. sold the goods to a third person; *Held*, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.

Action for non-delivery of wool according to agreement. At the trial at the last Lent assizes for the county of Worcester, before BURROUGH, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire. "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

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This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p. m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these *circumstances, [* 682] the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained; and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, Puller, and Richardson, showed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon —

Jervis and Campbell, in support of the rule. They relied on *Payne v. Cave*, 3 T. R. 148; 1 R. R. 679, and more particularly on *Cooke v. Oxley*, 3 T. R. 653; 1 R. R. 783. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till *the [* 683] plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons. But —

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The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

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5 Q. B. D. 346-352 (s. c. 49 L. J. Q. B. 701; 42 L. T. 897; 28 W. R. 916).

Contract. — Offer. — Acceptance. — Revocation.

[346] The defendant, being possessed of warrants for iron, wrote from

London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40s. per ton, net cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 p. m. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 p. m. found a purchaser for the iron, sent a telegram at 1.34 p. m. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent.

The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiff's telegram was sent at 9.42 A. M. how prices would range during the day:—

Held, by LUSH, J., that under the circumstances the plaintiff's telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and [*347] that, although * the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual

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until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable.

Further consideration before LUSH, J. The facts and arguments sufficiently appear from the judgment, which was pronounced after time taken for consideration of the argument.

May 25. LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40s. per ton, net cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for £1900, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May last.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39s., which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I *shall probably be able to wire you something definite on [* 348] Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:—

"Referring to R. A. McLean's letter to you *re* warrants, I have seen him again to-day, and he considers 39s. too low for same. At 40s. he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

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On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram:—

“ Cannot make an offer to-day ; warrants rather easier. Several sellers think might get 39s. 6*d.* if you could wire firm offer subject reply Tuesday noon.”

In answer to this Fossick wrote on the same day: “ Your telegram duly to hand *re* warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39s. 6*d.*, but will probably prefer to wait. Please let me know immediately you get any likely offer.”

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows:—

“ Mr. Fossick’s clerk showed me a telegram from him yesterday mentioning 39s. for No. 3 as present price, 40s. for forward delivery. I instructed the clerk to wire you that I would now sell for 40s., net cash, open till Monday.” No such telegram was sent by Fossick’s clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40s., net cash, and would hold it open all Monday. This it was admitted must have been the meaning of “ open till Monday.”

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: “ Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give.”

This telegram was received at the office at Moorgate at [* 349] 10.1 A.M., * and was delivered at the defendant’s office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40s., net cash, and at 1.25 sent off a telegram to the plaintiffs: “ Have sold all my warrants here for forty net to-day.” This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: “ Have secured your price for payment next Monday, — write you fully by post.”

By the usage of the iron market at Middlesborough, contracts

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made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed: "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied: "Your two telegrams received, but your sale was too late; your sale was not per my instructions." And to this the plaintiffs rejoined: "Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker at 41s. 6d., and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40s.

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only* as an inquiry, expecting an answer for his guidance, [* 350] and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of

delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde v. Wrench*, No. 12, p. 139, *post*; 3 Beav. 334, where one party offered his estate for £1000, and the other answered by offering £950. Lord LANGDALE, in that case, held that after the £950 had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in *Cooke v. Oxley*, 3 T. R.

653; 1 R. R. 783, that in order to constitute a contract [* 351] there must be the assent or concurrence * of the two minds

at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke v. Oxley* does not appear to me to warrant the inference which has been drawn from it, or the supposition that the Judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till four in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before four o'clock. The Court arrested the judgment on

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the ground that there was no consideration for the defendant's agreement to wait till four o'clock, and that the alleged promise to wait was *nudum pactum*.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke v. Oxley*. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see *Routledge v. Grant*, 4 Bing. 653. But in the absence of an intermediate revocation a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it. *Adams v. Lindsell*, *ante*, p. 80; 1 B. & Ald. 681; 19 R. R. 415. "Common sense tells us," said Lord COTTENHAM, in *Dunlop v. Higgins*, 1 H. L. C. 381, "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. **Cooke v. Oxley*, if decided the other [*352] way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke v. Oxley*, the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted," *Tayloe v. Merchants' Fire Insurance Co.*, 9 How. Sup. Court Rep. 390; and in *Byrne & Co. v. Leon Van Tienhoven & Co.*, 49 L. J. C. P. 316, my Brother LINDLEY, in an elaborate judgment, adopted this view, and held that an uncom-

municated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40s., net cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for £1900, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for £1900. The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

ENGLISH NOTES.

Denton v. Great Northern Railway Co. (1856), 5 El. & Bl. 860, 25 L. J. Q. B. 129, supports the rule in the principal cases. There a cause of action was said to lie for refusal to issue a railway-ticket for a certain train in accordance with the time-table, the train having been withdrawn, but without notice.

In *Baines v. Woodfall* (1859), 6 C. B. (N. S.) 657, 28 L. J. C. P. 338, a time policy of marine insurance was to expire on the 29th of July, 1858. The ship returned on the 12th of April, 1858, and on the 15th April the insured applied for return of part premium. On the 17th of April the policy was given up to the defendants to be cancelled, on the terms of returning the premium paid for the period between the 30th of April and the 30th of July; and on the 21st the policy was cancelled accordingly. On the 22nd the ship was burnt, and later on the same day the plaintiff (the insured) wrote to the defendant withdrawing his request for the return of premium (in other words, withdrawing his offer of having the policy cancelled), on the ground that he had not heard from the defendant. *Held*, that revocation of the proposal was too late after its actual acceptance.

In *Offord v. Davies* (1862), 12 C. B. (N. S.) 748, 31 L. J. C. P. 319, 6 L. T. 579, 19 W. R. 758, a letter of credit was issued by the defendants to A. for twelve months. A. drew some bills on the defendants and cashed them with the plaintiffs. After six months, the defendants revoked the letter of credit, and the plaintiff, with full knowledge of the revocation, cashed some further bills drawn by A. on the defendants. *Held*, that the defendants were not liable for these.

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In *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 45 L. J. Ch. 777, 34 L. T. 607, 24 W. R. 594, the defendant offered, by writing, his house to the plaintiffs for a certain price, the offer being expressly left open till the following Friday, 9 A. M. In the mean time, the defendant sold the house to A., who informed the plaintiff of the transaction. The plaintiff made a formal acceptance at the appointed time. *Held*, that the acceptance with actual knowledge of the revocation was inoperative.

In *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344, 49 L. J. C. P. 316, 42 L. T. 371, referred to and followed in the principal case of *Stevenson v. McLean*, the defendants, merchants at Cardiff, wrote to the plaintiffs at New York on the 1st of October, 1879, offering for sale 1000 boxes of tin plates on certain terms. The plaintiff received the proposal on the 11th of October and cabled acceptance at once. On the 8th of the same month the defendants had posted a letter revoking the offer, which had not been received by the plaintiffs up to the time of cabling acceptance. *Held*, that the plaintiffs made a legally binding contract, inasmuch as they accepted without actual knowledge of the revocation.

The same principles are illustrated by the cases of acceptance of an application of shares in a company, by letter of allotment, amongst which may be cited as examples: *In re National Savings Bank Association Hebb's case* (1867), L. R., 4 Eq. 9, 36 L. J. Ch. 748; *In re The Imperial Land Company of Marseilles: Harris's case* (1872), L. R., 7 Ch. 587, 41 L. J. Ch. 621; *Household Fire Assurance Co. v. Grant* (C. A. 1879), No. 10, p. 115, *post* (4 Ex. D. 216, 48 L. J. Ex. 577, 41 L. T. 298, 27 W. R. 858).

AMERICAN NOTES.

The two principal cases, and the next two, Nos. 9 and 10, may be considered together. The case of *Adams v. Lindsell* is stated in the text of Lawson on Contracts, § 20, and the doctrine in question was treated at some length by the editor of the American Reports, in Vol. 32, p. 40, citing *Adams v. Lindsell*. His conclusions were reproduced in Browne on Sales, p. 22, and are as follows:—

1. Where the offer is made by letter and is accepted by letter posted within a reasonable time, and before receipt of notice of withdrawal, the contract is complete, although the acceptance may be delayed, or may not be received, owing to the fault of the post. *Tayloe v. Merch. F. Ins. Co.*, 9 Howard (U. S. Supr. Ct.), 390; *Treror v. Wood*, 36 New York, 307; 93 Am. Dec. 511; *Abbott v. Shepard*, 48 New Hampshire, 14; *Hutcheson v. Blakeman*, 3 Metcalfe (Kentucky), 80; *Hamilton v. Lycoming Ins. Co.*, 5 Barr (Pennsylvania), 339; *Levy v. Cohen*, 4 Georgia, 1; *Falls v. Gaither*, 9 Porter (Alabama), 614; *Averill v. Hedge*, 12 Connecticut, 423; *Wheat v. Cross*, 31 Maryland, 99; 1 Am. Rep. 28; *Potts v. Whitehead*, 5 C. E. Green (New Jersey Eq.), 55; *Washburn v. Fletcher*,

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12 Wisconsin, 152; *Kempner v. Cohn*, 47 Arkansas, 519; 58 Am. Rep. 775; *Bishop v. Eaton*, 161 Massachusetts, 496 [the contrary doctrine of *McCulloch v. Eagle Ins. Co.*, 1 Pickering (Mass.), 277, and *Gillespie v. Edmonston*, 11 Humphreys (Tennessee), 553, is generally disapproved]. See also *Hartford, &c. Co. v. Lasher Stocking Co.*, 66 Vermont, 439; 44 Am. St. Rep. 859.

2. If delivery of the letter of offer is delayed by the fault of the sender, the offer is extended until its arrival. *Maclier's Adm'rs v. Firth*, 6 Wendell (New York), 103; 21 Am. Dec. 262, citing *Adams v. Lindsell*, *Averill v. Hedge*, 12 Connecticut, 436.

3. If undue delay or failure of delivery of the letter of acceptance is caused by the fault of the accepting party, there is no contract. *Thayer v. Middlesex F. Ins. Co.*, 10 Pickering (Massachusetts), 326; *Bryant v. Booze*, 55 Georgia, 438.

4. The acceptance, by its terms, must be unconditional and in accordance with the terms of the offer, and within the time prescribed, if any, by the offer. *Beaupré v. Pac. &c. Tel. Co.*, 21 Minnesota, 155; *Jenness v. Mt. Hope Iron Co.*, 53 Maine, 20; *Bruce v. Pearson*, 3 Johnson (New York), 534; *Eliason v. Henshaw*, 4 Wheaton (U. S. Supr. Ct.), 225; *Chicago, &c. R. Co. v. Dane*, 43 New York, 240; *Baker v. Johnson County*, 37 Iowa, 186; *Moulton v. Kershaw*, 59 Wisconsin, 315; 48 Am. Rep. 516; *Allen v. Kirwan*, 159 Pennsylvania State, 612. So where the offer called for reply by return mail, compliance was held essential. *Muclay v. Harrey*, 90 Illinois, 525; 32 Am. Rep. 35; *Sawyer v. Brossart*, 67 Iowa, 678; 56 Am. Rep. 371. Where an offer by telegraph to sell goods is answered by an offer to buy at a certain price, with the additional condition, "Must have reply early to-morrow," this is a stipulation for a reply within that time; and where it is not received until late in the evening of the day, in the absence of proof that the condition was not complied with, the contract was not complete. *Union Nat. Bk. v. Miller*, 106 North Carolina, 347; 19 Am. St. Rep. 538. To the same effect, *Atlee v. Bartholomew*, 69 Wisconsin, 43; 5 Am. St. Rep. 103. Where the owner of land writes a person in a distant city that he will take for the land a certain sum net, and such person answers that he accepts the offer, and requests the owner to send a deed to parties named, in such city, to whom he will pay the money on receipt of the deed, there is no completed contract, the offer implying payment at the owner's residence. *De Jonge v. Hunt* (Mich., to appear). Letters between the owner of a farm and another in which the former offers to lease the farm at a specified rate for three or five years, and the latter states that he will take a lease for five years, constitute a lease for five years, although in the latter letter the tenant states his reason for taking a five years' lease to be a desire to build a specified addition, and that he would like to do it himself if the owner will give him the privilege in the lease. *Culton v. Gilchrist* (Iowa), 61 N. W. Reporter, 384. In *Hareus v. American F. Ins. Co.* (Indiana Appellate Court), 39 Northeastern Reporter, 40, it was held that a letter reading, "I am prepared to make the arrangements with you on the terms you name," in answer to a letter of proposal, does not constitute an unconditional acceptance. This was based on *Telegram Co. v. Smith*, 47 Hun, 494, where the answer to a letter of proposal stated "the plan set forth in your letter is entirely satisfactory, we accept the same, and are ready to execute an agreement upon the basis proposed whenever prepared and submitted to

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us;" and on *Martin v. Fuel Co.*, 22 Federal Reporter, 596, where in answer to a telegram, answer was made, "You can consider the coal sold. Will be in Cleveland next week and arrange particulars;" in both cases the answer being held not to amount to an unequivocal and unqualified acceptance. The Court said: "It is simply equivalent to saying, 'I am ready to execute agreement on terms proposed by you when details are settled.'"

5. An immaterial addition to the acceptance does not prevent the contract from taking effect. Last citations.

6. Acceptance must be within a reasonable time, unless a time is limited in the offer. *Ferrier v. Storer*, 63 Iowa, 484; 50 Am. Rep. 752. Next day will answer, *Dunlop v. Higgins*, 1 H. L. Cas. 381; but four months will not. *Chicago, &c. Ry. Co. v. Dane*, 43 New York, 240.

7. Offer may be withdrawn before acceptance. *Eskridge v. Glorer*, 5 Stewart & Porter (Alabama), 264; 26 Am. Dec. 344; *Faulkner v. Hebard*, 26 Vermont, 452; *Beckwith v. Cheever*, 21 New Hampshire, 41; *Burton v. Shotwell*, 13 Bush (Kentucky), 271.

8. Acceptance may be withdrawn before or at receipt. *Dunmore v. Alexander*, 9 Shaw & Dun, 190. But Story says (Contracts, § 198): "The person accepting cannot therefore even stop his letter on the road after it is once mailed."

9. Withdrawal of offer after acceptance is duly posted is inoperative. *Byrne v. Van Tienhoven*, 5 C. P. Div. 344. *McCullough v. Eagle Ins. Co.*, 1 Pickering (Massachusetts), 278, holding that a retraction of an offer not then accepted, takes effect from the time it was posted, although not received by the other party until after he had mailed an acceptance, and so no contract existed, because at the moment the acceptance was sent the mind of the party offering had changed, and he had mailed his retraction, is generally discredited in this country, and is inconsistent with cases cited under reference 5 above. Mr. Benjamin (Sales, § 65, note 7), cites this, and *Hallock v. Commercial Ins. Co.*, 2 Dutcher (New Jersey), 268, as impugning the authority of *Cooke v. Osley*, 3 T. R. 653, which is generally accepted by the courts in this country, although attacked by Story, Kent, and Duer. Judge Bennett, the latest editor of Benjamin (Benj., Sales, 4th Am. ed., note, p. 76), says: "If the prevailing doctrine applies to every contract by letter, it seems to follow that a proposal of marriage by letter is duly accepted, and the contract closed when the acceptance is duly mailed, and if the proposer marry another because he never received the letter of acceptance of his first offer, he is liable at once to a suit for breach of promise!" Why not? He should be "sure he was off with the old love before he was on with the new."

10. If a letter of acceptance and a subsequently written letter of retraction are received at the same moment, there is no contract. *Dunmore v. Alexander*, *supra*.

Reference is also made to Mr. Inness' article, 9 Law Quarterly Review, 318, and to 27 Albany Law Journal, 245.

The rules as to acceptance by letter apply as to acceptance by telegraph: the bargain is complete when the message is deposited at the telegraph office for transmission. *Trevor v. Wood*, 36 New York, 307; 93 Am. Dec. 511; *Perry*

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v. Mt. Hope Iron Co., 15 Rhode Island, 380; 2 Am. St. Rep. 902; *Minn. L. O. Co. v. Collier Lead Co.*, 4 Dillon, 431.

If an acceptance is placed in a letter-box at the defendant's place of business, the contract is complete, even if he never received it. *Howard v. Daly*, 61 New York, 362; 19 Am. Rep. 285. But entrusting a letter of acceptance to a messenger for delivery is not sufficient, it not being shown to have been received. *Ehrlich v. Adams*, 4 Miscellaneous Reports (New York), 614.

A letter referring to and reciting the terms of and accepting an oral proposition and requesting an acknowledgment of acceptance, is not a contract. *Hough v. Brown*, 19 New York, 111.

Adams v. Linsdell was cited and followed in *Mactier's Admr's v. Fritte*, 6 Wendell, 103; 21 Am. Dec. 262; and *McCulloch v. Eagle Ins. Co.*, *supra*, was disapproved, MARCY, J., observing: —

“The principle of the decision of the King's Bench is simply that the acceptance of an offer made through the medium of a letter, binds the bargain, if the party making the offer has not revoked it, as he has a right to do, before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The CHANCELLOR, in deciding this case, gave his sanction to the latter rule. ‘To make a valid contract,’ he says, ‘it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact.’ The decision of the Court of Massachusetts makes knowledge by the party tendering the offer of the other's acceptance essential to the completion of the contract. If one party is not bound till he knows, or might know, and therefore is presumed to know, that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of acceptance. The principle of that case would bring the matter to the point stated by the CHANCELLOR, viz., the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether or not it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of the present concurrence of the wills of the contracting parties.

“All the authorities state a contract or an agreement (which is the same thing), to be *aggregatio mentium*. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn

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before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made.

“Testing the rules of law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me that we are not left at liberty to hesitate about the choice. If we are inclined, from the force of abstract reason, to prefer the rule laid down by the Court of King’s Bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists.”

No. 9. — BROGDEN v. METROPOLITAN RAILWAY COMPANY.

(H. L. 1877.)

No. 10. — HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

(C. A. 1879.)

RULE.

To constitute acceptance of an offer there must be an expression of the intention, by word, sign, or writing communicated or delivered to the person making the offer, or his agent. A mere private act of the person to whom the offer is made does not constitute acceptance. Where the post is prescribed or allowed by the offerer as the medium of communication, the acceptance is complete as soon as the letter of acceptance is posted.

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Contract. — Offer and Acceptance. — Communication of the Acceptance.

[666] B. had for some years supplied the M. Railway Company with coals.

At last it was suggested by B. that a contract should be entered into between them. After their agents had met together, terms of agreement were drawn up by the agent of the M. Company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the M. Company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the M. Company, there were explanations and excuses given by B. and the "contract" was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and B. denied that there was any contract which bound him in the matter: —

Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it B. must be held liable upon it.

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, was sufficient to show the [*667] *adoption of the writing previously altered and sent, and to constitute it a valid contract.

Per Lord BLACKBURN: The onus of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance.

In this case the directors of the Metropolitan Railway Company had brought an action against Messrs. Brogden & Co. to recover damages for a breach of contract. The defence was that there was no such contract. The cause was tried before Mr. Justice BRETT, at the Surrey Spring Assizes of 1873, when a verdict was found for the plaintiffs, subject to a special case.

The defendants in the action (the present appellants) were colliery owners in Wales. From the beginning of 1870 the defendants had supplied the plaintiffs with coal and coke for the use of their locomotives. The quantities supplied and the prices charged were sometimes varying, and it appeared that, in Novem-

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ber, 1871, a suggestion was made in writing by Mr. Hardman (the manager for the defendants) that a contract should be entered into between the parties. Mr. Burnett, an officer of the company, was appointed to meet Mr. Hardman and to make some arrangement, and the result of the communications between them was that a draft agreement was drawn up. This draft contained the following sentences: "The contractors [which meant Brogden & Co.] shall, at their own expense, as from the 1st day of January, 1872 (but subject as hereinafter expressed) supply every week and deliver, in narrow gauge railway wagons, for the use of the company, at the Paddington Station of the Great Western Railway, 220 tons of coal and any farther quantity of coal, not exceeding 350 tons per week, at such times and in such quantity as the company shall, by writing under their agent's hands, from time to time require." The coal was to be "from the best Bwllfa Merthyr four feet seam" and from no other. The payment was to be at the rate of 20s. per ton of 20 cwt., the money payable for the same being subject to the existing tolls payable at the date of the agreement to the Great Western Railway Company, "but should the existing tolls be advanced or reduced, the price per ton to be advanced or reduced accordingly." Should the contractors make default or become bankrupts, the company was to be at liberty to *terminate the agreement by [*668] notice. Provisions were made as to strikes, and differences arising between the parties were to be settled by arbitration. Either of the parties was to have liberty to "determine this agreement by giving two calendar months' previous notice in writing on the 1st day of November, 1872." If no such notice was given the agreement was to continue in force "for one year from the 1st of January, 1873," both parties agreeing to fulfil and observe the agreements and provisions herein contained, so far as they may then be applicable to existing circumstances. If any differences should arise they were to be referred to "the arbitration of —, and such person or persons as shall be mutually agreed upon." Such arbitrators to have all the powers given by the Common Law Procedure Act, 1854.

This paper was prepared by Mr. Burnett, who handed it to Mr. Hardman for approval by the defendants. Mr. Hardman submitted it to Mr. Alexander Brogden, the head of the firm of Brogden & Co., who dealt with it thus: He left the date in

blank. He filled up the part describing the parties by putting in the names of himself and partners. He introduced the word "Upper" after the words "Bwllfa Merthyr." He altered one of the sentences by substituting the words "during the period of" for the words "while they shall fulfil." He filled in the arbitration clause with the name, "William Armstrong, Esq., of Swindon," and, finally, he appended the word "approved," and under it signed his own name, "Alexander Brogden." He gave the paper back to Mr. Hardman to be returned to Mr. Burnett for the purpose (as it was said) of having a formal contract drawn in duplicate and signed by the respective parties. If such formal contract had been drawn it would have been signed "Alexander Brogden & Sons," instead of merely "Alexander Brogden." No formal copy was made. Mr. Hardman returned the paper to Mr. Burnett, inclosed in a letter dated the 21st of December, 1871, which letter contained these words: "Herewith I beg to return your draft of proposed agreement, *re* new contract for coal, which Mr. Brogden has approved. I am obliged to leave town for Bristol to-night and shall be up again on Monday week. If you have anything farther to communicate, letters addressed to

Tondu [the appellants' collieries] will find me." Mr. [*669] Burnett (who was the proper *custodian of the company's contracts for the supply of coke and coal) put the paper into his drawer where it remained. No entry of it was made in the books of the company. On the 22nd of December Mr. Burnett telegraphed, "We shall require 250 tons per week of locomotive coal commencing not later than the 1st of January next," and sent off a letter the same day to the same effect. Mr. Hardman answered, "We have arranged to supply you quantity you name, 250 tons weekly, from the 1st of January." The supply of coals appeared to have been made for some time upon the terms stated; but sometimes there was a failure of the regular supply, and many letters passed between the parties. In most of the letters the contract was referred to. Excuses were made and deficient supplies made up, till finally, in December, 1873, the Messrs. Brogden declined to continue the supply of coals in that manner.

An action for damages as for breach of contract was then brought. The defendants denied the existence of any contract for the supply of coals. The special case was argued before the

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Court of Common Pleas, and judgment was ordered to be entered for the plaintiffs, and the damages were assessed at £9643. The case was carried to the Court of Appeal, where Lords Justices of Appeal BRAMWELL and AMPHLETT were for affirming the judgment, Lord Chief Justice COCKBURN thinking that it ought to be reversed.

This appeal was then brought.

The case was at first argued before Lord HATHERLEY, Lord BLACKBURN, and Lord GORDON. A second argument, by one counsel on a side, was directed, and that took place before the LORD CHANCELLOR (Lord CAIRNS), Lord HATHERLEY, Lord SELBORNE, Lord BLACKBURN, and Lord GORDON. On the second argument the respondent's counsel were not called on to address the House.

Mr. Herschell, Q. C., Mr. Davey, Q. C., and Mr. Beresford, were for Messrs. Brogden, the appellants.

THE LORD CHANCELLOR (Lord CAIRNS):—

[672]

My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form.

My Lords, it was owing to the circumstance that your Lordships had in this case to deal with voluminous correspondence, and that you had not a formal completely executed agreement between the parties, that your Lordships desired to have the case argued a second time before you ultimately disposed of it; but having had that argument on the part of the appellants, and having heard from their very learned counsel everything which could be urged in support of the appellant's view of the case, it appears

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to me, and that seems also to be your Lordships' view, that there is not any necessity for considering the case beyond the point which it has already reached.

Now, my Lords, the facts of which I shall have to remind your Lordships for the purpose of expressing my opinion, need not range over any great length of statement. There is [* 673] no doubt that * before the 18th of November, 1871, the firm of Messrs. Brogden & Co. had been in the habit of supplying the plaintiffs the Metropolitan directors, with coal, and occasionally with coke, for the purpose of their railway. The exact prices which were paid prior to the close of the year 1871 are not set forth in the case, but I think it may be inferred from the documents I am about to mention, what the general character of those prices was. On the 18th of November, 1871, the firm of Brogden & Co. wrote to the railway directors in these words: "We beg to hand you statement showing the increase in price of our smokeless locomotive steam coal as supplied to you. The present price is 18s. 3*d.* Increased railway rate, 7*d.* Ten per cent. for increase of wages, 9*d.* The price of this particular quality of coal has advanced from 2s. 6*d.* to 3s. per ton in the market, and we have every reason to believe that it will continue to increase. We shall, however, be willing to make a contract with you for 300 or 400 tons per week at 20s. per ton of 20 cwt., delivered at Paddington. The supply to be for twelve months and subject to the usual conditions for strikes, and increase or decrease if the railway rate is changed. We also beg to state that we must add 7*d.* per ton to the price for nut coal, being the increase in railway rate." Now, my Lords, that is a letter which explains very clearly its object. There was a rising market, and it was the opinion of the coal producers that the market was going to continue to rise; they state the price which it had already reached, and they tell the railway directors that they will be willing to make a contract for the ensuing year for a certain maximum supply per week, at a fixed price which would be free from any future variations of the market, and the only casualties to which it would be subject would be the contingency of strikes and an increase or decrease of the railway rate from their pits.

No answer appears to have been given to that letter for a month, and on the 18th of December, 1871, the engineer of the

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railway company writes to the Messrs. Brogden, asking for an interview with their representative relative to the proposed contract for coal. The interview was arranged at once, "with reference to proposed new contract for coal."

My Lords, I dwell upon those expressions for the purpose of *reminding your Lordships that the parties were [* 674] approaching to a meeting for a definite and clearly expressed purpose, namely, to make a contract, which was to last for a considerable length of time, and it will be one of the observations in the case, that the view taken by the appellants in this case leaves your Lordships entirely without any explanation of what ultimately became of that contract which the parties, clearly, were seriously bent upon agreeing to in some form or other.

However they had this meeting on the 19th of December, and the case finds that at that meeting the representative of the railway company handed over the form of contract or agreement. The date was in blank, the names of the Messrs. Brogden were not filled up, and, in the clause with regard to arbitration, the name of the arbitrator was also left blank; the price was fixed in the way which had been mentioned in the letter at 20s. a ton, and the continuance of the agreement was to be for a twelve-month, to run on for another twelvemonth if a notice was not given to terminate by the 1st of November, 1872. This draft, or the agreement in this form, was handed over at this meeting to the Messrs. Brogden or to their agent. On the 21st of December, losing therefore no time, and showing that the parties at this time were clearly bent upon concluding the business, Mr. Hardman, the agent of Messrs. Brogden, returns the draft agreement with this letter:—[His Lordship read it, see *ante*, p. 96.] The last sentence is important.

Now what had been done with the agreement was this: The date was left in blank as it stood before; the blank with regard to the names was filled up by the introduction of the proper names of himself and his co-partners. The word "upper" was introduced before the words "four feet seam." But that appears to me, I may say in passing, to have made absolutely no difference, because either it would have become a different seam, which is not suggested, or if it was the same seam it was merely selecting one part of the seam which it would, without that, have been

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in the power of Messrs. Brogden to select; and in the 3rd paragraph of the letter Mr. Brogden "drew his pen through the words 'while they shall fulfil,' and interlined in their place the words 'during the period of,' so that the clause read, 'The company shall pay to, * or according to, the direction of the contractors every month during the period of this agreement.'" This seems to me also to make no substantial difference in the terms. Then "he filled in the blank in the arbitration clause with the name of 'William Armstrong, Esq., of Swindon,'" and "he put the word 'approved' at the foot of the paper, and signed the paper with the name 'Alexander Brogden.'"

Therefore, my Lords, subject to this question about the arbitrator's name, the document became a document signed by a gentleman who was signing clearly as one of the three persons named as partners in the agreement, and it was signed therefore necessarily upon their behalf; and, although the word "approved" is added, that is a word which in this case could not at all have the meaning which the word frequently has in drafts. Often when a draft is signed by a solicitor or a conveyancer as "approved," the word "approved" means nothing more than that the legal form and expression of the instrument is approved. Here the word "approved," signed by one of the partners, could have meant nothing else than this, — that he approved of the terms of the agreement on behalf of the partners.

My Lords, the only thing remaining was, as I have said, the insertion of the name of the arbitrator. I quite agree that that required the assent and approval of the railway directors. When they saw the name inserted they might have said, if they had been so minded, — We are not satisfied with this arbitrator — we do not treat this as a concluded agreement between us, we therefore require you to enter upon the negotiation in another form, and we are perfectly free to refuse what you have hitherto proposed. My Lords, it appears to me that it was with regard to the circumstance that there had been the insertion of this name among other matters, that the letter of the 21st of December contained the words to which I have already called your Lordships' attention, "If you have anything further to communicate, letters addressed to 'Tondü' will find me." That appears to me to be just what you would have expected, namely, that Mr. Hardman, on the part of Messrs. Brogden, writes to Mr. Burnett:

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"I send you back the draft of the agreement with the alterations we have made in it; it is now for you to say whether there is* anything farther to be remarked upon the matter; [* 676] if there is I here communicate to you my address."

My Lords, that draft having been sent in this form to the railway directors, the statement in the case is that "Mr. Burnett was the proper custodian of contracts for the supply of coke and coal for the plaintiffs. On receipt of the paper enclosed in Mr. Hardman's letter he put it into his drawer, and it remained there till the 7th of November, 1872, when it was produced to Mr. Alexander Brogden on the occasion hereinafter mentioned."

Now, my Lords, I will call your Lordship's attention to what was done subsequent to this date; but before I do so, there is at the very outset this remarkable circumstance, which your Lordships will bear in mind: these two parties having been in negotiation up to the 22nd of December, both of them clearly bent upon making a contract which was to provide for a supply of coals in the following year, both of them engaged upon it, and so seriously engaged upon it that they had reduced it into writing with very considerable minuteness of detail; according to the view of the appellants, this agreement, which they were so bent on forming, is said suddenly and without any kind of explanation to have passed entirely out of view, — an incomplete and unfinished transaction, as regarded which there never was any *consensus* between them, and no explanation is given in any shape or form of why it was, according to the view of the appellants, that there never was any reference afterwards to the contract, nor any proceeding taken to have it brought to a definite point. My Lords, it would be, indeed, a very strange matter if, both parties having shown such earnestness in the business to which they were addressing themselves, they were from the moment of the 22nd of December to be held to have parted without any impression whatever that anything had been done towards accomplishing the object of that act upon which they were bent.

But, my Lords, what took place afterwards was this: On the 22nd of December Mr. Burnett, getting this draft, putting it where the contracts of the company were placed for custody, writes in return to Messrs. Brogden & Sons. He makes no objection to anything which had been done with regard to that document; he is silent upon that subject, but he says, "We

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[677] shall require *250 tons per week of locomotive coal, commencing not later than the 1st of January next" — the very date which was the date mentioned in the contract for the commencement of the supply — "Reply by wire that you will do this, that we may arrange with other collieries accordingly." My Lords, the contract had provided, with regard to the amount of the supply, that it should be "220 tons of coal, and any farther quantity of coal not exceeding 350 tons per week, at such times and in such quantity as the company shall by writing under their agent's hands from time to time require, such notice to be given to the contractors or agents of the contractors for the time being."

Now reference was made to this letter, and some argument was raised upon it to the effect that it was a letter asking Messrs. Brogden to reply by wire whether they would supply the 250 tons, and that it was therefore inconsistent with a right to order that supply. My Lords, it seems to me to be the most natural letter possible for persons who had a contract to have written. They order a supply within the terms of the contract greater than the minimum, which was 220 tons, but within their power as regards the maximum; and it seems to me that, inasmuch as they had to give notice with regard to the times and the mode of any supply over 220 tons, it was only what men in that position would have done, to ask those who had to make that supply whether they might depend and rely upon their affording it at the times and in the quantity which were thus specified.

My Lords, on the 22nd of December Messrs. Brogden & Sons telegraph to the railway directors, "We have arranged to supply you quantity you name, 250 tons weekly, from 1st January." And without going through the letters as to the change of supply, I may say that the quantity was afterwards changed to a quantity of 350 tons per week, which also was a quantity not beyond the maximum mentioned, but the actual maximum mentioned by the contract.

Now, my Lords, what I have to ask myself is this: the draft having been returned with only one variation to which, as far as I can see, any objection could have been taken, namely, that with reference to the arbitrator, and no objection having been made upon the score of the insertion of his name, [* 678] although any *communication which might have been

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made must distinctly have been made in writing; I have to ask, how is the course of action of the parties — the suppliers of coal and the railway company — during the following year to be accounted for? In the first place, my Lords, the railway directors commence by ordering a supply exactly at the date specified in the contract; and, in the next place, and this is a point which I am bound to say appears to me not in any way to have been met by the very able argument we have heard, and yet to be all important in the case, — the price from that date, the 1st of January, commences to be, and continues to be, throughout the year, the very price stipulated for in the contract. And farther, that price is a price differing from the price which had prevailed up to that time. And not only is that so, but during the whole of the year, when, of course the market price was varying from time to time, this price never changes; it is an unvarying price throughout the year. And, my Lords, more than that, to that price there are added upon two occasions exactly the sum which by the contract might be added, namely, the sum of 5*d.* in the one case, and 6*d.* in the other, upon the charge of the Great Western Company being raised for the carriage of the coal. Then, my Lords, not only does the supply commence at the time mentioned in the contract, not only is the price the price which is explained by the contract, and cannot be explained in any other way, but in addition to that, the quantity is the quantity mentioned in the contract, and during the greater part of the year is exactly the maximum quantity authorized by the contract to be required.

Farther than that, your Lordships have in one of the letters a reference which, again I must say, has not in any way been explained to my satisfaction, and which I am unable to explain except by referring it to this contract, — I refer to a letter of the 25th of July, 1872. “We find,” says the agent for Messrs. Brogden, “that from 1st January to June 30th you received 8835.15 tons, which equal 340 tons per week, or about 40 tons per week more than your contract.” I have asked what is the meaning of the expression “more than your contract” there? and no explanation has been given of it. No explanation can be given of it unless it refers to the contract in question. It is quite * true that, as it is said, the contract in question [* 679] did not provide for a maximum of 300 tons per week, but

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of 350. My Lords, that may be so, but an error as to the maximum mentioned in the contract does not make it any the less a reference to the contract, and the letter cannot be explained in any other way. I think I can see how it came to pass that Messrs. Brogden spoke of the maximum supply as being 300 tons. I think it arose in this way: When they themselves first proposed the contract they had proposed a contract for a supply of 300 or 400 tons, and it may well be that, not having kept a copy of the contract, they may, in a loose way, have thought that 300 tons had been the agreed-upon amount which they had to supply under the contract. However, whether that was so or not appears to me to be quite immaterial. Here is an express admission by them, which it seems to me to be impossible to get over, that they were supplying coals under a contract, and no contract can be suggested except the contract to which I have already referred.

But, my Lords, over and above that, I must say that having read with great care the whole of this correspondence, there appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order. If it had not been so, I cannot conceive how when there were these repeated complaints against the Messrs. Brogden for short or irregular supplies, and when they say more than once that the prices they were receiving from the Metropolitan Company did not make their bargain a good one, or did not make the Metropolitan Company good customers, how it was that if they did not feel that there was a contract somewhere or other entitling the Metropolitan Company to a supply, and binding them (the Brogdens) to supply coal, they did not say, If you do not like the mode in which we are supplying, or the extent to which we are supplying, it is quite easy for you to get your supplies elsewhere, and we are under no obligation to supply you. They do not do that; on the contrary, they go on asking for indulgence and consideration in a way which * it appears to me to be impossible to account for, except upon the footing which they recognize in the letter I have read of the 25th of

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July, that there was a contract under which there was some maximum or other up to which they were bound to supply the coal.

My Lords, those are the grounds which lead me to think that, there having been clearly a *consensus* between these parties, arrived at and expressed by the document signed by Mr. Brogden, subject only to approbation, on the part of the company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. Brogden & Co. in the supply of coals. Therefore, my Lords, I am of opinion that the conclusion at which the Court of Common Pleas arrived was correct, as was also the conclusion at which the majority of the Court of Appeal arrived.

My Lords, I am bound to say, with regard to the very elaborate judgment of the LORD CHIEF JUSTICE, that, if I could as a matter of fact arrive at the conclusion in one respect at which he arrived upon the question of fact, I should be very much inclined to concur in the whole of his judgment. As I understand it from the passages to which I have referred in the judgment of the LORD CHIEF JUSTICE, which I will not read again, it was the opinion of the LORD CHIEF JUSTICE that, to use his own words, the Court might "safely infer" that the applications to the Metropolitan Company which are mentioned in one of the letters had actually been made. The Messrs. Tahourdin, the solicitors for the company, no doubt, being instructed that such was the case, had stated in their letter that the agent of Messrs. Brogden "afterwards repeatedly, at intervals, applied to the company's agent for the agreement to be completed, but could never obtain it, and was in fact told that there was no agreement, and at all events though often applied to thus the company have taken care never to place themselves in a condition to be charged by Messrs. Brogden upon the alleged contract in case of breach on their part." My Lords, if I found it proved that an application had * been made by the Messrs. Brogden to the rail- [* 681] way company for an agreement and to have the agreement or contract completed, and that they had been told that there was no contract and no agreement, it seems to me that it would have

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gone far to answer all the observations I have already made. But I have no doubt that if the Messrs. Tahourdin had found that they had been correctly informed when they made this statement, they would not have failed to prove, and they would have had the means of proving, before the arbitrator who stated the special case, the facts which thus they state in their letter. I take it that it must be inferred from the fact that no such proof was given, that no such proof could be given, and therefore these statements must entirely be removed out of the case. And, they being removed out of the case, I cannot but think that the judgment of the LORD CHIEF JUSTICE is deprived of what would have been one of the strongest arguments in support of it.

My Lords, I must move your Lordships that the judgment of the Court of Appeal be affirmed, and that this appeal be dismissed with costs. In one respect one cannot help feeling some anxiety, as I have felt about the case throughout, because one cannot help believing that, whether from carelessness or not I know not, Messrs. Brogden had not actually in their possession a copy of the agreement, and that in all probability they were not aware that the 1st of November was the last day on which they could have terminated the agreement, as probably they would have terminated it without entering upon another year. With that, however, we cannot deal, we must administer the law as the rights of the parties really stand.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. [His Lordship then went through the facts at some length, and concluded as follows:—]

[686] If you ask me, when in my judgment the agreement was complete, I answer that the agreement was complete when the first coals, the 300 tons of coal supplied in January, were invoiced at the differing price, and when that differing price was accepted and paid. I think that did bring the case up to what Mr. Herschell very fairly admitted, as he was bound to admit it, would be a sufficient case to make out on the part of the plaintiffs. It does establish a course of action on the part of the plaintiffs of such a character as necessarily to lead to the inference on the part of the defendants that the agreement had been

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accepted on the part of the plaintiffs, and was to be acted upon by them; and they did act upon it accordingly.

*I think, my Lords, it is not necessary for me to go [*687] into more detail. I confess that there is no part of the correspondence throughout that at all shakes the view I entertain in this case as derived from the documents which I have already referred to, and I am therefore of opinion that the plaintiffs are entitled to succeed in the action, and that the appeal should be dismissed with costs.

LORD SELBORNE:—

My Lords, the question which is brought before your Lordships in this case is entirely one of fact, namely, whether the dealings between these parties in the year 1872 were upon the footing of the draft contract signed by Mr. Alexander Brogden in December, 1871. [After briefly stating the facts up to the letter of 21st December, 1871, he continued:—]

I by no means say that if nothing had been done upon [688] the footing of the agreement, silence would have given consent in such a sense as to bind the parties on either side. If either LORD COLERIDGE or Mr. Justice BRETT intended to express an opinion that a mere mental consent given under those circumstances, and followed up neither by communication nor by action, would make a binding contract, I should certainly hesitate very much before I assented to that proposition. I do not know that it is necessary so to understand their expressions. No doubt their Lordships did say that mental consent without communication or intimation might do, but then probably their Lordships did not intend to leave out of sight action following upon that assent and consistent with it.

However that may be, this sentence is most material to the *interpretation of what follows. The one party [*689] writes to the other in terms which I interpret to mean this; I do not suppose you will have anything farther to say, or that you will make any objection to the way in which I have filled up these blanks, but, if you have anything farther to say, let me hear from you. Now what follows? On the very next day, the 22nd of December, not indeed mentioning this contract, but dealing with the subject-matter of it, Burnett writes and says, "We shall require 250 tons (that is the quantity which we shall want supplied) per week of locomotive coal commen-

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cing not later than the 1st of January next," that was the very day on which the agreement was to take effect. I can hardly present to my mind the point of view from which any person can refuse to connect the letter of the 22nd of December with the letter of the 21st of December, which said, "if you have anything farther to communicate." The company's agent had this to communicate, — the quantity we shall want is 250 tons per week, and we shall want that supply to commence as early as the 1st of January, the day mentioned in the agreement. To my mind that is a clear reference to the agreement which had been drafted, although the agreement itself is not mentioned.

Then, my Lords, all that follows, the immediate requirement on the very same day to supply that quantity from the 1st of January, the action (which I see no reason for referring to any other period) of stopping the supply they had been receiving of fuel from the North on the faith of this agreement upon which they can rely, the quantity originally less but soon raised to the maximum of 350 tons a week, and spoken of in many letters as "the full weekly quantity of 350 tons," and finally so spoken of in the following terms, in a letter of the Messrs. Brogden themselves, "We hope to be able to deliver your full quantity," and the price charged being the same as that mentioned in the contract, — it appears to me that every single circumstance points quite unequivocally to this agreement; and, looking at the order of events with regard to the dates and the communications between the parties, I should have thought it absolutely impossible for any person to doubt that, if the directors, after getting the benefit of the lower price for nearly an entire year, had afterwards endeavoured to turn round because the price might [* 690] have risen in the market, they would have been turned without much hesitation out of any Court into which they had come.

Now it is said that Messrs. Brogden could not have understood it so, because they did not give the notice which they might have given at the beginning of November. My Lords, I think there is an extremely simple and easy explanation of that, as well as of their letter of the 25th of July, in which they speak of a "contract," although showing some error as to its terms, and also of the peculiar terms of that letter of the 7th of November, written immediately after the dispute had arisen, in which they

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say that if the agreement is exchanged they will go on to the end of the year, but they will not go on any longer without new terms being settled. The explanation of the whole to my mind is this, — they had not kept a copy of the agreement which Mr. Alexander Brogden had signed; — they had kept a copy of their own letter of the 18th of November, containing their proposal in which there was no provision for carrying on the contract beyond the end of the year, unless notice were given, and of course nothing whatever as to the time at which such notice was to be given. They had been acting under the impression that the actual contract was on the footing of that letter, probably thinking that the less number of tons mentioned there, namely 300, had been settled instead of the greater 400, which would explain the calculations in the letter of the 25th of July. They had been acting throughout upon the footing not that there was no contract, but that the contract was in that respect different in its terms from what it actually was, and when they found that they had made that mistake, they tried to get out of the contract altogether.

That, my Lords, is the clear conclusion to which if I was a jurymen sitting upon this case, I should come upon the case, which entirely rests upon fact. I therefore entirely concur in the motion which has been made to your Lordships by my noble and learned friend on the woolsack.

Lord BLACKBURN: —

My Lords, in this case the question which has now to be decided is, I believe, quite a question of fact; but part of what was said * in the Court of Common Pleas would raise [* 691] an important question of law, if it were to be taken in a way in which it was not necessary for either Lord COLERIDGE or Mr. Justice BRETT to hold it, and in which therefore they both said, looking to the facts which had been found, they did not hold it. I wish to say upon that point that I cannot agree with what seems to be their view. Mr. Justice BRETT, referring to the case of *Ex parte Harris, In re Imperial Land Company of Marseilles*, L. R., 7 Ch. 587, before the Lords Justices, and other cases, says that, looking to all this, he has come “to a strong opinion that the moment one party has made a proposition of terms to another, and it can be shown by sufficient evidence that that other has accepted those terms in his own mind, then the contract is made, before that acceptance is intimated to the pro-

poser." And he goes on to say, applying that to the present case, that, to his mind, as soon as Burnett put the letter into his drawer, a contract was made, although none was formally entered into.

My Lords, I must say that that is contrary to what my impression is, and that I cannot agree in it. If the law was as intimated by Mr. Justice BRETT, there would be nothing to discuss in the present case. But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer. So again, where, as in the case of *Ex parte Harris*, a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly, says, If you agree with me send an answer by the post, there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.

[* 692] * But when you come to the general proposition which

Mr. Justice BRETT seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV., 17 Edw. IV., T. Pasch. case 2, Chief Justice BRIAN decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them; that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on Contracts of Sale, p. 190 *et seq.*, and is there trans-

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lated. BRIAN gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: "This plea is clearly bad, as you have not shown the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my Lords, that that, which was said 300 years ago and more, is the law to this day, and it is quite what Lord Justice MELLISH in *Ex parte Harris*, L. R., 7 Ch. 593, accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject.

But my Lords, while, as I say, this is so upon the question of * law, it is still necessary to consider this case [* 693] farther upon the question of fact. I agree, and I think every Judge who has considered the case does agree, certainly Lord Chief Justice COCKBURN does, that though the parties may have gone no farther than an offer on the one side, saying, Here is the draft, — (for that I think is really what this case comes to,) — and the draft so offered by the one side is approved by the other, everything being agreed to except the name of the arbitrator, which the one side has filled in and the other has not yet assented to, if both parties have acted upon that draft and treated it as binding, they will be bound by it. When they had come so near as I have said, still it remained to execute formal agreements, and the parties evidently contemplated that they were to exchange agreements, so that each side should be perfectly safe and secure, knowing that the other side was bound. But, although that was what each party contemplated, still I agree (I

think the Lord Chief Justice COCKBURN states it clearly enough), "that if a draft having been prepared and agreed upon as the basis of a deed or contract to be executed between two parties, the parties, without waiting for the execution of the more formal instrument, proceed to act upon the draft, and treat it as binding upon them, both parties will be bound by it. But it must be clear that the parties have both waived the execution of the formal instrument and have agreed expressly, or as shown by their conduct, to act on the informal one." I think that is quite right, and I agree with the way in which Mr. Herschell in his argument stated it, very truly and fairly. If the parties have by their conduct said, that they act upon the draft which has been approved of by Mr. Brogden, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding.

But then, my Lords, I think Mr. Herschell was justified in what he said, that the *onus probandi* lay upon the railway company who were asserting that, and that it was a question whether enough was done to show that it must be taken that the two parties did agree. Upon that I had on the former argument come to the conclusion, agreeing there with Lord Chief Justice

COCKBURN, that there was not enough here to show that [* 694] the *onus* was satisfied, and *that the acting upon the draft was completely made out. I have heard the argument of Mr. Herschell again to-day, and every word that could be said upon the subject in support of that view was, I am quite confident, said by him. Notwithstanding that argument, the majority of your Lordships think otherwise. I think, as indeed I thought before, that there is *some* evidence here that the parties had so treated the draft agreement. I do not think it can be said to be conclusive evidence, but it is evidence on the question of fact to justify the conclusion to which the majority of your Lordships have come. But after listening to what has been said, and farther considering it, I can only say that I hesitate whether I should agree in the verdict or not. I do not say that I dissent from it, I only say that I hesitate about it.

Now, my Lords, I will say very briefly what I have to say upon this subject, just to indicate where it is that I have my doubt. I think that when the draft was sent in that letter there

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had been considerable delay. They had begun to talk about making this contract in October.* The appellants wrote making an offer in November; they had an interview on the 18th of December, and they had run it on until the 22nd of December, when Mr. Hardman writes: "Herewith I beg to return you draft of proposed agreement, *re* new contract for coal which Mr. Brogden has approved," according to grammatical construction that means "which draft he has approved." Then it goes on: "I am obliged to leave town for Bristol to-night, and shall be up again on Monday week" (that is the 1st of January). "If you have anything farther to communicate letters addressed to Tondy will find me." Now, upon that, viewing it there, I certainly think it was contemplated that there might be something more to be communicated, there might be indeed need to be something more communicated as to whether they agreed upon the arbitrator or not; but I think that might be communicated without any express words doing it, if the parties showed that they were willing to go on upon those terms.

The next letter that passes is this — I pass by the telegram — Mr. Burnett writes, "I am in receipt of your letter of yesterday, informing me of your having been obliged to go to Bristol, and thereby prevented calling, as expected, to see me regarding the *supply of coal. As the matter is pressing" (it [*695] must be remembered that the 1st of January was fast approaching), "and as you will not be in town again until Monday week, I have just telegraphed to you as follows: — 'We shall require 250 tons per week of locomotive coal, commencing not later than 1st of January next. Reply by wire, that you will do this, that we may arrange with other collieries accordingly;' as it is necessary for us to know definitely what you can do for us in the way of locomotive fuel, so that we may arrange with other parties who are supplying us at present. The supply of your coal seems to be very irregular at present." Now, as regards that letter, the impression on my mind is, that if it stood alone it would fairly admit of this construction, I, the writer, Mr. Burnett, am not prepared to say whether my directors will enter into the contract or not. I have put aside the agreement to consider about it, but, as unfortunately you are out of the way, and the 1st of January is fast coming, I telegraph to you and ask you, can you supply us with 250 tons of coal per week

from that time forward, pending the time which we have taken to consider. If that were so, clearly that would not have bound the contract.

But then, comes a thing which does make strong evidence, and which, I think, the noble and learned Lord who spoke first on the other side of the House (Lord HATHERLEY) has placed his reliance mostly upon, which is this: After he had written that letter there comes, on the 2nd of January, again a letter complaining of short supplies, which must of course have meant short supplies prior to the 1st of January, but going on: "I would remind you that it was on your assurance that your firm could send us a regular weekly supply of 250 tons that I stopped our supply of fuel from the North." And in a letter to the principals at the same time, he says, "I now remind you that we stopped the supply of coke from the North on your Mr. Hardman's assurance that you would be able to send us a regular supply of 250 tons per week." I thought, at first, that the LORD CHIEF JUSTICE's explanation of that letter was the right one, and that when he said, "Upon your assurance you would be able to send us a regular supply of 250 tons per week" "we [* 696] stopped the supply of coke from the *North," that necessarily pointed back to the time when the strike ceased; but I am not by any means certain now that that is right. I think it is very possible that they might have been getting a supply of coke as fuel from the North, and what is meant here is, that it was in reliance upon the statement in your telegram, in which you told us you would supply us with 250 tons per week, that we stopped the supply of coke from the North. That is an observation not without weight.

It is true that that letter was not written as to a person who had a contract, — Remember you have bound yourself to give me 250 tons a week, and I hold you to your engagement. It is rather a complaint; it is put in this way: Recollect that you said you would give us that supply. It is, therefore, more a kind of letter which I might call a neutral letter, pointing not very distinctly to either one view or the other.

But then, my Lords, comes this fact: after that letter there is a supply all through the month of January of a considerable quantity, and all of that coal is invoiced and paid for according to the contract price of 20s., which was higher than the price

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had been before. That was evidence, and strong evidence, that the parties had entered into a new contract; that both of them meant to enter into a new contract, I think, cannot admit of any doubt. It is upon that that Lord Justice BRAMWELL almost entirely bases his judgment. I do not, myself, feel that it is quite so strong as he does. It is, to my mind, evidence, and strong evidence, that they were agreeing. Viewing it as a question of fact, if a jury were to take that view, and were to find that that would be enough to bind the contract, I could by no means say that they were not right. My own view is, that I hesitate a good deal as to whether there is enough to satisfy the *onus* which is cast on the Metropolitan Railway Company to establish a contract; but farther than that hesitation I will not go.

I will not detain your Lordships any longer by remarking upon the other portions of the case. Some of the letters read one way and some the other. I can only say that apart from that change in the price I should have thought that they could all be explained consistently with saying that the bargain was not made; but this * is a piece of evidence, and a strong piece of evi- [* 697] dence, bearing upon that. It is a question of fact, and I think there is no doubt at all that if the evidence of fact is sufficient, there is quite enough to bind the contract.

Lord GORDON concurred with the majority.

Judgment complained of affirmed, and appeal dismissed with costs.

Lords' Journals, July 16, 1877.

**Household, Fire, and Carriage Accident Insurance Company Limited
v. Grant.**

4 Ex. D. 216-239 (s. c. 48 L. J. Ex. 577; 41 L. T. 298; 27 W. R. 858).

Offer. — Acceptance. — Allotment of Shares. — Letter of Allotment miscarried.

The defendant applied for shares in the plaintiff's company. The [216] company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by the defendant: —

Held, by BAGGALLAY, L. J., & THESIGER, L. J. (*dissentiente* BRAMWELL, L. J.), that the contract was complete and that the defendant was a shareholder.

Action to recover £94 15s., being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in

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pursuance of an application from the defendant for such shares, dated the 30th of September, 1874.

At the trial before LOPES, J., during the Middlesex sittings, 1878, the following facts were proved. In 1874, one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for [* 217] * shares in the plaintiff's company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence 16 Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application, but the plaintiff's company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of $2\frac{1}{2}$ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends amounting altogether to the sum of 5s. was also credited to the defendant's account in the books of the plaintiff's company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned Judge left two questions to the jury. 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned Judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins*, 1 H. L. C. 381.

The defendant appealed.

May 22. Finlay and Dillwyn, for the defendant, contended

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that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received * was not a communication to the defendant of [*218] the allotment, and that there was therefore no contract between the parties.

Wilberforce, and G. Arbuthnot (W. G. Harrison, Q. C., with them), for the plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post-office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: *Reidpath's Case*, L. R., 11 Eq. 86; 40 L. J. Ch. 39; *Townsend's Case*, L. R., 13 Eq. 148; *Wall's Case*, L. R. 15 Eq. 18; 42 L. J. Ch. 372; *Guan's Case*, L. R., 3 Ch. 40; 37 L. J. Ch. 40; *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190; *Pellatt's Case*, L. R., 2 Ch. 527; 36 L. J. Ch. 613; *Ex parte Cote*, L. R., 9 Ch. 27; *Taylor v. Jones*, 1 C. P. D. 87; Pollock on the Law of Contracts, 2 ed. p. 13.

Cur. adv. vult.

July 1. The following judgments were delivered:—

THESIGER, L. J. In this case the defendant made an application for shares in the plaintiff's company, under circumstances from which we must imply that he authorised the company in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter, containing the notice of allotment, but, upon the finding of the jury, it must be taken that the letter never reached its destination. In this state of circumstances LOPES, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court. The leading case upon the subject is *Dunlop v. Higgins*, 9 H. L. Cas. 381. It is true that Lord COTTENHAM might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest, and * did rest his judgment as to one of [*219]

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the matters of exception before him upon a principle which embraces and governs the present case. If so, the Court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the LORD JUSTICE GENERAL directed the jury in point of law, that if the pursuers posted their acceptance of the offer in due time according to the usage of trade, they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all, and Lord COTTENHAM, in expressing his opinion that it was not open to objection, did so, after putting the case of a letter containing a notice of dishonour being posted by the holder of a bill of exchange in proper time, in which case he said (1 H. L. Cas. at p. 399), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." In short, Lord COTTENHAM appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop v. Higgins* is that taken by JAMES, L. J., in *Harris's Case*, L. R., 7 Ch. 587; 41 L. J. Ch. 621. There at L. R., 7 Ch. 592, 41 L. J., 7 Ch. 623, he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the LORD CHANCELLOR in giving judgment;" he adds, the LORD CHANCELLOR "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made the offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it." MELLISH, L. J., also took the same view. He says, L. R., 7 Ch. 595; 41 L. J. Ch. 627, "In *Dunlop v. Higgins* the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*, p. 80, *ante*, 1 B. & Ald. 681; 19 R. R. 415. The House of Lords approved of the ruling in that case. Lord Chancellor COTTENHAM [* 220] said, in the course of his judgment, that in the case of * a bill of exchange, notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken*

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v. *Collin*, 7 M. & W. 515 ; 10 L. J. Ex. 227, on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams v. Lindsell* and quoted the observation of Lord ELLENBOROUGH, C. J. That case, therefore, appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris's Case* for the moment, I turn to *Duncan v. Topham*, 8 C. B. 225 ; 18 L. J. C. P. 310, in which CRESSWELL, J., told the jury that if the letter accepting the contract was put into the post-office, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete: and both he and WILDE, C. J., and MAULE, J., seem to have understood this ruling to have been in accordance with Lord COTTENHAM's opinion in *Dunlop v. Higgins*. That opinion, therefore, appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins* were out of the way, *Harris's Case* would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord ELLENBOROUGH in the case of *Adams v. Lindsell*, which is a recognised authority upon this * branch of law. But, on the other [* 221] hand, it is a principle of law as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually or by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by corre-

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spondence through the post? I see no better mode than that of treating the post-office as the agent for both parties, and it was so considered by Lord ROMILLY in *Hebb's Case*, L. R., 4 Eq. 9 at p. 12, when, in the course of his judgment, he said, "*Dunlop v. Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." ALDERSON, B., also in *Stocken v. Collin*, a case of notice of dishonour, and the case referred to by Lord COTTENHAM, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow, that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final, and absolutely binding, as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in *The British and American Telegraph Company v. Colson*, L. R., 6 Ex. 108; 40 L. J. Ex. 97, which was a case directly on all fours with the present, and in which KELLY, C. B., at L. R., 6 Ex. p. 115, is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case [* 222] now before the Court, if the letter * of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders*, 6 Hare 1. And hence, perhaps, the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But, with deference, I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by MELLISH, L. J., in *Harvis's Case*, how there can be any relation back in a case of this

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kind as there may be in bankruptcy? “If,” as the LORD JUSTICE said, “the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted.” The principle laid down in *Harris's Case*, as well as in *Dunlop v. Higgins*, can really not be reconciled with the decision in *The British and American Telegraph Company v. Colson*. JAMES, L. J., in the passage I have already quoted (L. R., 7 Ch. 592; 41 L. J. Ch. 623), affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to *Hebb's Case*. There a distinction was taken by the MASTER OF THE ROLLS, that the company chose to send the letter of allotment to their own agent, who was not authorised by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorised agent, they had sent it through the post-office, the applicant would have been bound, although the letter had never been delivered. MELLISH, L. J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out (at the close of his judgment, L. R., 7 Ch. at p. 597), when stopping short of actually overruling the decision in *The British and American Telegraph Company v. Colson*, that although * a contract is [* 223] complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says (L. R., 7 Ch. p. 596), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord BLACKBURN in *Brogden v. Directors of Metropolitan Railway Company*, 2 App. Cas. 666, 691 (*ante*, p. 110), “put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound.” How then can a casualty in the post, whether resulting in delay, which in commercial transaction is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears, that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an

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accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post, he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is

of importance to him, he can make inquiries of the [* 224] *person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of convenience and inconvenience it seems to me, applying with slight alteration the language of the Supreme Court of the United States in *Taylor v. The Merchants' Fire Insurance Company*, 9 Howard S. Ct. Rep. 390, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication which the parties themselves contemplated, instead of postponing its completion till the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the

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judgment of LOPES, J., was right, and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L. J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop v. Higgins* in the House of Lords, and *Harris's Case* in the Court of Appeal in Chancery, that, if an offer is made by letter, which expressly or impliedly authorises the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. LOPES, J., was of opinion that the principle * was applicable to such a case, and gave judgment in favour of the plaintiffs, and from such judgment the present appeal is brought. [* 225]

In support of his appeal, the defendant relies upon the decision of the Court of Exchequer in the case of *The British and American Telegraph Company v. Colson*, to which, for conciseness, I will refer as *Colson's Case*.

After a detailed examination, of the cases of *Dunlop v. Higgins*, *Colson's Case*, and *Harris's Case*, he came to the conclusion that the decision of the Court of Exchequer in *Colson's Case* had been virtually overruled, and that the principle established in the House of Lords in *Dunlop v. Higgins*, was applicable to the case under consideration.

BRAMWELL, L. J. The question in this case is not [232] whether the post-office was a proper medium of communication from the * plaintiffs to the defendant. There is no [* 233] doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner; and so in this way, and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be

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in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what, in my judgment, it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case: —

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, — per BRIAN, C. J., and Lord BLACKBURN. Blackburn on Sale, p. 193, orig. ed.; *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. at p. 692; p. 94, *ante*.

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That, as a consequence of or involved in the first proposition, if the acceptance is written or verbal, *i. e.*, is by letter or message, as a rule it must reach the proposer, or there is no communication, and so no acceptance of the offer.

Fourthly. That, if there is a difference where the acceptance is by a letter sent through the post, which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice.

[*234] * Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated

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by post, *e. g.*, a notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he has communicated to me his acceptance of my offer but not his notice to quit. Suppose a man has paid his tailor by cheque or bank-note, and posts a letter containing a cheque or bank-note to his tailor, which never reaches. Is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and bank-notes to his banker by post, and posts a letter containing cheques and bank-notes which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognised this mode of remittance by sending back receipts, and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask, why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if BRIAN, C. J., had had to adjudicate on the case he would deliver the same judgment as that reported. That because a man, who may send a communication by post or *otherwise, [* 235] sends it by post, he should bind the person addressed though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequences; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is

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relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, and information posted does not reach, and some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer who may have made his arrangements on the footing that his offer was not accepted. His non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post-office is no more authorised by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss, and cast it on the other party? It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and

there is no case to show that such anticipation would not [*236] prevent the *letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer, if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled, suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "unless I hear from you by return of post the offer is withdrawn." that the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in the "Times" before the MASTER OF THE ROLLS, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till

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the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn," makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions such as, if the words are "unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words? Lord BLACKBURN says that MELLISH, L. J., accurately stated, that where it is expressly or impliedly stated in the offer, "You may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on, — as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord BLACKBURN was not dealing with the question before us; there was no doubt in the case before him that the letter had reached.

As to the authorities, I shall not re-examine those in *ex-[* 237] istence before *The British and American Telegraph Company v. Colson*. But I wish to say a word as to *Dunlop v. Higgins*; the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop v. Higgins* decided nothing contrary to the defendant in this case. MELLISH, L. J., in *Harris's Case*, L. R., 7 Ch. 596, says, "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of *The British and American Telegraph Company v. Colson* with *Dunlop v. Higgins*. I do not share that difficulty, I think that they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord JUSTICE points out in *Harris's Case*, might happen if the law were

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otherwise, when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop v. Higgins* was, whether the ruling of the LORD JUSTICE CLERK was correct, and they held it was. Now Mr. Finlay showed very clearly that the LORD JUSTICE CLERK decided nothing inconsistent with the judgment in *The British and American Telegraph Company v. Colson*. Since the last case there have been two before Vice-Chancellor MALINS, in the earlier of which he thought it "reasonable" and followed it. In the other, because the LORDS JUSTICES had in *Harris's Case* thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds, "There is no default on his part. Why should he be the only person to suffer?" Very true. But there is no default in the other, and why should he be the

only person to suffer? The only other authority is the ex-
[* 238] pression of opinion by *LOPES, J., in the present case. He

says the proposer may guard himself against hardship by making the proposal expressly conditional on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been

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an acceptance of the defendant's offer, and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins*, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing, that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer, by post, is only to bind if it *reaches me." But the question is not to be decided on [* 239] these considerations. What is the law? What is the principle? If BRIAN, C. J., had had to decide this, a public post being instituted in his time, he would have said the law is the same now there is a post as it was before, viz., a communication to affect a man must be a communication, *i. e.*, must reach him.

Judgment affirmed.

ENGLISH NOTES.

That the conduct of the parties may show communication of the acceptance to the person making the offer, is also exemplified by the decision of the Common Pleas in *Richards v. Home Assurance Company* (1871), L. R., 6 C. P. 591, 40 L. J. C. P. 290, 24 L. T. 752, 19 W. R. 893. There the plaintiff was to be appointed as local manager of the defendant company if he took twenty-five shares. He applied for and was allotted the shares, but no formal notice of allotment was sent. He deposited £1 per share and accepted the managership offered. He was held to be a shareholder. But the conduct which is relied on as constituting the acceptance must be unequivocal and unconditional. Thus in *Warner v. Willington* (1856), 3 Drew. 523, 25 L. J. Ch. 662, it was held that the sending of a draft lease was not an acceptance of the terms of tenancy offered.

Here may be noted cases where the question has been whether acceptance of an offer by conduct carries with it assent to terms not directly presented to the mind of the offeree. In *Henderson v. Sten-*

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son (1875), L. R., 2 H. L. Sc. 470, 32 L. T. 709, it was decided that a passenger was not bound by an endorsement on the back of ticket exempting the carriers from loss caused by their negligence, unless his attention was drawn to or unless he knew of it.

In *Watkins v. Rymill* (1883), 10 Q. B. D. 178, 52 L. J. Q. B. 121, 48 L. T. 426, 31 W. R. 337, the cases on this subject were elaborately reviewed in a judgment delivered by Sir JAMES FITZJAMES STEPHEN. After mentioning the cases, which in their order of date are as follows: *Zunz v. The South Eastern Railway Company* (1869), L. R., 4 Q. B. 539, 38 L. J. Q. B. 209, *Harris v. The Great Western Railway Company* (1876), 1 Q. B. D. 515, 45 L. J. Q. B. 729, *Parker v. The South Eastern Railway Company* (1877), 2 C. P. D. 416, 46 L. J. C. P. 768, *Burke v. The South Eastern Railway Company* (1880), 5 C. P. D. 1, 49 L. J. C. P. 107. — he sums up the result of the authorities: "A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document, or otherwise informs himself of its contents, or not. To this general rule, however, there are a variety of exceptions — (1) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception are to be found in the judgments in *Parker v. The South Eastern Railway Company*, and in the language of some of the Lords in *Henderson v. Stevenson*, though these must be received with caution, for reasons given by Lord BLACKBURN in his judgment in *Harris v. The Great Western Railway Company*. (2) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document. (3) A third exception occurs, if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson v. Stevenson* is an illustration of this. (4) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord BRAMWELL suggests some illustrations of this in his judgment in *Parker v. The South Eastern Railway Company*. One is the case of a ticket having on it a condition that the goods deposited in a cloak-

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room should become the absolute property of the railway if not removed in two days.”

The facts in *Watkins v. Rygmill* were that the plaintiff left a wagonette to be sold at the defendant's depository and took a receipt for it “subject to the conditions as exhibited on the premises.” One of these conditions was that, on the lapse of a month, property might be sold by auction without notice to the owner unless the charges were paid. The plaintiff was held bound by the conditions.

In *Richardson v. Rountree* (H. L. 1894), 1894, A. C. 217, 63 L. J. Q. B. 283, 70 L. T. 817, following *Henderson v. Stevenson*, it was decided that while knowledge of the special terms may be inferred from reasonable means of knowledge, it is a question for the jury, having regard to all the circumstances such as the class of persons to whom the notice is addressed, whether the terms are reasonable. In the case in question, the plaintiff, who was a steerage passenger in a steamboat from Philadelphia to Liverpool, sustained injuries; and the question was whether she was bound by the special terms in small print on her ticket. The jury found that she did not know that the writing on the ticket contained conditions relating to the terms of the contract of carriage; and also, that the defendants did not do what was reasonably sufficient to give the plaintiff notice of the conditions. The House of Lords decided, following *Henderson v. Stevenson*, that she was not bound by the conditions.

The principle in *Household Fire, &c. Insurance Co. v. Grant* underlies the following cases: *Adams v. Lindsell*, No. 7, p. 80, ante (1 B. & Ald. 681, 19 R. R. 415); *In re The Imperial Land Co. of Marseilles, Townsend's Case* (1871), L. R., 13 Eq. 148, 41 L. J. Ch. 198, where the contract was held complete on the posting of the letter of acceptance, which failed to reach the offerer owing to a faulty address given by him; *In re The Imperial Land Co. of Marseilles, Wall's Case* (1872) L. R., 15 Eq. 18, 42 L. J. Ch. 372, a case of similar circumstances; and *Henthorn v. Fraser* 1892, 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. 439, 40 W. R. 433, where it was decided that an offer delivered by hand is completely accepted when a letter of acceptance is posted, if the parties contemplated a resort to the post.

Liability of directors of companies for qualifying shares depends on the same principle. These will be particularly dealt with under the head of “Corporation.”

The offer must be accepted within a reasonable time: after the lapse of which it goes off. Thus where directors of companies allotted shares a long time after application for them, the applicants were held not to be shareholders. *Ramsgate Victoria Hotel Company v. Montifiore* (1866), L. R., 1 Ex. 109, 35 L. J. Ex. 90, 13 L. T. 715, 14 W. R. 335; *In re Bourn, Baily and Co., Baily's Case* (1868), L. R., 5 Eq. 428, 3 Ch. 592, 37 L. J. Ch. 255, 670.

Unless the offer is definite, its acceptance does not constitute a contract. For instance, acceptance of an offer to sell for what the offeree thinks proper, *Taylor v. Brewers* (1813), 1 M. & S. 290; or for a fixed sum and £5 more in case of luck, *Guthing v. Lynn* (1831), 2 B. & Ad. 232; or "reserving the necessary land for making a railway," *Pearce v. Watts* (1875), L. R., 20 Eq. 492, 44 L. J. Ch. 492; or of an offer to serve for a fixed sum in one case and for what the offeree may think proper in another case, *Roberts v. Smith* (1859), 4 H. & N. 315, 28 L. J. Ex. 164, 32 L. T. 320, does not create a contract.

AMERICAN NOTES.

See notes to Nos. 7 and 8, *ante*, p. 91; *Household Fire Ins. Co. v. Grant*, was reproduced in full in note, 32 Am. Rep. 42. In *Quick v. Wheeler*, 78 New York, 300, there was a written contract for the sale and delivery by plaintiff to defendant of a certain quantity of timber, which was executed. In the same writing the defendant agreed to accept and pay for a certain additional quantity, but the plaintiff did not agree to deliver it, and delivered but a part of it. *Held*, that there was no binding contract to deliver the additional quantity, but only a revocable offer by defendant.

There must be an acceptance notified to the proposer. "A mental determination not indicated by speech, or put into course of indication by act to the other party, is not an acceptance which will bind the other." And so where one wrote to another, "upon an agreement to finish the filling up of offices 57 Broadway, in two weeks from date, you can commence at once," the other made no reply, but immediately purchased lumber for the work and began to prepare it, and the next day the defendant countermanded the order; *held*, no contract. *White v. Corlies*, 46 New York, 167. "The mere determination of the mind, unacted on, can never be an acceptance. . . . An acceptance is the distinct act of one party to the contract as much as the offer is of the other." *Mactier's Admr's v. Frith*, 6 Wendell (New York), 103; 21 Am. Dec. 262.

In *Van Valkenburgh v. Rogers*, 18 Michigan, 180, the plaintiff wrote the defendant proposing to charter his boat; the defendant answered suggesting a different bargain; the plaintiff replied that he thought well of the plan suggested, but wished a definite understanding; the defendant then telegraphed the plaintiff to begin fitting up the boat. Plaintiff thereupon took possession, fitted her up at his own expense, and used her until the defendant retook her. *Held*, that there was no binding contract for the use of the boat; "while the correspondence showed that the parties had begun to make a bargain, it also showed that no bargain was perfected."

In *Nundy v. Matthews*, 34 Hun (New York Supr. Ct.), 74, it was held that where in answer to a letter proposing a settlement of an existing controversy, a letter is written offering a settlement, the terms of which differ materially from those contained in the first letter, it is incumbent upon the party who wrote the first letter, if he desires to accept the modified offer, to expressly notify the writer of the second letter of his acceptance. His mental deter-

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mination to accept the modified offer, evinced by his omitting to take further steps in the controversy until after the expiration of a time fixed in the amended offer, is not a sufficient acceptance to render its proposer bound thereby. "Acting upon the faith of the offer, without an agreement to accept, creates no binding contract."

In *McDonald v. Baing*, 43 Michigan, 394; 38 Am. Rep. 199, the owner of lands, asking M. a fixed price for them, declined to give him a refusal of them, but offered him a commission if he would sell them to other parties. The negotiations were all in writing. M. made no reply to this proposal, but sent a person to the owner to whom the latter sold directly, at a lower price. *Held*, that M. was not entitled to any commission. "No offer to employ another binds the person making it to pay for services, unless he is given to understand that the offer is accepted."

So in *Beckwith v. Cheever*, 21 New Hampshire, 41, where A. offered to sell B. a lot of timber; B. said he would accept if his brother would assist him to pay for it; A. replied that he need not decide at once, but might do so thereafter; B.'s brother agreed to assist him; but A. was not notified of it, and sold the timber to C. *Held*, no sale to B.

See *Dyer v. Duff*, 39 West Virginia, 148; 24 Lawyers' Rep. Annotated, 339; *Stembridge v. Stembridge's Adm'r*, 87 Kentucky, 91; *Bostwick v. Hess*, 80 Illinois, 138. The subject was learnedly examined in *Wearer v. Burr*, 31 West Virginia, 736; 3 Lawyers' Reports Annotated, 94.

An implied contract of purchase of goods however is raised where goods delivered on certain specified terms are retained and used without objection. *Dent v. N. A. St. Co.*, 49 New York, 390.

No. 11. — WILLIAMS *v.* CARWARDINE.

(1833.)

RULE.

AN offer may be addressed to the world at large. Performance of the conditions of such an offer is acceptance of it.

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4 B. & Ad. 621-623 (s. c. 1 N. & M. 418; 5 C. & P. 566).

Contract. — Offer of Reward by Advertisement. — Acceptance

A. by public advertisement stated, that whoever would give information which should lead to the discovery of the murder of B. should, on conviction, receive a reward of £20: *Held* that C., who gave such information, was entitled to recover the £20, though she was led to inform, not by the proffered reward, but by other motives.

Assumpsit to recover £20, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murderer of Walter Carwardine. Plea, general issue. At the trial before PARK, J., at the last Spring assizes for the county of Hereford, the following appeared to be the facts of the case:—One Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public-house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before [* 622] the magistrates, but did not then *give information which led to the apprehension of the real offender. On the 25th of April the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murderer of Walter Carwardine should, on conviction, receive a reward of £20; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer assizes, 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23d of August 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant, to give evidence, the law would not imply a contract by the defendant to pay her the £20. The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

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* Curwood now moved for a new trial. There was no [* 623] promise to pay the plaintiff the sum of £20. That promise could only be enforced in favour of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITLEDALE, J. The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

ENGLISH NOTES.

The Indian Contract Act, sect. 8, embodies the rule of the principal case in the following words: "Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of a proposal."

The principal case has been very much commented upon, for it is said, there was no *animus contrahendi* and no real consideration; but all that appears from the report of the case is that the motive of performing the conditions of the offer was other than the reward; and it is a well-known principle of law that motive is immaterial in contracts. The absence of *animus contrahendi* can only be inferred from the fact of non-communication of the acceptance to the offeror. But cases of which *The Household Fire, &c. Ins. Co. v. Grant*, No 10, p. 115, *ante*, is the type have settled that where the offeror points out a mode of communication, that mode is binding on him. The acceptor need do no more than resort to it. Hence, absence of express communication does not warrant the inference of absence of an *animus contrahendi*. It may also be mentioned that consideration lay in the trouble of giving information. The rule in the principal case was applied in *Gibbons v. Proctor* (1891), 64 L. T. 594, and *Carlill v. Car-*

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Carbolic Smoke Ball Co. (1893), 1 Q. B. 256, 62 L. J. Q. B. 257, 67 L. T. 837, 41 W. R. 210. In the former case, a reward was offered for information given to the officer Penn leading to the detection of a crime. Before the hand-bills offering the reward were published, *i. e.*, printed and distributed, the plaintiff, a police officer, gave the information to another officer, who in due course communicated it to Penn, but not until after the publication of the hand-bills. It was decided that the plaintiff was entitled to the reward, for the person to whom the plaintiff first conveyed the information was his agent to communicate, and not Penn's agent to receive the information; hence the information must be taken to have been given after the publication of the hand-bills. The correctness of the decision as reported has been doubted by Sir F. POLLOCK and Sir W. ANSON.

In the latter case (*Carill v. Carbolic Smoke Ball Co.*), the defendant company offered to pay £100 to any one who would contract influenza after using one of the Carbolic Smoke Balls according to the printed directions. The plaintiff contracted the illness after using it in the prescribed manner, and was held entitled to the reward.

The rule in the principal case has also been applied to the advertised time-tables of railway companies and other cases of open offers. In *Denton v. Great Northern Railway Co.* (1856), 5 El. & Bl. 860, 25 L. J. Q. B. 129, tender of a fare to travel by an advertised train, and the refusal of the company to issue a ticket, was held to have given rise to a cause of action. In *Warlow v. Harrison* (1858-9), 1 El. & El. 295, 28 L. J. Q. B. 18, and 1 El. & El. 309, 29 L. J. Q. B. 14, the *bouâ pde* highest bidder at a sale by auction "without reserve," was held to have a cause of action against the auctioneer for refusal to knock down the lot to him. In *Ex parte Asiatic Banking Corporation, In re Agra and Masterman's Bank* (1867), No. 46 of "Bill of Exchange," 4 R. C. 612 (L. R., 2 Ch. 391, 36 L. J. Ch. 222, 16 L. T. 162, 15 W. R. 414), taking bills drawn by virtue of an open letter of credit issued by a bank, was held to constitute a contract binding on the bank. Many other cases might easily be added to the list. A very important one is *Bheegrandass v. Netherlands India Sea Insurance Co.* (J. C. 1888), 14 App. Cas. 83. There the respondents issued an "open cover," *i. e.*, a proposal to insure for Rs. 15,000 on certain terms, before the cargo was shipped. The cover was indorsed to the appellants, who applied for policies amounting to Rs. 15,000. Held, that the open cover was an offer of insurance to all persons having an insurable interest in the goods.

General offers must, however, be distinguished from general invitations to make offers. Performance of the conditions of the former makes a legally binding contract, whereas compliance with the requirements

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of the latter is nothing more than an offer, which may or may not be accepted by the other party. So in *Spencer v. Harding* (1870), L. R., 5 C. P. 561, 39 L. J. C. P. 332, 23 L. T. 237, 19 W. R. 48, it was decided that an invitation to make tenders did not impose on the advertiser the obligation of accepting any tender. Sending the proposal form of an insurance office is an invitation to offer. The intending insured by filling up the form makes an offer which the insurance company is at liberty to accept or reject. *Canning v. Farquhar* (C. A. 1886), 16 Q. B. D. 727, 55 L. J. Q. B. 225, 54 L. T. 350, 34 W. R. 423.

An auctioneer, advertising a sale by auction, is not obliged to hold the auction, nor is there any obligation to put up any particular lot. *Harris v. Nickerson* (1873), L. R., 8 Q. B. 286, 42 L. J. Q. B. 171, 28 L. T. 410, 21 W. R. 635.

AMERICAN NOTES.

The principal case is cited by Lawson on Contracts, §§ 12, 26, and in an extensive note on Rewards, 26 Am. Rep. 5. The doctrine laid down in it is the law in this country, and is illustrated in *Ryer v. Stockwell*, 14 California, 134; 73 Am. Dec. 634; *Morrell v. Quarles*, 35 Alabama, 544; *Harson v. Pike*, 16 Indiana, 140; *Pierson v. Morch*, 82 New York, 503; *Janerin v. Exeter*, 48 New Hampshire, 83; 2 Am. Rep. 185; *Besse v. Dyer*, 9 Allen (Massachusetts), 151; 85 Am. Dec. 747; *First Nat. Bank v. Hart*, 55 Illinois, 62; *Cummings v. Gann*, 52 Pennsylvania State, 484; *Hayden v. Souger*, 56 Indiana, 42; 26 Am. Rep. 1; *Shuey v. United States*, 92 United States, 73 (reward for the apprehension of Surratt, accomplice of Booth in the assassination of President Lincoln); *Central, &c. Co. v. Cheatham*, 85 Alabama, 292; 7 Am. St. Rep. 48; *Kasling v. Morris*, 71 Texas, 584; 10 Am. St. Rep. 797; 11 Lawyers' Rep. Annotated, 398.

The offer may be oral. Thus in *Reif v. Paige*, 55 Wisconsin, 496; 42 Am. Rep. 731, a man in front of a burning building shouted to the crowd: "I will give \$5000 to any person who will bring the body of my wife out of that building, dead or alive." A fireman brought out her dead body, and was held entitled to recover the reward.

The reward cannot be recovered by one whose official duty it is to perform the service, as a constable with a warrant for arrest. *Hayden v. Souger*, *supra*. Or by a watchman discovering an incendiary. *Pool v. City of Boston*, 5 Cushing (Massachusetts), 219; *Matter of Russell*, 51 Connecticut, 577; 50 Am. Rep. 55. (See a very eloquent diatribe by Senator Tracy against Lord Bacon in *Hatch v. Mann*, 15 Wendell [New York Court of Errors], 50.) But it is no part of the duty of a paid fireman to rescue human beings from burning buildings at peril of their own lives. *Reif v. Paige*, *supra*.

Notice of acceptance is not essential. *Harson v. Pike*, 16 Indiana, 140; *Symmes v. Frazier*, 6 Massachusetts, 344; *Morse v. Bellows*, 7 New Hampshire, 549; *Shuey v. U. S.*, *supra*; *Reif v. Paige*, *supra*.

Whether knowledge of the offer before the rendition of the services is

No. 11. — *Williams v. Carwardine.* — Notes.

essential to a recovery is a question somewhat in conflict. It is generally held not necessary. *Dawkins v. Sappington*, 26 Indiana, 199; *Russell v. Stewart*, 41 Vermont, 170; *Eagle v. Smith*, 4 Houston (Delaware), 293; *Auditor v. Ballard*, 9 Bush (Kentucky), 572; 15 Am. Rep. 728. In New York it is held to the contrary. *Fitch v. Snedaker*, 38 New York, 248; 97 Am. Dec. 791; *Howland v. Lounds*, 51 New York, 604; 10 Am. Rep. 654; and so in *Marvin v. Treat*, 37 Connecticut, 96; 9 Am. Rep. 307; *Hewitt v. Anderson*, 56 California, 476; 38 Am. Rep. 65; *Stamper v. Temple*, 6 Humphreys (Tennessee), 113. In *Howland v. Lounds*, *supra*, one Judge said: "Where a contract is proposed to all the world in the form of a proposition, any party may assent to it, and it is binding; but he cannot assent without knowledge of the proposition." This is founded on *Fitch v. Snedaker*, *supra*; but that decision seems distinguishable, because in that case the information in question was given before the reward was offered. The Court distinguished the principal case on the ground that it did not appear therein "whether or not the plaintiff had ever seen the notice or handbill posted by the defendant offering the reward." In *Hewitt v. Anderson*, *supra*, it did not appear whether or not the plaintiff acted with knowledge of the offer of the reward; but it was found that he acted without any intention of claiming it. The other point was not decided. In *Auditor v. Ballard*, *supra*, the Court said, "If the offer was made in good faith, why should the State inquire whether appellee knew that it had been made? Would the benefit to the State be diminished by the discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and bring a felon to trial? And is it not well that all may know that whoever in the community has it in his power to prevent the final escape of a fugitive from justice, and does prevent, not only performs a virtuous service, but will entitle himself to such reward as may be offered therefor?"

The offer may be revoked before performance. *Cummings v. Gann*, *supra*; *Hawson v. Pike*, *supra*. And performance afterward, without knowledge of the revocation, does not warrant recovery. *Shucy v. U. S.*, *supra*.

An offer unlimited in time has been generally held to be binding only for a reasonable time. *Loring v. City of Boston*, 7 Metcalf (Mass.), 409 (not for three years and eight months); *Mitchell v. Abbott*, 86 Maine, 338; 41 Am. St. Rep. 559; 25 Lawyers' Rep. Annotated, 503 (not for twelve years); *Shaub v. City of Lancaster*, 156 Pennsylvania State, 362; 21 Lawyers' Rep. Annotated, 691. But elsewhere it has been held binding until revocation or bar by the Statute of Limitations. *Ryer v. Stockwell*, *supra*; *In re Kelly*, 39 Connecticut, 159.

An unwarranted offer by a mayor may be effectually ratified by the proper municipal authority. *Craushaw v. Roxbury*, 7 Gray (Mass.), 377.

It must appear that the offer was one deliberately intended to be acted on, and not a mere expression of feeling or willingness. So where a man whose son had been feloniously killed, and he himself wounded, and he and his family were in great distress of mind in consequence, said he would give two hundred dollars to have the perpetrators arrested, this was held not a binding offer. "Such expressions . . . are evidence of strong excitement, but

No. 12. — Hyde v. Wrench, 3 Beav. 334, 335. — Rule.

not of a contracting intention." Stress was laid on the fact that "he made no public offer." This would distinguish the case from *Reif v. Paige*, *supra*; *Stamper v. Temple*, 6 Humphreys (Tennessee), 113; 44 Am. Dec. 296. The same is true of representations in business circles. *Lyman v. Robinson*, 14 Allen (Mass.), 254.

Contracts may originate in advertisements addressed to the general public. The intent manifested by an advertisement for bids must govern in its interpretation. Where the advertisement is nothing more than a suggestion to induce offers of a contract by others, it imposes of itself no liability. *Anderson v. St. Louis Bd. of Public Schools*, 26 Lawyers' Reports Annotated, 707, 122 Missouri, 61.

No. 12. — HYDE v. WRENCH.

(1840.)

RULE.

WHERE an offer is refused, there is an end of it; and no subsequent acceptance, without a renewal of the offer, will make a contract.

Hyde v. Wrench.

3 Beav. 334-337.

Contract. — Offer. — Refusal.

The defendant, on the 6th of June, offered in writing to sell his farm [334] for £1000. The plaintiff offered £950, which the defendant on the 27th of June, after consideration, refused to accept. On the 29th the plaintiff, by letter, agreed to give £1000, but there appeared to be no assent on the part of the defendant, though there had been no withdrawal of the first offer: *Held*, that there was no binding contract within the Statute of Frauds.

This case came on upon general demurrer to a bill for specific performance, which stated to the effect following: —

* The defendant, being desirous of disposing of an estate, [* 335] offered, by his agent, to sell it to the plaintiff for £1200, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me £1200 for my farm: I will only make one more offer, which I shall not alter from; that is, £1000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the

No. 12. — *Hyde v. Wrench*, 3 Beav. 335, 336.

plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain enquiries, and, the instant I receive his reply, will communicate with you, and endeavour to conclude the prospective purchase of my farm; I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the £950 for the purchase on the 26th of June; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of [* 336] £950 for your farm at * Luddenham. This being the case, I at once agree to the terms on which you offered the farm, viz., £1000, through your tenant Mr. Kent, by your letter of the 6th inst. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the defendant "returned a verbal answer to the last mentioned letter, to the effect, he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. Kindersley and Mr. Keene, in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v. Eyre*, 2 Sim. & St. 194. The plaintiff, instead of accepting the alleged proposal for sale for £1000 on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

No. 13. — *Jordan v. Norton.* — Rule.

Mr. Pemberton and Mr. Freeling, *contrà*. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there, therefore, exists a valid subsisting contract. *Kennedy v. Lee*, 3 Mer. 441; 17 R. R. 110; *Johnson v. King*, 2 Bing. 270, were cited.

* The MASTER OF THE ROLLS: —

[* 337]

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1000, and if that had been at once unconditionally accepted there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

AMERICAN NOTES.

The principal case is cited in the text of Lawson on Contracts, § 17. In *Davis v. Parrish*, Littell (Kentucky), 153; 12 Am. Dec. 287, it was held that where a contract for the sale of land has by its terms expired, it cannot be revived by a parol acceptance. The doctrine is also found in *National Bank v. Hall*, 101 United States, 50; *Cornells v. Kregel*, 41 Illinois, 394; *Jenness v. Mt. Hope Iron Co.*, 53 Maine, 20; *Northwestern Iron Co. v. Meade*, 21 Wisconsin, 474; 94 Am. Dec. 557; *Clay v. Ricketts*, 66 Iowa, 362; *Dorrick v. Monette*, 73 Alabama, 75; *Eggleston v. Wagner*, 46 Michigan, 610. These cases lay down the rule that an acceptance after refusal operates only as a counter-proposal, which the original proposer may either accept or reject.

No. 13. — *JORDAN v. NORTON.*

(1838.)

No. 14. — *IN RE ABERAMAN IRON WORKS. PEEK'S CASE.*

(1869.)

RULE.

A COMMUNICATION purporting to accept an offer, but introducing a new term as part of the proposed contract, does not constitute an acceptance. But where the offer is

accepted by a communication which adds to the acceptance a collateral requisition not warranted by the terms of the offer, that circumstance does not prevent the contract being complete.

Jordan v. Norton.

4 M. & W. 155-163 (s. c. 7 L. J. Ex. 281).

Contract. — Offer. — Acceptance introducing New Term.

[155] In assumpsit for a mare sold and delivered, to which the defendant pleaded *non assumpsit*, it appeared that the defendant, having seen and ridden the mare, wrote to the plaintiff: "I will take the mare at twenty guineas, of course warranted; and as she lays out, turn her out my mare." The plaintiff agreed to sell her for the twenty guineas. The defendant subsequently wrote again to him: "My son will be at the World's End (a public house) on Monday, when he will take the mare and pay you: send any body with a receipt, and the money shall be paid; only say in the receipt, sound and quiet in harness." The plaintiff wrote in reply, "She is warranted sound, and quiet in double harness; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned Judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away: — *Held*, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned Judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent; and consequently that the plaintiff was not entitled to recover.

Assumpsit for the price of a mare sold and delivered and on an account stated. Plea, *non assumpsit*. At the trial before GURNEY, B., at the last Oxford Assizes, it appeared that, after some negotiation between the plaintiff and defendant (who lived at a distance of about thirty miles from each other) for the purchase by the defendant of the plaintiff's mare, she was sent on the 16th of October, 1837, at the defendant's request, to a public house called the World's End, nearly half-way between their houses, for trial by the defendant. The defendant's son, in his presence, rode the mare, and the defendant then offered twenty

No. 13. — *Jordan v. Norton*, 4 M. & W. 155, 156.

guineas for her, which was refused by the plaintiff's servant who had her in charge, he having directions from the plaintiff not to take less than £22, and he took her back. The plaintiff, however, was afterwards willing to let the defendant have her for twenty guineas, and wrote to him to that effect. The defendant wrote in answer as follows:—

UXBRIDGE, Oct. 17, 1837.

"SIR, — I will take the mare at twenty guineas, of course warranted; but as you say you have another horse that I shall buy, the same expense will bring the two up; therefore, as the mare lays out, turn her out my mare; and I will meet you at West Wycombe, Saturday or Monday, which day you like, and pay you at once.

W. NORTON."

The mare was sent to Wycombe accordingly, but the [156] defendant was not there; two appointments also which were subsequently made, one at the World's End, and the other at Wycombe, not having been kept by him, the plaintiff wrote to him on the subject, and received the following answer:—

UXBRIDGE, Oct. 26, 1837.

"SIR, — Of course I mean to have the mare, and if you had read my note properly it would have saved you a great deal of trouble. I now say, my son will be at the World's End on Monday, the 30th instant, when he will take the mare and pay you. If you want to go elsewhere, send any body with a receipt, and the money shall be paid; only say in the receipt sound, and quiet in harness."

On the 27th of October, the plaintiff wrote in answer: "I will send the mare as desired; she is warranted sound, and quiet in double harness; I never put her in single harness, as I never wanted it." On the 30th, the mare was sent to the World's End, according to the appointment; but the defendant's son not being there, the plaintiff's servant left her in the care of the landlord, with directions not to give her up to the defendant without payment of the price. After he had gone, the defendant's son came, took away the mare without paying for her, rode her home (a distance of eighteen miles) to the defendant's stable, where she was kept two days, and then sent back as being

unsound, her legs being at that time swelled; but the plaintiff refusing to receive her, she was turned out of his yard, and it did not appear what had become of her. The son, who was called as a witness for the defendant, said that his father had given him directions not to bring the mare away from the World's End without the warranty, and was angry with him for having done so. He also, as well as the person who took her back to the plaintiff's, spoke to her unsoundness at that time. This evidence was objected to by the plaintiff's counsel, but the [*157] learned Judge held that it was receivable *in mitigation of damages. In summing up, his Lordship told the jury that the plaintiff was bound, in order to recover, to prove a delivery of the mare; but there could not, under the circumstances of the case, be a complete delivery unless there had been an acceptance on the part of the defendant, whereby he had waived the conditions he had previously required, and which the plaintiff had not complied with, namely, the giving of a receipt, and of a warranty inserted in it; that the question whether there had been such acceptance would depend on whether the defendant had returned the mare within a reasonable time or not; and if they thought he had returned her within a reasonable time, that they should find for the defendant; if not, for the plaintiff. He also desired them to state their opinion whether the defendant's son had authority to take away the mare without a warranty. The jury found that the defendant had not accepted the mare, and that the son had no authority to take her away. The learned Judge thereupon directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for the sum of £21 in case the Court should think the direction to the jury, and the admission of evidence of unsoundness, to have been wrong.

Talfourd, Serjt., having obtained a rule to enter a verdict, or to enter a verdict for nominal damages, on the latter ground of objection, or for a new trial,

Ludlow, Serjt., now showed cause. The defendant's son having, as the jury have found, acted without his authority in taking home the mare, the defendant was not bound by his act; and having returned her within a reasonable time, he has done nothing whereby to waive his previous demand of a warranty and of a receipt. Neither of these having been given, and there having been no acceptance by the defendant, the contract

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was never *complete so as to bind the defendant. It [*158] is true, the plaintiff offered to give a limited warranty, that the mare was quiet in double harness; but that, not being co-extensive with the warranty required by the defendant, left the contract still open, and nothing but an actual acceptance of the mare, and a waiver of the warranty, could render the defendant liable for the price. Whatever the contract was, the vendor had a right to insist on the payment of the price before delivery; so, on the other hand, the vendee had a right to insist on the terms interposed by him, viz., that he should have a receipt for the money, in which should be embodied an acknowledgment of the warranty required by him. If the plaintiff insists that he has delivered the mare, he must be taken to have adopted the condition of the defendant, that a warranty should be given of her being quiet in harness generally, without any limitation. In effect, the son goes home to ascertain whether the father will adopt the delivery. There was no contract which the plaintiff could enforce, except that, the terms of which were stated by the defendant, and from which he has never receded. He was therefore clearly entitled to a verdict.

Talfourd, Serjt., and Keating, *contra*. — There was a complete delivery to the son, who was the agent pointed out by the father himself to receive the mare, and the party with whom the plaintiff was to deal. The defendant was not entitled afterwards to object that the son had but a limited authority, and that he was his agent for some purposes, and not for others. He might as well have said the son was his agent to receive the mare, but not to pay the price. He authorized him to do all that related to the delivery; and it must be taken as if the defendant had been there himself, without having written the letter of the 27th, and had taken her away without insisting on the previous conditions.

* But the learned Judge misdirected the jury, in leaving [*159] to them the question whether the defendant had accepted the mare. In the first place, there was a complete binding contract, and therefore no acceptance was necessary in order to make a complete delivery: and further, — even if the express contract was open, and the plaintiff was bound to resort to an implied contract, there is sufficient on the face of the evidence to bind the defendant. — The letter of the 17th of October must be looked to. Now, before that letter was written, there

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had been a trial of the mare by the son riding her; there had been no trial in harness: then the defendant writes to offer twenty guineas, subject only to a warranty, which terms the plaintiff accepts. There was then, therefore, a complete executory contract between them, on the plaintiff's warranting her sound; for the warranty then imported soundness only. [ALDERSON, B. It is shown by the subsequent correspondence, that it meant sound and quiet in harness.] The defendant certainly introduced that term, but it does not appear that the plaintiff assented to it. The opinion of the jury ought to have been taken whether the trial, without harness, did not import that the warranty agreed for applied to soundness only. If any new term was to be introduced, the assent of the plaintiff was necessary to give it effect; and even if there was such assent, it did not become a condition precedent to the payment of the price, without consideration. [PARKE, B. True, if there was a binding contract before; but that is the difficulty. ALDERSON, B. I think it is clear that at that time the contract was not only for the defendant to give a warranty, but such a warranty as the parties should afterwards agree upon.] It is submitted that the contract was substantially completed between the parties; if so, no acceptance was necessary, and the learned Judge was wrong in resting the case upon the defendant's intention to accept, as constituting a delivery. Delivery may be complete, for [*160] the purpose of *this action, without acceptance. It has been universally held, in special declarations on a contract, that a substantial performance of conditions precedent is sufficient.

But further, even if the express contract remained open, the acts of the defendant were sufficient to fix him with an implied promise to pay the price, and it was misdirection, under the circumstances, to ask the jury whether the mare had been kept beyond a reasonable time. The son rode her eighteen miles; the defendant kept her two days, and then returned her with her legs swollen. These acts of the defendant (looking also to his previous conduct as to the trials of the mare, &c.) were sufficient to conclude him as the purchaser. *Street v. Blay*, 2 B. & Ad. 460. [PARKE, B. The question, whether the defendant has so dealt with her as to raise an implied promise to pay, has been left to the jury, and they have found he did not accept her.]

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Lastly, with respect to the evidence offered as to the unsoundness of the mare, it was never put to the jury what would be the value of her if unsound; and the jury, when the question was put to them as to the return within a reasonable time, would assume that he had a right to return her, being unsound. But the case of *Street v. Blay* shows, that having had an opportunity of exercising his judgment on the mare before the purchase, he might have accepted and received her so as to preclude himself from returning her on discovering a non-compliance with the warranty, and yet the return might have been within a reasonable time, assuming him not to have so precluded himself from it. [PARKE, B. That would be so, had there been a complete contract of purchase; here the question is, whether there ever was a purchase.]

PARKE, B. I am of opinion that this rule should be discharged. The first question to be disposed of is, whether there is any evidence of a complete contract in *writing between [*161] the parties. If there was, then the only step necessary to be proved in order to entitle the plaintiff to recover in this action, was to prove the delivery of the mare, and it was not competent to the defendant to annex to it any conditions. It certainly appears that the mare was seen by the defendant, and ridden in his presence, and twenty guineas offered by him for her, prior to the first material letter to which I am about to advert; that is, on the 16th of October. Then, on the 17th, the defendant writes a letter to the plaintiff, which amounts to a proposal to take the mare on new terms, one of which was not yet arranged between the parties. [His Lordship read the letter.] This letter amounts only to a proposal to give twenty guineas for the mare, provided she were warranted; but the terms of the warranty still remained to be agreed upon. If the parties do not agree upon a warranty which shall be satisfactory to both, there is no complete contract. We are to see, then, whether there was a warranty subsequently agreed on. Next comes the letter of the 26th of October. [His Lordship read it.] By that letter the defendant agrees to be bound by the contract, if the plaintiff will give a warranty of a particular description, — viz. that the mare is quiet in harness; that is, *primâ facie*, in all descriptions of harness. The plaintiff replies, that he will agree, not to the precise terms of the warranty asked for, but only that she is

quiet in double harness. The correspondence, therefore, amounts altogether merely to this: that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties never have contracted in writing *ad idem*.

We are then to ascertain, in the next place, whether this is supplied by the parol evidence, or by the acts or conduct of the parties. There is nothing in the parol evidence to supply [*162] it: the question therefore is, first, *whether the conduct of the defendant's son at the World's End amounts to an acceptance. It is contended that the defendant is bound by the son's acts on that occasion; but I think he is not, because the son had only a limited authority; and if a party contracts with another through his agent, he can take only such rights as the agent can give: and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorized to receive the mare if a warranty were given that she was quiet in harness. Then the only remaining question is, whether she was in fact accepted by the defendant on the terms of the limited warranty proposed by the plaintiff. That question was left to the jury, and they found it in favour of the defendant. I agree, that if there was a complete contract in writing before, the direction of the learned Judge would not have been quite correct; but the question being whether there was an acceptance in fact, the contract not being complete before, the direction was perfectly unexceptionable. The case comes therefore to this: there was no complete contract in writing by which both parties were bound, there was no sufficient delivery to the defendant, and there was no acceptance. The defendant is therefore entitled to the verdict.

BOLLAND, B. I am of the same opinion. There is one point only which I will observe upon. It is said, that after the mare was taken home, she was kept for such a time as showed that the defendant intended to adopt the act of his son, and amounted to an acceptance on the new terms. That reasoning may apply to the case of a specific chattel, where the party has had an opportunity of exercising his judgment upon it; but here the defendant had had no previous opportunity of ascertaining whether the mare was quiet in all harness, which was what he required; the plaintiff had only warranted her quiet in double harness.

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ALDERSON, B. If the contract was complete, — if the [163] one had agreed to sell and the other to buy completely, there was a sufficient delivery. Again, if the son was authorized to receive the mare on the limited terms agreed to by the plaintiff, the delivery to him was sufficient; or if, not being so authorized, the defendant had nevertheless agreed to receive her on the delivery to him, that would have been sufficient to bind him. But the son had no such authority, and the father, immediately on the mare coming home, repudiates his act, and within a reasonable time returns her. I think there was no case for the plaintiff.

GURNEY, B., concurred.

Rule discharged.

In re Aberaman Iron Works. Peek's Case.

L. R., 4 Ch. 532-536.

Contract to take Shares in Company. — Allotment. — Acceptance of Offer accompanied by Collateral Requisition.

P. applied for shares according to a form of application which [532] bound him to pay, in addition to the £1 per share which he had paid on application, £4 per share "on allotment." On the 6th of September he received a letter stating that the directors had allotted him eighty shares, "on which £5 per share must be paid on or before the 15th instant." On the 10th of September, before anything further had been done, P. wrote to the company refusing to accept the shares: —

Held (affirming the decision of MALINS, V. C.), that the application and the letter constituted a complete contract, and that the repudiation of the 10th of September was ineffectual.

This was a motion by way of appeal from a decision of Vice Chancellor MALINS settling the name of Mr. Peek on the list of contributories of the Aberaman Ironworks, Limited.

The prospectus of the company required a deposit of [533] £1 per share on an application for shares, and a payment of £4 per share more on allotment. Annexed was a form of application for shares. Peek made an application for shares according to this form; his application being as follows: —

"Having paid to your bankers the sum of £100, being the deposit of £1 per share on 100 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares, or any less number you may allot to me,

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and I agree to pay the deposit on allotment, and to sign the articles of association of the company when required; and I authorize you to insert my name on the register of members for the number of shares allotted to me."

On the 6th of September, 1864, Peek received from the secretary a letter, which was as follows:—

"In reply to and on the terms of your application, the directors have allotted to you eighty shares in the company, on which shares £5 per share must be paid on or before the 15th instant."

On the 10th of September, Peek wrote a letter to the company repudiating the shares on the ground of alleged misrepresentations in the prospectus, which he considered to differ essentially from one subsequently issued.

The company placed the name of Peek on the register. At what time this was done did not precisely appear, but it was not established that it was done before the receipt of Peek's letter of repudiation. He never paid anything more in respect of the shares, but on the 27th of September a call was made upon him of £5 per share, which he did not pay. Some correspondence passed between Peek and the officers of the company, in which they insisted on his being a shareholder, and threatened him with legal proceedings, but nothing had been done when, in June, 1865, an order was made to wind up the company.

Vice-Chancellor MALINS held that the allotment was not conditional, but absolute, and that the secretary's letter, received on the 6th of September, 1864, could not be treated as introducing a new term, so as to prevent the application and the letter from constituting a complete contract, inasmuch as the allow-
[* 534] ing time for payment *till the 15th of September was wholly for the benefit of the allottee. His Honour considered that the alleged misrepresentations were not proved, and that Mr. Peek had not on the 10th of September any right to repudiate the shares. His Honour thought that Mr. Peek's name appeared not to have been on the register on the 10th of September, 1864, but held that this was immaterial, for that as Mr. Peek had bound himself to take the shares the directors had a continuing authority to put his name on the register, and if they put it on after the 10th of September the act was as effectual as if they had done it before that day.

No. 14. — In re Aberaman Iron Works. Peek's Case, L. R., 4 Ch. 534, 535.

Mr. Glasse, Q. C., and Mr. Fischer, for Peek, relied on *Pentelou's Case*, L. R., 4 Ch. 178.

Sir Roundell Palmer, Q. C., Mr. Cotton, Q. C., and Mr. Ferrers, for the official liquidator, were not called upon.

Sir C. J. SELWYN, L. J. : —

We have been much pressed in argument with our decision in *Pentelou's Case*. In that case we affirmed the decision of Vice-Chancellor MALINS, who appeared to have founded his judgment, not without doubt and hesitation, upon all the particular circumstances of the case. It was a case very near the dividing line, and its circumstances were very materially different from those of the case now before the Court. In the first place, in *Pentelou's Case* there was a clear and admitted fraud giving Mr. Pentelou an indisputable right to repudiate the contract, and that, in my judgment, is very far indeed from being the case in the matter now before us. In the next place, in *Pentelou's Case* the allotment was expressed in a conditional form, by means of a letter which introduced a new date, and before the expiration of the time fixed by that letter of allotment the conduct of both parties was such as to lead to the conclusion that neither of them considered that any final or binding contract had been entered into. I refer particularly to the letter of the 10th of August, in which, so far from stating to Mr. Pentelou that the contract had been actually entered into and completed, so far from telling him that the shares had *been actually allotted [*535] and actually registered in his name, the secretary says,

“Mr. Hyatt, the traveller for the firm, will call on you in a day or two, and will furnish you with any further information you may require.” In the present case, so far from there being any conditional form of allotment, or any such conduct on the part of the company as could be considered to express a doubt whether any final contract had been entered into, the company absolutely allot the shares, and say that the money must be paid, though it is true that they say that it must be paid on or before a particular day. They send notice of a subsequent call, and they have always consistently treated the present appellant as a person bound by a concluded contract, and, consequently, as a shareholder. I think that those circumstances essentially distinguish this case from *Pentelou's Case*.

[His Lordship then stated his reasons for holding that the alleged misrepresentations in the prospectus were not established.]

It is true that the present appellant cannot be said to have lain by and taken advantage of an opportunity of seeing whether this company became prosperous or not. It is true that he did attempt to repudiate the contract within a very short time after it was entered into, but, in my judgment, he has entirely failed in showing any such circumstances as would entitle him to repudiate it, he having applied for shares in the common form, having authorized the insertion of his name in the register, and then having received a letter of allotment which said that the shares were allotted to him, and merely required the payment of money consequent upon such allotment. I think, therefore, that the present appeal entirely fails, and must be dismissed with costs.

Sir G. M. GIFFARD, L. J. :—

I am of the same opinion. As regards *Pentelour's Case* we certainly went to the extreme verge of the cases of that character, and we based our decision upon this, that the contract was conditional, and that, in point of fact, Mr. Pentelow had a right to assume throughout that his name was not on the share register.

Now here, certainly, there is no conditional contract. [* 536] There is a * most distinct allotment, and a notice to pay on a particular day. And when that letter of allotment was received Mr. Peek certainly had no right to assume that his name would not when that allotment was sent be then and there placed upon the list of shareholders. The next question, then, is, whether any such fraud is shown as would entitle Mr. Peek to repudiate. I am of opinion on the facts which are here proved that no such fraud is made out. That being so, the whole case is disposed of, and it is enough to say that from the very first Mr. Peek knew that it was a matter of dispute between himself and the company whether he had or had not a right to repudiate, that he knew throughout that they were disputing his right to repudiate, that he knew throughout that they were holding him to his contract, and that he supposed throughout that they would put his name upon the list, and assert a right to do so. In that state of things, I am clearly of opinion that the writing of the letter of repudiation is not a ground to excuse him from being on the list. I entirely agree with the VICE CHANCELLOR that the evidence would not satisfy me that Peek's name was on the register before the 10th of September, 1864, but I also agree with

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him in considering that circumstance utterly immaterial. The ground on which we distinguished *Pentelow's Case* from *Oakes v. Turquand*, No. 78, *post*, L. R., 2 H. L. 325; 36 L. J. Ch. 949, does not exist here.

ENGLISH NOTES.

In *Holland v. Eyre* (1825), 2 Sim. & St. 194, where the defendant offered to take the assignment of the plaintiff's lease, and the latter offered him an underlease, no contract was held to exist. In *Routledge v. Grant* (1828), 4 Bing. 653, 1 M. & P. 717, 3 C. & P. 267, the defendant offered to purchase the plaintiff's house with possession from the 25th of July, and the defendant accepted the offer, but altered the date of possession to the 1st of August. Held, that there was no contract. In *Duke v. Andrews* (1848), 2 Ex. 290, 17 L. J. Ex. 231, the defendant offered to purchase some railway shares; and the plaintiff purported to sell them to him with the words "not transferable" endorsed. It was held that these words introduced a new term; and the defendant was therefore not bound. In *re European Central Railway Co., Ex parte Gustard* (1868), L. R., 8 Eq. 438, A. applied for shares in a company. The shares were then £20 shares. Before allotment the directors, according to the powers reserved to them by the articles of association, increased the amount payable on each share to £40; and allotted shares to A. without informing him of the change. It was held that there was no contract binding A. to take the shares.

Other cases of insufficient acceptance are:—

Meynell v. Surtees (1855), 1 Jur. N. S. 737 (offer of wayleave, acceptance for a line for general traffic); *Hall v. Hall* (1848), 12 Beav. 414 (acceptance introducing a condition); *Honeymoon v. Marryat* (1857), 6 H. L. Cas. 112, 26 L. J. Ch. 619 (acceptance "subject to the terms of a contract being arranged"); *In re Leeds Banking Co., Addinell's Case* (1865), L. R., 1 Eq. 225, 35 L. J. Ch. 75; and *Jackson v. Turquand* (1869), L. R., 4 H. L. 305, 39 L. J. Ch. 11 (proposal to take shares accepted with a condition of their forfeiture in case of non-payment of price within a prescribed time); *In re United Ports Insurance Co., Wynne's Case* (1873), L. R., 8 Ch. 1002, 43 L. J. Ch. 138, and *In re United Ports Insurance Co., Beck's Case* (1874), L. R., 9 Ch. 392, 43 L. J. Ch. 531 (on a proposal to amalgamate two companies, the purchasing company, which was unlimited, inserted a proviso limiting the liability of its members for the debts of the absorbed company to the amount unpaid on their shares. Two shareholders of the absorbed company applied for shares in the purchasing company credited with a certain sum according to the agreement, and were allotted shares credited with a "proportionate amount of the net assets" of the absorbed

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company. These shareholders were held not bound by the allotment); *Stanley v. Dowdeswell* (1874), L. R., 10 C. P. 102, 23 W. R. 389 (acceptance with the words "I have decided on taking No. 22 Belgrave Road, and my agent will arrange terms with you"); *Appleby v. Johnson* (1874), L. R., 9 C. P. 158, 43 L. J. C. P. 146 (acceptance of a proposal to serve as salesman, with the postscript, "I have made a list of customers which we can consider together"); *Lucas v. Martin* (1887), 37 Ch. D. 597, 57 L. J. Ch. 261, 58 L. T. 862, 36 W. R. 627 (proposal to buy a bankrupt's assets on condition of payment of the bankruptcy expenses, preferential debts, and a composition to the unsecured creditors, and annulment of bankruptcy. The creditors purport to accept this, adding a clause that a bond should be given by the offeror for payment of the price. This was held to be a new term, and there was no contract).

As further illustrations of the latter part of the rule may be cited the following: *Gibbins v. N. E. Metropolitan Asylum District* (1847), 11 Beav. 1, 17 L. J. Ch. 5; *Skinner v. M'Dowall* (1848), 2 De Gex & Sm. 265, 17 L. J. Ch. 347; *Macomber v. Trower* (H. L. 1894), 2 Ir. Rep. 663.

A mere answer to an enquiry, "what is the lowest price," is not an offer. So that a statement by the enquirer that he will give the price named is not an acceptance of an offer, but a mere offer. *Harvey v. Facey* (J. C. 1893), 1893, A. C. 552, 62 L. J. P. C. 127, 69 L. T. 504, 42 W. R. 129.

See also cases noted under *Hussey v. Horne-Payne*, No. 15, p. 155, *post*.

AMERICAN NOTES.

See note, *ante*, p. 90, subdivisions, 4, 5. A written offer of land at a certain price for cash, giving a privilege of purchase for sixty days, is not accepted so as to make a binding contract by a letter announcing a determination to take the land and a readiness to pay for it on the conveyance by a proper deed. There should have been an unconditional acceptance, with payment or tender within the sixty days. If to the acceptance of a proposal a condition is affixed, or any modification or change in the offer is requested, this constitutes a rejection. *Wearer v. Burr*, 31 West Virginia, 736; 3 Lawyers' Rep. Annotated, 94; citing *Eliason v. Henshaw*, 4 Wheaton (U. S. Supr. Ct.), 225; *Ocean Ins. Co. v. Carrington*, 3 Connecticut, 357; *Hamilton v. Lycoming M. Ins. Co.*, 5 Pennsylvania State, 339; *Boston & M. R. Co. v. Bartlett*, 3 Cushing (Mass.), 224. So where a proposal to buy land at a certain price is accepted with a provision that it shall be free from expense of titles and the purchaser shall repay one year's insurance which had been paid, this was held no acceptance. *Kennedy v. Gramling*, 33 South Carolina, 367; 26 Am. St. Rep. 676.

Mr. Lawson says (Contracts, § 16): "The offer must be accepted exactly as it is made, for there is no contract if there is a variance of any kind between the terms of the offer and the acceptance." (Setting out the principal

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case in the text.) *Potts v. Whitehead*, 23 New Jersey Equity, 512; *Eads v. Carondelet*, 42 Missouri, 113; *Corcoran v. White*, 117 Illinois, 118; 57 Am. Rep. 858; *Siebold v. Davis*, 67 Iowa, 560; *Moxley v. Moxley*, 2 Metcalf (Mass.), 309; *Northwestern Iron Co. v. Meade*, 21 Wisconsin, 474; 94 Am. Dec. 557; *Baker v. Holt*, 56 Kansas, 100; *Stagg v. Compton*, 81 Indiana, 171; *Bruce v. Bishop*, 43 Vermont, 161.

So an offer to sell lands, and an acceptance "provided the title is perfect" do not constitute a contract. *Corcoran v. White*, *supra*. So where a resident of California addressed a letter to the plaintiff at his residence in Iowa, offering to sell him land at a certain price; the plaintiff telegraphed that he would take it at the price, adding: "Money at your order on First National Bank here;" this was held not an acceptance. An acceptance of an offer to sell land, but fixing a different place for the delivering of the deed and payment of the money from the residence of either of the parties, is not effectual. *Northwestern Iron Co. v. Meade*, *supra*.

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(1879.)

RULE.

WHERE a contract is alleged to have been made by letters, the whole of the correspondence and negotiations may be put in evidence in order to determine whether there was a contract or not.

And although certain letters, if taken by themselves, appear to constitute a binding agreement; yet, if the whole correspondence and negotiations show that there were other terms contemplated by both parties as essential to the proposed contract, and on which they failed to agree, the result is that there is no binding contract.

Thomas Hussey, appellants, v. John Horne-Payne and G. M. Horne-Payne his wife, respondents.

4 App. Cas. 311-323 (s. c. 48 L. J. Ch. 846; 41 L. T. 1; 27 W. R. 585).

Contract. — Correspondence.

Where a Court has to find a contract in a correspondence, and not [311] in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

Applying this rule, though the first two letters of a correspondence seemed

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to constitute a complete contract, the House, upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.

Per THE LORD CHANCELLOR: *Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself?

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal?

Per Lord SELBORNE: The observation stated in *Jercis v. Berridge*, L. R., 8 Ch. at p. 360; 42 L. J. Ch. 518, at p. 523, that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed.

Appeal against a judgment of the Court of Appeal reversing an order of Vice-Chancellor MALINS, made in an action for specific performance, brought by the appellant against the respondents, in relation to a sale of certain freehold land situated at North End, Fulham.

Mrs. G. M. Horne-Payne was entitled for her separate use to the property in question called the Mornington estate. Negotiations for the purchase of the estate by Mr. Hussey had been going on when Mrs. Horne-Payne wrote the following letter, dated the 4th of October, 1876: "I cannot accept your offer of £35,000 for my freehold land at North End. I refused that sum for [* 312] it fifteen months * ago, when offered by Messrs. Willett through Messrs. Saunders. I am now willing to divide the difference between your offer and my price, and I am prepared to accept £37,500 for the entire freehold property, or £34,000 for the property without the Mornington House and 1½ acre of ground." This letter was addressed to Mr. Weaver, who was acting on behalf of Mr. Hussey.

On the 6th of October, 1876, Mr. Weaver sent an answer in the following terms: "I beg to acknowledge the receipt of your letter of the 4th instant, stating that you are willing to accept the sum of £37,500 for the whole of your freehold land at North End (including the Mornington House estate), and I hereby, on behalf of Mr. Thomas Hussey, of 96 Kensington High Street, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid, extending from Hammersmith

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Road to the Hammersmith Railway, subject to the title being approved by our solicitors.”

It was alleged that there had been a suggestion made by Mrs. Horne-Payne that it would be for the mutual convenience of herself and Mr. Weaver that the purchase-money should be paid by instalments, but at a meeting of Mr. Hussey, Mr. Weaver, and Mr. Gasquet (the solicitor of Mr. Hussey), at the office of Mr. Crowdy (the solicitor of Mrs. Horne-Payne), it was said by Mr. Crowdy that he knew of no agreement to take the money by instalments, and that nothing less than the immediate payment of ten per cent. of the purchase-money by way of deposit, and the payment of the residue in a few months would be accepted. It was stated that Mr. Hussey had been mistaken on this point, and his solicitors, on the 24th of October, 1876, wrote to Mr. Crowdy that as he had said he could make no other arrangement for the payment of the purchase-money except ten per cent. down as a deposit, and the balance in a few months time, Mr. Hussey had no alternative but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat on the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. Hussey's behalf. Mr. Hussey afterwards saw Mrs. Horne-Payne, and reminded her of the understanding about payment by instalments, and on the 25th of October, 1876, she wrote to Mr. Weaver: “I have this moment seen Mr. Crowdy, *and have given him pos- [* 313] itive instructions to accept Mr. Hussey's offer of payment by instalments in three years and the deposit down. This is very much against Mr. Crowdy's wishes, but I, after all, am the gainer or loser by it, and I have taken the responsibility.”

Mr. Crowdy, on the 31st of October, 1876, wrote to Mr. Gasquet the following letter: “Mornington Park estate. We have had some farther communication with our clients hereon, and are authorized to state to you that they will be willing to carry out this sale upon the following terms which, we believe, correspond with what your client proposes, videlicet:—

“1. A deposit of £10 per cent. to be paid down.

“2. Balance of purchase-money to be paid by three equal instalments from date of contract.

“3. Interest at £5 per cent. on balance unpaid from time to time.

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" This we believe is all that relates to the money payments, the other details of the contract we can settle.

" We should add that this only binds our client on acceptance by yours."

On the same day Mrs. Horne-Payne wrote to Mr. Weaver, announcing that Mr. Crowdy had written accepting the terms proposed, of paying 10 per cent. down, and the balance in three years, and expressing a hope that the details might be carried out before the following Saturday.

On the 14th of November, 1876, Mr. Weaver called on Mr. Crowdy and left with him a complete statement of the terms as actually understood between the parties. The paper was headed " Proposal by Mr. Thomas Hussey for the purchase of the freehold property known as the Morningson estate." The instalments named therein were six, the first to fall due on the 25th of December, 1877, and a corresponding part of the estate was to be conveyed on the payment of each instalment. The last sentence of this proposal was, " Upon the contract being signed the said Thomas Hussey is to be let into possession of the property." On the 21st of November Mr. Crowdy (who was then very ill) wrote to excuse himself for not having noticed at the time an

" obvious mistake" in the paper left, and pointed out that [* 314] the first * instalment instead of being in December, 1877, ought to be in June, 1877, and Mr. Gasquet having afterwards called on Mr. Crowdy, and agreed to the suggested alteration, it was understood (as the statement of claim alleged) that Mr. Crowdy's counsel was at once to prepare the draft of the formal contract. The formal contract never was prepared, and after correspondence between the parties, beginning in March, 1877, this action was, in August, 1877, brought by Mr. Hussey claiming specific performance and damages, and farther relief.

The defendants demurred on the ground that in the statement of claim no subsisting agreement was alleged of which specific performance was claimed, nor was there any memorandum or note in writing of such agreement signed by either of the defendants, within the Statute of Frauds.

Vice-Chancellor MALINS was of opinion that the offer of the 4th of October was unconditionally accepted by the letter of the 6th of October; that Hussey proposed to abandon it on the 24th of October on account of the difference as to the payment of the

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purchase-money by instalments, but that the defendants declined to abandon it, and on the 25th of October conceded the payment by instalments; and that the subsequent negotiations between the parties did not constitute any legal abandonment of the contract; he therefore overruled the demurrer. This decision was reversed by the Court of Appeal, 8 Ch. D. 670; 47 L. J. Ch. 519, 751, the LORDS JUSTICES being of opinion that there had not been a completed contract, for that the words "subject to the title being approved by our solicitors," constituted a new term which required acceptance.

Mr. John Pearson, Q. C., and Mr. H. M. R. Pope, for the appellant: —

The two letters of the 4th and 6th of October, 1876, constituted a contract for the sale of the estate. There had been some previous negotiations which the letter of the 4th of October noticed and adopted; and the letter of the 6th of October was a formal acceptance of the terms stated in that of the 4th. The contract was, therefore, concluded and complete. The addition of the words "subject to the title being approved of by our solicitor" could * not affect the matter. They were mere [* 315] words of form which were understood, if not expressed, in every negotiation and contract for the sale of land. The vendor was always bound to make out a good title, and unless he did so the purchaser was not bound to accept it. The words, therefore, were mere words of course. Yet the Court below had treated them as if they formed a precise, specific, and unaccustomed stipulation, and required to be formally assented to, and if not formally assented to, the contract could not be complete. That was not the way in which they were treated in practice. *Hudson v. Buck*, 7 Ch. D. 683; 47 L. J. Ch. 247, did not justify the purpose for which it was cited in the Court below. On the contrary, it really treated those words as the necessary accompaniment of any negotiations for the sale of an estate, without complying with which (where there was no *mala fides* or unreasonableness on the part of the purchaser) a sale could not be enforced. No *mala fides* existed here, nor was any unreasonable objection made. *Duddell v. Simpson*, L. R., 2 Ch. 102; 36 L. J. Ch. 70, *Page v. Robinson*, 3 Russ. 114, and *Price v. Dyer*, 17 Ves. 356; 11 R. R. 102, showed that even if there had been some variations of terms after a contract had been really made, the

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Court would still enforce performance of it; and *Gordon v. Mahoney*, 13 Ir. Eq. 383, established that there must be as clear evidence of the waiver of a contract as of the making of it. *Noble v. Ward*, L. R., 1 Ex. 117; 35 L. J. Ex. 81, affirmed on appeal, L. R., 2 Ex. 135; 36 L. J. Ex. 91, No. 50, *post*, following *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310, proceeded on that principle. And even as to leases, where a first lease had been granted, and then a second, which recited the surrender and acceptance of surrender of the first, but which turned out to be itself inoperative, it was held that the first remained in force. Where there was a concluded and complete contract it could not be destroyed by anything less formal than itself. *Carolan v. Brazazon*, 3 J. & Lat. 201; Vendors and Purchasers, chap. iv. s. ix.

Mr. H. Fox Bristowe, Q. C., and Mr. Benjamin, Q. C. (Mr. F. W. Bush was with them), for the respondents:—

The authority of the cases cited on the other side may [*316] be *admitted, but they are wholly inapplicable here.

There never was a concluded and complete contract in this case. That was the real question to be decided here, and it must be decided on a consideration of all the circumstances of the case. *Rossiter v. Miller*, 3 App. Cas. 1124, p. 174, *post*. So considered it was clear that there never had been any contract of which performance could be directed.

Mr. Pearson replied.

THE LORD CHANCELLOR (Earl Cairns):—

My Lords, I will not refer, in the first instance, to the grounds upon which this case was decided by the VICE CHANCELLOR and the Court of Appeal, but I will ask your Lordships to observe what the facts of the case are upon which you have now to form an opinion. My Lords, at the outset I must say that I recognize the great convenience of having a case stated frankly and fairly as this case has been, upon the claim, and thereby enabling the Court, without the parties being put to any greater expense, to decide upon the claim, upon a demurrer being put in, whether the plaintiff has a case in respect of which he is entitled to relief.

This is an action for specific performance of a contract. It is a contract for the sale of land, and the plaintiff must show two things: he must show that there is a contract concluded between the parties, and that there is a note, a memorandum in writing, of that contract sufficient to satisfy the requirements of the

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Statute of Frauds. The second requisite in this case he proposes to supply through the medium of letters which passed between the parties, and it is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, "We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond." In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.

* The first two letters in this case are dated the 4th and [* 317] the 6th of October. In the first of them Mrs. Horne-Payne, who appears to have been entitled to freehold property for her separate use, stated that she was willing to "divide the difference" between an offer which had been made to her and the price she had asked, and to accept the sum of £37,500 for the freehold property, mentioning the name of the property. The answer was in these words:—[His Lordship read it, see p. 156, *ante*.]

Now I put aside these last words, "subject to the title being approved," for separate observation, and, putting them aside, I should say that if these two letters were the only information which your Lordships had upon the subject—if the matter had ended here as it began, with these letters—I should have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the Statute of Frauds. There is property named, there is a price to be paid, and there is the name of the vendor and of the purchaser. And, of course, stopping there again, the words which I have read would imply that the purchase-money was to be paid in the usual way, namely, as soon as the title to the land could be produced by the vendor and a conveyance offered.

But the case does not stop there, and, we are told, partly by the statements of the plaintiff and partly by farther letters which passed, very much more, which must be imported into the case and must be taken along with the letters which I have read. The first thing we are told by the plaintiff himself is this: that "in the course of the negotiations which resulted in" these "letters, the defendant had suggested that it would be for the

mutual convenience of herself and the plaintiff that the purchase-money should be paid by instalments, and the plaintiff acquiesced." Now that is alleged to be a statement of a term of the agreement arranged outside what was written, but omitted to be mentioned in what was written. I look upon this more as a statement that it had been agreed between them that there should be a settlement as to the instalments in which the purchase-money was to be paid; that it should be paid by way of instalments, and not in one sum, but that it should be a subject of settlement what were to be the instalments in which the money should be paid.

And that seems also to be the view of the plaintiff, be-
[*318] cause he *continues, "Pursuant to this suggestion, she, shortly, after the receipt of the letter of the 6th of October, 1876, viz. on the 11th of October, 1876, wrote to William Weaver" (the agent of the plaintiff), "requesting him to meet her at the office of Mr. Crowdy, her solicitor, on the following day, 'to discuss the terms of payment, etc. ;'" that is to say, to discuss the subject of a payment to be made by way of instalments and not in one gross sum—as I understand it—to arrange the instalments in which the payment was to be made. Then the plaintiff continues: "Accordingly, on the 12th of October, 1876, the plaintiff and his solicitor, Mr. Gasquet, and the said Mr. Weaver, called upon the said Mr. Crowdy. The said defendant, however, failed to keep her appointment, and the said Mr. Crowdy, alleging that he knew of no agreement to take the purchase-money by instalments, stated that nothing less than the immediate payment of £10 per cent. of the purchase-money by way of deposit, and the payment of the residue thereof in a few months would be accepted," that is to say, Crowdy stood upon that which was written in those two letters. Those, said he (this was his view), constitute an agreement upon which we may rely; we hold you to them, and you must pay the purchase-money in one sum, putting aside the deposit, and on the usual terms.

But was that the view of the appellant? Certainly not, because he says, "Meanwhile the plaintiff, on the faith of the understanding that the purchase-money should be paid by instalments, had allowed certain arrangements which he had made for providing the purchase-money at once, to fall through. Shortly after the last-mentioned interview, therefore, in the belief that he had

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in this respect been unfairly treated by the said defendant, he directed his solicitors to write, and they, on the 24th of October, 1876, wrote to the said Mr. Crowdy, that as he stated that he could make no other arrangement for payment of the purchase-money except 10 per cent. down as a deposit, and the balance in a few months' time, Mr. Hussey had no alternative but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat upon the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. Hussey's behalf."

* I can conceive nothing clearer than the result of the [* 319] statement which the appellant thus makes. There were two letters, no doubt, but, as he says, both I and the vendor were at one that there was to be a payment of the purchase-money by way of instalment; we had not agreed what those instalments should be. I was ready to settle them. Your solicitor repudiated the idea that there were to be instalments, and required immediate payment of the purchase-money. Thereupon I said that that was unfair, and I was not ready to be bound by any claim of that kind, and that I would "decline the matter," which must be taken to mean decline the arrangement for the purchase, and he would be ready to treat, or to "negotiate again" as soon as Mr. Crowdy "should be prepared to treat upon the footing of payment by instalments." Now this is not a matter of controversy upon the demurrer; this is the attitude which the appellant assumed at the time, and it must be taken, as against him, that that was the correct view of the facts of the case at that moment.

How, then, did the case proceed? Weaver, his agent, saw Mrs. Payne and she wrote to him. He having reminded her of the understanding about the instalments, she at once admitted it, and in her letter said:— [His Lordship read the letter]. Now, if this could be taken as a memorandum of that part of the agreement which, up to that time, never had been settled; if this could be taken as the statement of what was wanting, and a memorandum in writing of the manner in which what was wanting was to be supplied, then the *desideratum*, the thing which was omitted in the two original letters, might be taken as supplied. But this, after all is merely a statement referring the appellant to the solicitor of the respondent, and a statement of what she had

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desired the solicitors to do. Therefore we must look at what the solicitor did under those instructions.

Now what he did say was this? He wrote to the solicitor for the appellant, "We have had some farther communication with our clients hereon, and are authorized to state to you that they will be willing to carry out this sale upon the following terms." And then he gives three terms with regard to the instalments. "This," (he says) "we believe is all that relates to the money payments, the other details of the contract we can settle.

[* 320] Let us *hear if you are instructed to the above effect. We should add that this only binds our client on acceptance by yours." Here, again, if this had been then accepted, you would have had this added to what had already been put in writing, and you would have had the agreement completed in the way required to complete it. But was this accepted? On the contrary, a week or thereabouts, a fortnight, I think, passes over. Then the agent of the appellant calls on the solicitor for the respondent, and in place of accepting the terms which had been put in writing, puts in a counter proposal — a counter statement of terms — headed, "Proposal by Mr. Thomas Hussey for the purchase of the freehold property known as the Mornington estate," treating it again as still a matter of proposal. He proposes instalments to be paid in a different way, and to be accompanied with certain provisions for partial conveyance as each instalment was paid. The details are not material. "Mr. Crowdy," he says, "on behalf of the defendant, went carefully through the same, and verbally agreed thereto." But even if that had been so, a verbal agreement is insufficient; there was no writing to bind Mr. Crowdy or his client to it.

But a few days after that Mr. Crowdy writes, and in place of expressing agreement with the paper, he demurs to one or two of the provisions in the counter proposal, and speaks of one serious error, which in his ill state of health he had omitted to notice. He points out that they would not have the effect which he would desire, and he requires a change in the proposal to be made. There was no completed contract. Crowdy was seized with illness; he afterwards died, and nothing was done in the way of supplying what was wanting.

Now, my Lords, the conclusion I draw from that is this, that we have here the appellant himself telling us that the two origi-

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nal letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence * therefore of the whole is, that it appears to me not only [* 321] that there is no note in writing, according to the Statute of Frauds, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties.

My Lords, I said I would refer to the grounds upon which the case was decided in the Courts below. The VICE CHANCELLOR was of opinion that the two letters constituted a completed agreement, and then he looked to see whether there was any rescission of that completed agreement, and he was of opinion that there was not. As to that, I can only say that if I could arrive at the conclusion at which the VICE CHANCELLOR arrived, that the two original letters constituted a completed agreement, I should be disposed to agree with him and say — at all events I should be unwilling to decide in an opposite sense — that there was no rescission standing upon a memorandum of equal authority with the letters. But from what I have said, your Lordships will understand that I cannot find that there was originally in those two letters a completed agreement.

The Court of Appeal reversed the VICE CHANCELLOR's decision, and dismissed the action, but upon a different ground. The Court of Appeal held that the second of what I have called the first two letters, introduced in the last words of it a new term by stipulating that the sale was to be subject to the title being approved by the solicitors of the purchaser. The LORDS JUSTICES were of opinion that that constituted the solicitors the arbiters of whether the title was a good one or not, and that the vendor had not agreed to that term, making the solicitors of the purchaser the arbiters of that question. I rather infer, from the judgments of the learned Judges of the Court of Appeal, that they were disposed to look with doubt upon the question of whether, even without this, there was a completed agreement, or would turn out

to be a completed agreement between the parties; but they were of opinion that this difficulty was sufficient to decide the case against the appellant.

My Lords, I have not desired to put the opinion which I have offered to your Lordships upon that ground, and I should doubt very much myself, if it were necessary to decide it, whether the opinion of the Court of Appeal in this respect could be [*322] maintained. *I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased,—he might change his solicitor from time to time. There is no *directio personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them, and the case which was cited from Ireland would be authority if authority were needed for that view, I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course that would be subject to any objection which the solicitor made being submitted to decision by a proper Court, if the objection was not agreed to.

Therefore, my Lords, although I arrive at the conclusion at which the Court of Appeal arrived, I desire to say that I am unable to arrive at that conclusion upon the same grounds, but I think it would be much more satisfactory to look at the case upon the broader ground. I think there was here no concluded agreement between the appellant and the vendor, and therefore I submit to your Lordships and move your Lordships, that this appeal should be dismissed with costs.

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Lord SELBORNE: —

My Lords, I am of the same opinion, and for the same reasons, with my noble and learned friend upon the woolsack.

I cannot agree with what appeared to be suggested by part of * the appellant's argument, that, because two let- [* 323] ters were written, by which the conditions required by the Statute of Frauds would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a Court of Equity ought specifically to perform, without regard to what preceded, or what followed. The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said, when sitting in the Court of Chancery, in the case of *Jerris v. Berridge*, L. R., 8 Ch. at p. 360; 42 L. J. Ch. at p. 523, that the Statute of Frauds "is a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties;" and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them.

Lord GORDON concurred.

Order appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 1st May, 1879.

ENGLISH NOTES.

The words "subject to the title being approved by our solicitor" came up for decision in *Hudson v. Buck* (1872), 7 Ch. D. 683, 47 L. J. Ch. 247, 38 L. T. 56, 26 W. R. 190. There it was held that in absence of *mala fides* or unreasonableness on the part of the purchaser or of his solicitor, the vendor was not entitled to specific performance in face of disapproval of the title by the solicitor.

In *Bristol, &c. A. B. C. Company v. Maggs* (1890), 44 Ch. D. 616, 59 L. J. Ch. 472, KAY, J., applied the principle of *Hussey v. Horne Payne* to a case where one of the parties, in subsequent correspondence, tried to introduce a new term into what but for this would have appeared a completed agreement. He says: "Having treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them (the plaintiffs' solicitors) to say, 'Although we thus treated the matter as incomplete and a negotiation only, yet the defendant had no right to do so, but was bound by a complete contract.'" The reasoning of KAY, J., is criticised by NORTH, J., in *Bellamy v. Debenham* (1890), 45 Ch. D. 481. The real question, after all, must be, did the earlier letters contain in themselves all the terms agreed on at the time, and were thus written with the intent of binding the writers. Fry on Specific Performance, 3rd ed., § 553.

The principle of the rule is the same as that which underlies all those cases where parol evidence is admitted notwithstanding a written document purporting to embody a contract. The rule of English law is that parol evidence is not admissible to vary or contradict a written instrument containing the terms of a contract. Where, however, the object of the parol evidence is to show that the written instrument was not intended by the parties to be the record of a contract, or to be the record of the whole contract, it is admissible. For instance:—

(1) In *Pym v. Campbell* (1856), 6 El. & Bl. 370, 25 L. J. Q. B. 277, a condition precedent on which the existence of an alleged contract in writing depended, was allowed to be proved by parol.

(2) In *Wake v. Harrop* (1861-2), 6 H. & N. at p. 774, 30 L. J. Ex. 273, 4 L. T. 555, 9 W. R. 788 (affirmed in Exch. Chamber, 1 H. & C. 202, 31 L. J. Ex. 451), the law was laid down by BRAMWELL, B., as follows: (6 H. & N. 774), "It should be borne in mind that a written contract not under seal is not the contract itself but only evidence, — the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written

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document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract." In *Rogers v. Hadley* (1863), 2 H. & C. 227, 32 L. J. Ex. 241, 9 L. T. 292, parol evidence was allowed to prove that a writing purporting to be the record of a contract signed by the parties was not in fact intended to operate as a contract. The principle on which the decision in *Pym v. Campbell* and *Wake v. Harrop* rested is reiterated by BRAMWELL, B., as follows: "Where the parties to an agreement have preferred to set down the agreement in writing, they cannot add to it or subtract from it, or vary it in any way by parol evidence, otherwise they would defeat that which was their primary intention in committing it to writing. But when at the time when a document, which is apparently an agreement, was signed, the parties expressly stated that they did not intend it to be the record of any agreement between them, though this is a conclusion of fact which a jury should admit with extreme reluctance, the parties would not in such a case be bound by the document. Whether the signature is or is not the result of a mistake is immaterial. The reasoning proceeds on the ground that the parties never intended that the document should contain the terms of an agreement between them." The same principle is illustrated by the cases of *Clever v. Kirkman* (1875), 24 W. R. 159, 33 L. T. 672.

(3) In *Jerris v. Berridge* (1873), L. R., 8 Ch. 351, 42 L. J. Ch. 518, 28 L. T. 481, 21 W. R. 395, parol evidence was allowed to prove the real contract, collateral to the contract on which the action was brought; although there was a document purporting to embody the collateral agreement, but suppressing some of the terms agreed upon between the parties. In *Stones v. Dowler* (1860), 29 L. J. Ex. 122, where a written proposal was assented to verbally and with variation, allowed also verbally by the offeror, the verbal contract was held to be binding. In *Erschine v. Adeane* (1873), L. R., 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. 234, 21 W. R. 802, a collateral agreement by the lessor to keep down rabbits was allowed to be proved verbally by the lessee. See also *Angell v. Duke* (1875), L. R., 10 Q. B. 174, 44 L. J. Q. B. 78, 32 L. T. 25, 320, 23 W. R. 307, 548; *Clarke v. Coleman*, C. A., from Q. B. D. 1895.

(4) A custom of a locality, trade, or market may be proved orally, provided it is not inconsistent with the written instrument. *Wigglesworth v. Dullison* (1778), Dougl. 201, 1 Smith's Lead. Cas. 569; *Humfrey v. Dale* (1857), El. Bl. & El. 1004; *Nickalls v. Merry* (1875), L. R., 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. 623, 23 W. R. 663; *Tucker v. Linger* (1883), 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. 273, 32 W. R. 40. The custom or usage must be reasonable, not contrary to law, well known (*Cooke v. Eshelby* (1887), No. 13 of "Agency," 2 R. C. 398, 12 App. Cas. 271, 56 L. J. Q. B. 505), and must not affect

No. 16. — Winn v. Bull. — Rule.

the intrinsic validity of the contract. It may, however, vary the mode of performance. *Robinson v. Mollett* (1875), L. R., 7 H. L. 802, 41 L. J. C. P. 362. Evidence of custom is not admissible to discharge a party already liable on the face of the contract, *Magee v. Atkinson* (1837), 2 M. & W. 440, but is admissible to charge a party not so liable. *Humfrey v. Dale*, *supra*; *Higgins v. Senior* (1841), 8 M. & W. 834.

(5) Parol evidence may be given to explain the customary, special, or technical meaning of terms. *Smith v. Wilson* (1832), 3 B. & Ad. 728; *Hutton v. Warren* (1836), 1 M. & W. 466; *Grant v. Maddox* (1846), 15 M. & W. 737, 16 L. J. Ex. 227; *Myers v. Sarl* (1860), 3 El. & El. 306, 30 L. J. Q. B. 9, 9 W. R. 96; *Bowes v. Shand* (1877), 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. 857, 25 W. R. 730.

AMERICAN NOTES.

See notes, *ante*, pp. 154, 155, and *Brown v. N. Y. Cent. R. Co.*, 44 New York. 79; *Dietz v. Farrish*, 79 New York, 520; *Baker v. Lyman*, 38 U. C. Q. B. 498. A contract may be spelled out from contemporaneous papers. *Rogers v. Smith*, 47 New York, 324; *Draper v. Snow*, 20 New York, 331; 75 Am. Dec. 408; *Hunt v. Livermore*, 5 Pickering (Mass.), 395.

The principal case is reported in 25 Moak's Eng. Rep. 561, with a long note, but no American case exactly in point is cited.

No. 16. — WINN v. BULL.

(1877.)

No. 17. — ROSSITER v. MILLER.

(1878.)

RULE.

WHERE parties agree in a binding manner to all the terms of a contract, the agreement is none the less a contract because it appears from the terms of the written agreement or otherwise, that the parties intend to embody the terms in a more formal contract; but where it appears that the drawing up and signing a formal contract was contemplated as a condition precedent of the final transaction by which the parties were to be bound, there is no contract until this is done.

No. 16. — Winn v. Bull, 7 Ch. D. 29, 30.

Winn v. Bull.

7 Ch. D. 29-32 (s. c. 47 L. J. Ch. 139; 26 W. R. 230).

Agreement 'subject to Preparation of Formal Contract.' — No binding Contract.

By a written agreement the defendant agreed with the plaintiff to take [29] a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—

Held, that there was no final agreement of which specific performance could be enforced against the defendant.

On the 16th of March, 1877, the plaintiff and defendant entered into and signed the following agreement for a lease of a freehold house belonging to the plaintiff:—

"An agreement entered into between William Winn (the plaintiff) of the one part, and Edward Bull (the defendant) of the other part: whereby the said William Winn agrees to let and the said Edward Bull agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as 'Westwood,' situate in the Avenue, Southampton, as the same were lately in the occupation of Mrs. Sullivan, at the yearly rent of £180, the first year's rent to be allowed to the said Edward Bull and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract."

No formal or other contract was ever entered into between the parties.

The plaintiff's solicitor subsequently sent the defendant's solicitor a draft of the proposed lease containing covenants on the part of the defendant to keep the premises in repair.

The defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the plaintiff insisting that the lease should remain substantially in its original form, whereas the defendant contended that its terms were contrary to the intention of the agreement, and he ultimately * refused to take a lease at all. The plaintiff [* 30] thereupon brought this action claiming specific performance of the agreement.

In his statement of defence the defendant relied upon the Statute of Frauds, alleging that the agreement was conditional

only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The plaintiff then joined issue, and the action now came on for trial.

Chitty, Q. C., and Jolliffe, for the plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner. They referred to *Rossiter v. Miller*, 5 Ch. D. 648 (p. 174, *post*), *Crossley v. Maycock*, L. R. 18 Eq. 180, and *Chinnock v. Marchioness of Ely*, 4 D. J. & S. 638.

Roxburgh, Q. C., and Maidlow, for the defendant, were not called upon.

JESSEL, M. R. : —

I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favourable to specific performance. When a man agrees to buy an estate, there are a great many more [* 31] stipulations * wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent Act of Parliament — the Vendor and Purchaser Act, 1874 — no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing.

Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shows that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the plaintiff says in effect, "I agree to grant you a lease on certain terms, but subject to something else being approved." He does not say, "Nothing more shall be required beyond what I have already mentioned," but "something else is required" which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

* I will take only one of them, *Chinnock v. Marchioness* [* 32] of *Ely*. There Lord WESTBURY says, 4 D. J. & S. 645, 646 :

"I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." Then he goes on, "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

No. 17. — *Rossiter v. Miller*, 3 App. Cas. 1124.

That judgment of Lord WESTBURY's did not require any approval, but it was approved of by the Court of Appeal in *Rossiter v. Miller*.

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the defendant.

**W. J. Rossiter, George Curtis and others, Appellants, v.
Daniel Miller, Respondent.**

3 App. Cas. 1124-1154 (s. c. 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865).

Contract. — Offer. — Acceptance, adding Statement of Intention to send Formal Agreement. — Specific Performance.

[1124] Several persons interested in a particular piece of land authorized, by agreement among themselves, one of their number, W., to dispose of it. The land was divided into lots and a plan of the lots made, and certain conditions on which the land might be let or sold were printed on the plan. M., an intending purchaser, made inquiries of W. as to the sale of certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to M. that he had done so, and (stating the conditions) that the proprietors had accepted his offer: adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. W. added that he had instructed the solicitors to forward to M. the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which in such a case regulated the mode of proceeding. M. wrote back, in answer that he could not be bound to build at any given time or at all, and that the subject had better be reconsidered, unless W. was prepared to leave him to do as he might think best. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best. M. afterwards declined to complete the purchase:—

No. 17. — *Rossiter v. Miller*, 3 App. Cas. 1124, 1125.

Held, that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that the reference to it in W.'s letter did not suspend or in any way affect the contract; and that M. was bound specifically to perform his contract of purchase: —

Held, also, that the dealings between the parties sufficiently showed the authority of W. to enter into the contract; and, farther, that the description of "the proprietors" for whom he acted was sufficient.

This was an appeal against an order of the Court of Appeal which had reversed a previous decision of the MASTER OF THE ROLLS, 5 Ch. D. 648; 46 L. J. Ch. 737.

* Rossiter and Curtis were, with six other persons, pro- [* 1125] prietors of some plots of land near Dorking, in Surrey.

There was an agreement between these eight persons by which Rossiter and Curtis were to act as trustees for themselves and the rest in the sale of the land, but the trust was not to appear on the face of any conveyance. In pursuance of this agreement the land was in due form conveyed to Rossiter and Curtis. Mr. White (who was also one of the eight persons interested) was a land agent, and acted as such in the disposal of the land. In July, 1871, the land was laid out in lots, and a plan was prepared showing the lots. Eight conditions were printed on this plan. The first condition set forth the price of each lot. A conveyance, exclusive of stamp duties, was to be furnished, with a title commencing from the 30th of October, 1797, for the sum of £2 2s. for each plot, and each purchaser could employ his own solicitor, paying only the £2 2s. for the abstract of title. The second related to the dimensions of the property; the third to the lines on which the fronts of any intended houses might be placed; the fourth to fences; the fifth described the sort of buildings that might be erected; the sixth prohibited burning bricks on the land; the seventh related to roads and bridges; and the eighth was in these words: "Each purchaser, on completing his purchase, to execute a deed of covenant embodying the above rules and stipulations, and providing for their due performance, mutually, by such purchaser and the vendors." The applications were to be made to Messrs. White & Sons, estate agents, Dorking, or to Messrs. Hart & Marten, solicitors there. Then came the following: "Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10 per cent on the amount of the purchase

money, and for the completion of the purchase at the expiration of, not exceeding, two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided for by the first stipulation."

In April, 1875, Miller called on White and verbally offered to purchase some of the lots for £1000, and was then informed that he must purchase under the conditions printed on the [* 1126] plan, and * White promised to lay his offer before the "proprietors." Their names were not mentioned. He did so: the offer was accepted at a meeting on the 21st of April, and on that day White wrote to Miller the following letter: "The proprietors have this day agreed to accept your offer of Saturday last, conveyed to them through me, viz., to purchase for £1000, plots 33, 34, and 35 on the original estate plan, dated July, 1871, and lot 1 in the sale particulars of August, 1873, subject to the conditions and stipulations printed on the plan first named. It was taken into consideration by them, in reducing the published price, that you intended building at once, which of course they wish to encourage. I have requested Messrs. Hart & Marten to forward you the agreement for purchase. Will you please elect whether to take the title, or employ your own solicitor?"

On the 22nd of April the defendant wrote this answer: "I am in receipt of yours of yesterday's date in which you say, 'It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage.' I cannot be bound to build at any given time, or at all; therefore, as you say the reduction in price was in consequence of your understanding that I should build at once, the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I may think best."

On the same day White replied, "Mine to you of yesterday's date was not intended to convey a conditional acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this, every house that is built increases the value of the remaining land. This I laid before the proprietors. Your offer, I take to be based simply on the stipulations of July, 1871, so that, in your own words, 'you are at liberty to do as you may think best.'"

Shortly afterwards the defendant informed White that he

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should not employ a separate solicitor. On the 30th of April Messrs. Hart & Marten, the solicitors of the owners, sent the defendant a formal agreement with a letter, asking him to return it signed, with a cheque for £100 deposit. On the 3rd of May the * defendant returned the agreement unsigned, [* 1127] with a letter declining to do anything more as to the purchase of the land, but offering to pay any reasonable charges for the trouble incurred.

After some correspondence, in which Messrs. Hart insisted that Miller had entered into a valid contract for the purchase of the land, proceedings were taken to enforce performance of the agreement. Miller put in a demurrer on the ground that it did not appear by the statement of claim that the alleged agreement or any note or memorandum thereof was ever signed by him or by any person authorized on his behalf. The case was tried before the MASTER OF THE ROLLS, who gave judgment for the plaintiffs. On appeal the LORDS JUSTICES reversed his decision, thinking that no sufficient contract had been executed. This appeal was then brought.

Mr. Davey, Q. C., and Mr. Carson, for the appellants : —

There was a complete contract constituted here. The conditions printed on the plan were those to which a purchaser was required to agree. They were fully communicated to Mr. Miller by Mr. White when the offer to purchase was made. No objection was then or afterwards made to these conditions. The acceptance of the offer here in no way whatever varied the terms of the conditions printed on the plan. The mention, in the 8th condition, of executing “a deed of covenant embodying the above rules and stipulations,” did not prevent a complete contract from being constituted, even though such a formal deed should not be executed. It is settled law that if, in the correspondence between the parties, a clear contract can be found, the execution of a formal instrument declaring that contract, which instrument could then only repeat the terms agreed on in the correspondence, is not necessary. Here the letters did fully constitute a contract, and were signed by the parties entitled to make it.

But then it is said that there is nothing to show that Mr. White was the agent of the vendors, authorized to make the contract. The affidavits in the case leave no doubt upon that point.

As to the other point, that the persons designated as the “proprietors” ought to have been named, it is clear that naming them is not a legal requisite in a case like this, where the person who is their agent (and here he happened to be one of the body of persons really interested) acts on their part and with their assent, and, until it is sought to get rid of the contract, never has his authority questioned.

Peck v. The North Staffordshire Railway Company, 10 H. L. C. 473, No. 6 of “Carrier,” 5 R. C. 286; *Smith v. Webster*, 3 Ch. D. 49; 45 L. J. Ch. 430, 528; *Honyman v. Marryatt*, 6 H. L. C. 112; 26 L. J. Ch. 619; *Fowle v. Freeman*, 9 Ves. 351; 7 R. R. 219; *Kennedy v. Lee*, 3 Mer. 441; 17 R. R. 110; *Thomas v. Dering*, 1 Keen, 729; *Gilengall v. Barnard*, 1 Keen, 769; *nom. Gengall v. Thynne*, 2 H. L. C. 131; *Skinner v. M'Dowall*, 2 De G. & Sm. 265; 17 L. J. Ch. 347; *Crossley v. Maycock*, L. R., 18 Eq. 180; 43 L. J. Ch. 379; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46; *Bonnewell v. Jenkins*, 8 Ch. D. 70; 47 L. J. Ch. 758; Benjamin on Contracts, p. 164; *Hood v. Barrington*, L. R., 6 Eq. 218; *Sale v. Lambert*, L. R., 18 Eq. 1; 43 L. J. Ch. 470; *Potter v. Duffield*, L. R., 18 Eq. 4; 43 L. J. Ch. 472; *Commings v. Scott*, L. R., 20 Eq. 11; 44 L. J. Ch. 563; *Beer v. London and Paris Hotel Company*, L. R., 20 Eq. 412; *Catling v. King*, 5 Ch. D. 660; 46 L. J. Ch. 384; *Brogden v. The Metropolitan Railway Company*, 2 App. Cas. 666, (No. 9, p. 94, ante); *Meynell v. Surtees*, 3 Sm. & Giff. 101; 25 L. J. Ch. 257; *Marcin v. Wallis*, 6 El. & Bl. 726, and *Chinook v. The Marchioness of Ely*, 4 De G. J. & S. 638; 34 L. J. Ch. 399, were cited and commented on.

Mr. Chitty, Q. C., and Mr. Phear, for the respondent:—

There was no perfect contract entered into in this case. No deed of covenant was ever executed,—none was ever drawn up and presented to the respondent for execution. Yet the 8th article of the conditions expressly required such a deed to be executed, “embodying the rules and stipulations, and providing for that due performance mutually by the purchaser and the vendors” Without that deed, any correspondence that took place between the parties was mere treaty and negotiation. And another portion of the same 8th condition even more peremptorily required this to be done, for the words were, “Each purchaser will be [* 1129] * required to sign a contract embodying the foregoing

conditions, and providing for the payment of a deposit," &c. In such a case as this, it was impossible to say that these absolute requirements for executing a formal contract were to be superseded by a correspondence by letter, in which one party referred to what had been verbally proposed, and the other did not object to his statements. But here, in fact, an objection was made, for the letter of the 21st of April written by Mr. White did introduce a new stipulation, one which had never been mentioned in the printed conditions, and which new stipulation was instantly rejected by the respondent. The introduction of that new stipulation and its rejection threw open the whole negotiation, and after that, nothing could satisfy the conditions marked on the plan short of the execution of that formal contract and covenant which those conditions required. All the cases where there were ordinary negotiations commenced and carried on between the parties by mere letters, were quite inapplicable here, for here the negotiations themselves began by a distinct reference to the conditions printed on the plan, and no arrangement between the parties could be valid without a complete observance of the terms of those conditions.

The cases referred to on the other side were discussed, and *Chinnock v. The Marchioness of Ely* was especially relied on, and in addition *Winn v. Bull*, No. 16, p. 171, *ante*, 7 Ch. D. 29; 47 L. J. Ch. 139, *Shelton v. Cole*, 1 De G. & J. 287, and *Thomas v. Brown*, 1 Q. B. D. 714; 45 L. J. Q. B. 811, were cited.

There was here no sufficient proof of the authority of White. And then, too, the description of "proprietors" was not a sufficient description of the persons with whom the supposed contract was said to be made.

Mr. Davey replied.

THE LORD CHANCELLOR (LORD CAIRNS): —

My Lords, after a careful and anxious consideration of this case, I regret to say that I am not able to look at it in the point of view in which it has presented itself to the learned Judges of the Court of Appeal.

My Lords, the appeal arises in an action for specific performance, * brought by the vendors of certain property [* 1130] against the purchaser; and in that action three questions have been raised, one, which I will call the principal question,

and two others, which are to some extent subordinate. The principal one, the main question in the case, is, whether there was in point of fact a concluded contract between the parties; and the two subordinate questions are, whether in the view of the enactment of the Statute of Frauds, the vendors were sufficiently described in writing by the term "proprietors;" and secondly, whether the person who affected to act as agent for the vendors had authority to bind them. My Lords, those being the three questions which have been raised, it was upon the first of them that the case was determined by the Court of Appeal. Their Lordships, all of them, as I understand, thought that there was no contract actually concluded in the case. Lord Justice JAMES said, that in his opinion it was not a question of the Statute of Frauds, but a question of whether there was any contract; and Lord COLERIDGE and Lord Justice BAGGALLAY both founded their decisions upon a case decided by the late Lord WESTBURY, the case of *Chinnock v. The Marchioness of Ely*, the decision in which was that there was no contract. Therefore I understand that, as I have said, all the learned Judges in the Court of Appeal proceeded on the principle that in the present case no contract had been actually concluded.

Now, my Lords, in order to consider that first question, I will remind your Lordships that there was here a certain property in the county of Surrey which had been bought by some persons, eight in number, upon a speculation with the view of re-selling it, and they had the property conveyed to two of their number, entering at the same time, or just before, into an agreement amongst themselves as to the manner in which the speculation should be conducted. The property was to be vested as regards the legal estate in two of the number, but there was to be no notice of the trust put upon the title. The two were to have, upon the title, the power of leasing and of selling, but, as between them and the other proprietors, they were not to lease or sell without the sanction of their co-proprietors, and that sanction was to be given by the majority, and meetings were [*1131] to be held, five of *the number constituting a meeting, and the questions being decided by the majority of the meeting.

My Lords, they then took a course which is not unusual in such cases. As the object was to sell in lots of considerable size,

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they had a map of the property prepared for circulation, and they had printed upon the map certain terms and conditions upon which the sales were to be made. I must call your Lordship's attention particularly to the nature of those terms. They commence in this way: "The following are the conditions of sale;" that is the introduction to the statement of them. "The Holloway Estate, Dorking, is situated about half a mile south of the town, and about one mile from its railway stations on the South Eastern and South Coast lines." Then it speaks of the site, of the supply of water, and of the drainage. It speaks then of the roads, and that it uses the term "proprietors" to denote the owners of the property who are offering it for sale. The first head of the conditions is as to the price of the plots, and that states, "The price of each plot, including the timber growing thereon, is marked on the map. The proprietors will furnish a conveyance, exclusive of stamp duties, with a title commencing from October 30th, 1797, for the sum of £2 2s. for each plot; this to include the lithographed abstract, the deed of covenant embodied in the conveyance, and the contract hereinafter mentioned; but should two or more pieces be purchased by one person, they shall for this purpose be considered as one plot. Should any purchaser prefer employing his own solicitor, he can do so at his own expense, paying the vendor's solicitor the sum of £2 2s. for the abstract of title:" a stipulation which is unusually detailed with regard to the title and the expense which a purchaser would incur in obtaining the title which was offered to him.

Then there is a second head as to the dimensions of the plots, a third as to building lines, and where fences are to be erected, a fourth as to fences, a fifth as to the value of buildings to be put upon the plots, a sixth as to forbidding brick-making, a seventh reserving certain rights as to the control of the roads and the drainage, and then an eighth in which again there is a return to the question of title and conveyance: "Deed of Covenant;" "Each purchaser, on completing his purchase, to execute a deed of *covenant embodying the above rules and [*1132] stipulations, and providing for their due performance mutually by such purchaser and the vendors. Applications to purchase to be made on and after the 26th day of August next, to Messrs. White & Sons, estate agents, Dorking, or to Messrs.

Hart, Hart, & Marten, solicitors, Dorking." Then, "In the event of more than one application being made during the first day's sale," it provides who should be the purchaser, and then it concludes with this sentence: "Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of £10 per cent. on the amount of the purchase-money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided by the first stipulation."

I pause there for the purpose of pointing out to your Lordships that in these conditions there are to be found the terms — and the detailed terms — of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is no doubt a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in and will make offers of the price which is required for the plots, and at that point the persons so offering will not be bound by anything; it will be necessary to bind them, and therefore they are told, beforehand, that at the time when their offer is accepted, or along with the acceptance of it, the matter will not be allowed to rest *in dubio*, or without legal obligation, but that they will be required to sign something which will bind them. But they are also told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.

That being the scheme by which this property was [* 1133] offered to * the public, I have only to say that it appears that some sales were made in the year 1871 as to which no question arises, and some more in the year 1873, but in the year 1875 there was still some part of the property unsold. It was in that year that the present respondent made an offer, to

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which I am about to refer, for one or more of the plots of the unsold land. The manner in which the offer was made is detailed in an affidavit, and there appears to be no controversy as to that part of the case. Mr. White, who I may say here was acting as the agent of the vendors — not their agent with plenipotentiary powers, but their agent as a surveyor for the purpose of receiving offers and communicating with intending purchasers — says in his affidavit: “In the month of March, 1875, the defendant” (that is the respondent) “personally made an application to me at my office at Dorking with regard to purchasing part of the said estate, and on the 16th of the said month he was furnished with a copy of the aforesaid plan of July, 1871” (that is the map with conditions to which I have referred). “On or about the 17th day of April, 1875, the defendant, accompanied by his daughter and his son-in-law, Mr. Roslyn, called upon me at my said office in Dorking, and then and there verbally offered to purchase the said plots numbered 33, 34, and 35 on the aforesaid plan of July, 1871, and also the lot No. 1 on the said plan of August, 1873, at the price of £1000. I pointed out to the defendant, at the same time and place, that he must purchase subject to the conditions and stipulations printed on the said plan of July, 1871, a copy of which had been furnished to him as aforesaid, and I promised him to lay his offer before the said proprietors. To the best of my recollection and belief, the offer was made in the following words: — The defendant, addressing his said son-in-law, said, ‘Shall I make Mr. White an offer at once or write?’ and on Mr. Roslyn replying, ‘Make it at once,’ he accordingly did so.” That, of course, was a verbal offer, which would not become binding upon him until some writing had passed, but it was an offer as to the terms of which there is, I believe, no controversy. It was an offer which, after the statement of Mr. White as to the way in which it was made, must be taken to be an offer of £1000 for these particular plots on the terms and conditions in the printed paper of July, 1871.

*That offer having been made Mr. White submitted [*1134] it to a meeting of the persons beneficially interested (I will refer presently to the fact as to who were present), and having received the authority of that meeting to accept the offer, he wrote a letter to the respondent on the 21st of April, 1875, in these words: “Holloway Farm Estate. — Dear Sir, — The pro-

prietors have this day agreed to accept your offer of Saturday last conveyed to them through me, viz. : ” — and then he rehearses the offer — “ to purchase for £1000 plots 33, 34, and 35 on the original estate plan, dated July, 1871, and lot 1 in the sale particular of August, 1873, subject to the conditions and stipulations printed on the plan first named. It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage. I have requested Messrs. Hart and Marten to forward you the agreement for purchase. Will you please elect whether to take the title or to employ your own solicitor. I may add that the water company will lay on their main as soon as you require their water for building purposes.” I will put aside for the moment the mention here that it had been taken into consideration by the proprietors in reducing the published price, that Mr. Miller intended building. That introduced an element which became the subject of another letter. Putting that aside, your Lordships have here a rehearsal or repetition by the writer, Mr. White, of the terms, stating the price, stating the property to be purchased, and stating that the purchase was made subject to the conditions and stipulations printed upon the plan of July, 1871. My Lords, taking that in connection with that plan it is, so far as this letter is concerned, an acceptance by the vendors, and if Mr. White was their authorized agent, then an acceptance by their authorized agent, in writing, of an offer clear and distinct, upon the terms of that paper; and, so far as the vendors were concerned, I am at a loss to conceive any words which could more clearly or distinctly have expressed the form of agreement by which they were content to be bound.

Mr. White adds this: “ I have requested Messrs. Hart & Marten to forward you the agreement for purchase.” My Lords, what did that mean? At the time this letter was written it was an absolute necessity that something should be signed by [* 1135] Mr. Miller, for up * to that time he had signed nothing; he had made no offer in writing, and he was not in any way bound. It therefore was not only natural for Mr. White, but it was the duty of Mr. White in accepting the offer and recording the acceptance of the vendors in writing, to take immediate steps to obtain a correlative acceptance in writing by the purchaser. The natural way in which he would obtain that

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acceptance would be by calling on the purchaser to sign that agreement which he was told in those conditions of sale he would be asked to sign, and accordingly Mr. White says so in his letter. It is not in any way a suspending of the making of a contract until an agreement is determined upon and is arranged. It is a letter recording the conclusion of a contract so far as the vendors are concerned, which letter at the same time takes notice that the purchaser is not yet bound by the signature required under the Statute of Frauds; and he is therefore called upon to place himself under the obligation under which the vendors already were content to lie.

Accordingly, my Lords, that was accompanied with a contemporaneous letter to the solicitor of the vendors which I only refer to as part of the history. It could not of course in any way bind the purchaser, "Will you please prepare and forward to Daniel Miller, Esq., 1 Avenue Villa, St. Peter's Road, Croydon, the contract for purchase as this day agreed by the proprietors. I have written Mr. Miller stating that you will do so and accepting his offer."

Now Mr. Miller replied to the letter I have read; and here I wish to remind your Lordships of the course which the transaction might have taken. It might have been the case that Mr. Miller did not make any answer by letter; if so, the matter would have rested upon this letter written by the vendors, and, until the solicitor came to Mr. Miller with the agreement, Mr. Miller would have signed nothing and would not have been bound. But without waiting for the agreement, Mr. Miller wrote the letter which I am going to read. He said: "I am in receipt of yours of yesterday's date, in which you say, 'It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage.' I cannot be bound to build at any given time, or at all. Therefore, as you * say the reduction in price [* 1136] was in consequence of your understanding that I should build at once, the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I may think best."

What, my Lords, is the meaning of that letter? It is of course to be read in juxtaposition to, and in continuation of, the letter to which it is an answer. He speaks of his offer as Mr. White had in the letter written to him spoken of it. The writers of the

first letter and of the second are therefore at one as to what the offer was, as to the property to be sold, the price, the terms, and conditions. Mr. Miller therefore puts his signature to a letter in which he affirms his assent to the description of the offer which he had found in the letter addressed to him. But then, in consequence of the sentence in the letter addressed to himself, which had implied that the vendors expected him to build at a particular time, although they of course had no right absolutely to call for that building, he very properly, in order to avoid any misunderstanding, states that he would not come under any terms of that kind, and therefore he says "the offer had better be reconsidered unless you are prepared to leave me at liberty to do as I may think best." My Lords, I apprehend that to mean my offer is still before you; you have described my offer correctly in your letter; I repeat it; but let there be no misunderstanding with regard to the question of building immediately; that is not included in my offer, so I ask you again to consider it; but, supposing that is rightly understood, and my offer is accepted pure and simple, I am content that it should be so. My Lords, it therefore comes at this point of the case to a distinct and clear offer made, and made by a person who has confirmed it in writing, and the only question is, was that letter accepted?

On the 22nd of April Mr. White replies: "Mine to you of yesterday's date was not intended to convey a *conditional* acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this, every house that is built increases the value of the remaining land — this I laid before the proprietors.

Your offer I take to be based simply on the stipulation [* 1137] of July, *1871, so that in our own words 'You are at liberty to do as you may think best.'

My Lords, I have only to say that — but that I have found the learned Judges in the Court of Appeal, for whose opinion I have the greatest respect, taking a different view — I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear, by reference to an elaborate scheme of conditions under which the sales were to be made. The offer is recognized in terms by the person who had

made it, under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom the offer was made.

My Lords, the reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that at that time the purchaser was in no way bound, and therefore it was right in the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1871, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, either party would have had a perfect right not only to refuse to accept those other terms, but to insist upon an agreement in the original terms of the paper of 1871.

My Lords, I therefore come to the conclusion that there is here clearly and distinctly a concluded contract with the terms expressed in this letter, subject to the observation I have yet to make upon what I call the second part of the case in reference to the use of the word "authorized."

Let me, my Lords, here say that I am at a loss to understand upon what principle the case of *Chinnock v. The Marchioness of Ely* * was supposed to bear upon the [*1138] present case. In that case there was a house agent, who was authorized to find a purchaser for a house belonging to Lady Ely. He was warned that he was not to put his hand to any paper upon the subject, because the conditions as to title under which the house required to be sold were such that they must be prepared by a solicitor with great care. The house agent scrupulously adhered to these instructions; he got an offer for the house at a particular price, but he refused to put his name to any acceptance of it. There were no terms and conditions mentioned, but merely an offer of the price of £10,000. Then the negotia-

tion, for some reason or other, fell into abeyance, and remained so for some time. Afterwards it was taken up again, and taken up by the solicitor, not by the house agent. At the time it fell into abeyance there is not the slightest doubt that there was nothing which in any way amounted to a contract; there neither was a concluded contract, nor a note in writing of a concluded contract. When the solicitor came in he wrote the letter upon which the whole case turns, and that letter was this: "We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you in a few days." My Lords, the construction put upon that by the LORD CHANCELLOR was that it amounted to no more than the solicitors saying that they took up the matter where it had stopped, and it had stopped at a point where there was no contract, and that they took it up, therefore, saying that they would continue the negotiation in order that a contract might be prepared to which both parties might agree. And then Lord WESTBURY uses these words, 4 De G. J. & S. at p. 645, "I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle v. Freeman*, *Kennedy v. Lee*, and *Thomas v. Dering*, which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term [*1139] that a *formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract." Up to that point it appears to me that these words exactly describe the case which your Lordships have before you. But the words which are relied upon by the learned Judges in the Court of Appeal are the words which follow: "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me,

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for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th of November may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th of November either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement."

My Lords, I can only say that I am willing to accept every word of Lord WESTBURY as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

My Lords, it is a satisfaction to think that before the judgment of the parties in this case became somewhat obscured by the *controversy which arose between them, the view [*1140] which I certainly must take of the case was the view which, as it appears to me, was taken both by the respondent himself and by his legal advisers. With regard to the respondent himself, I am at a loss to conceive how the offer which he made of the payment of expenses incurred could have arisen unless he had felt in his own mind that, whether he had a right to resile by reason of some technicality connected with the Statute of Frauds or no, still that as between man and man a contract had been concluded between him and the vendors. And with regard to his solicitors, we find them after some time, and after, as it appears, they had for the first time been made aware of the contents of the conditions, which were printed on the paper of July, 1871, stating that they would advise their client in this way.

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On the 16th of June they say: "On considering the effect of the conditions printed on the plan of 1871, we shall advise Mr. Miller that what has occurred creates, as you maintain, a contract mutually binding on the basis of those conditions. Please to send us accordingly an abstract of the vendor's title, commencing from the 30th October, 1797." Then lower down, "We shall be happy to pay you the £2 2s., as presented by the printed conditions. The terms of the contract sent for Mr. Miller's signature may or may not be reasonable to be required where no contract already existed, but are certainly unreasonable where a contract existed entitling him to better terms." My Lords, that of course did not bind the respondent, but it was a just view, as it seems to me, of the law; and I greatly regret that the advice of his solicitors was not taken by him.

My Lords, the other two points in the case really are very small. As to the use of the term "proprietors" I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale not merely by auction but by private contract in which it is stated that the sale is made, sometimes by the owners, and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty [* 1141] which is described *in the legal maxim *id certum est quod certum reddi potest*. If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid.

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My Lords, as to the other question, the question of authority. As a matter of pleading the authority of the agent for the vendors which he professed to have, and averred that he had, is not denied, is not traversed. Your Lordships were asked if there was a difficulty upon that point to take steps which would admit of an amendment being made. My Lords, I certainly do not think there could be a case in which less indulgence at any stage ought to have been given to the respondent than on this point, with regard to amendment, because, during the whole of the controversy from the month of April, 1875, and thenceforward for a number of months, the idea never was suggested between the parties that there was any want of authority on the part of Mr. White. Every possible objection that could be taken was taken, but that objection never was taken. My Lords, it is an objection which, even if it had been pleaded, seems to me perfectly baseless. The speculation with regard to this property I have already described to your Lordships. There was a meeting of the proprietors at which the proposal of the respondent was considered. There were present at that meeting five of the number including the two in whose names the legal estate was vested. There was, therefore, a majority at a meeting duly summoned, such as the terms of the agreement for the speculation required. It was by meetings of that kind that the whole business of the speculation was arranged and conducted, and there is not the slightest ground, * as it seems to me, for saying that the [* 1142] business of the speculation was not conducted in a way completely to bind every member of it. It seems to me that Mr. White had undoubtedly the authority of the proprietors, and who the proprietors were, there could, as I have observed, be no possible doubt.

I therefore move your Lordships that, as I have already said, the order appealed from be reversed, and that the decree made by the MASTER OF THE ROLLS be restored, and that the respondent pay to the appellants their costs both in the Court of Appeal and in your Lordships' House.

Lord HATHERLEY and Lord O'HAGAN concurred.

Lord BLACKBURN : —

[1151]

My Lords, I also concur in the judgment proposed.

I quite agree with the LORDS JUSTICES that (wholly independent of the Statute of Frauds) it is a necessary part of the plain-

tiff's case to show that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

This is what I understand to be the meaning of Lord CRANWORTH in *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46; and this is the case (6 H. L. C. at p. 307), as stated by Lord WENSLEYDALE, and in terms assented to by Lord ST. LEONARDS. I think, however, that though they agree on the terms in which the proposition of law is stated, it is obvious that Lord WENSLEYDALE, trained in the Courts of Common Law and accustomed to deal with the question of what was to be left to the jury, attached far more weight to the stipulation that there should be a formal

agreement, as evidence that the parties were not yet [* 1152] agreed, than *did Lord ST. LEONARDS, trained in the

Courts of Equity, where fact and law are decided together. I think Lord WENSLEYDALE would not have come to the same conclusion as Lord LANGDALE did in *Gibbons v. The North Eastern Asylum*, 11 Beav. 1; 17 L. J. Ch. 5. I doubt whether Lord ST. LEONARDS would not have preferred the decision of the VICE CHANCELLOR to that of Lord WESTBURY in *Chinnock v. The Marchioness of Ely*.

Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from

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the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. If I thought with Lord Justice BAGGALLAY that the letters here “left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement,” I should also think that the plaintiffs failed; but I cannot put that construction on the letters. If I understand Lord Justice JAMES rightly, he thinks that, in practice, persons who really meant only to enter into such a preliminary negotiation may be held bound contrary to their intention, and I do not doubt that this sometimes happens. I infer, though of this I am not quite sure, that he wishes it to be a canon of construction that, wherever there is a stipulation for a farther and more formal agreement, the previous arrangements should be held to be only of this preliminary nature. I doubt whether such a canon of construction would not often defeat the intention of the parties; but I think it is too late now to introduce it. I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up. In the present case I think the whole is a question of what is expressed in the three letters, one of the 21st of April, 1875, and *two of the 22nd of April, 1875, and the conditions [*1153] therein referred to. The contract mentioned in the last of the conditions was to be one embodying the foregoing conditions “and providing for the payment of 10 per cent. deposit.” Nothing new could be introduced into it, and the purchaser, if he signed such a contract as is stipulated for there, would not have agreed to anything more than he had already agreed to. And there is nothing that I can find postponing the final assent till the agreement was seen and signed. Unless, therefore, such a new canon of construction as I have alluded to is to be introduced, I think the parties were bound as soon as they both assented to those terms expressed in the conditions. It would have raised quite a different question if a lithographed form of agreement (which did vary from the conditions and introduce important new stipulations about title) had been enclosed in the letter.

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On the other points raised I have very little to add. I cannot understand the objection made to the evidence of White's authority. And though the construction by which it is held that there can be no memorandum of the agreement unless the writing shows who the parties are, is now inveterate, it is not necessary that they should be named. It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram in his Treatise calls evidence, Wigr. on Extrinsic Evidence, Intr. Obs. p. 10, "to prove intention as an independent fact." In the present case, without receiving any such evidence, there is ample to show that the plaintiffs were those designated by the description of "the proprietors."

LORD GORDON concurred.

Order appealed against reversed. Order of the Master of the Rolls, dated the 22nd of January, 1877, restored. Respondent ordered to pay to appellants their costs in the Court of Appeal and in this House.

Lords' Journals, 22nd July, 1878.

ENGLISH NOTES.

In *Ridgway v. Wharton* (1856-7), 6 H. L. C. 238, 27 L. J. Ch. 46, it was held that a paper consisting of "instructions" to a solicitor to prepare a lease (and referred to in another paper signed by the party to be charged) was a sufficient memorandum of the supposed contract to satisfy the Statute of Frauds, it being in evidence that the "instructions" contained all the terms verbally agreed upon, and that they were sent merely for the purpose of putting that agreement into a formal shape: but Lord CRANWORTH, C., observed that, generally speaking, the circumstance that parties did intend a subsequent agreement to be made, was strong evidence to show that they did not intend the previous negotiations to amount to an agreement. In *Crossley v. Maycock* (1872), L. R., 18 Eq. 180, 43 L. J. Ch. 379, 22 W. R. 387, a communication was made to the offerer in these terms: "which offer we accept, and now hand you two copies of Conditions of Sale," and therewith a formal agreement with conditions of a special character were enclosed. It was held that there was no contract. In *Bonnevell v. Jenkins* (1878), 8 Ch. D. 70, 47 L. J. Ch. 758, 38 L. T. 81, 26 W. R. 294, an offer was made to A.'s agents "subject to the conditions of the lease being modified to my solicitor's satisfaction." A.'s agents answered,

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“We are instructed to accept your offer, and have asked A.’s solicitor to prepare a contract.” The conditions in the lease were modified as required. It was held that there was a complete contract, in spite of the “formal contract” not being prepared.

In *Hawkesworth v. Chaffey* (1886), 55 L. J. Ch. 335, 54 L. T. 72, the plaintiff and defendant signed a written document whereby the defendant agreed to buy and the plaintiff agreed to sell an estate therein described at a specified price, “subject to a formal contract being prepared and signed by both parties as approved by their solicitors.” No formal contract having been signed as approved by the solicitors, it was held by KAY, J., following *Winn v. Bull*, *supra*, that there was no contract. The same principle was followed by KEKEWICH, J., in *Lloyd v. Nowell*, 31 July, 1895.

In *Page v. Norfolk* (1894), 70 L. T. 781, an offer to buy was made “subject to our approving a detailed contract to be entered into.” Its acceptance was held not to constitute a contract.

AMERICAN NOTES.

A contemporaneous agreement to reduce a contract to writing is merely an agreement to provide a particular kind of evidence of the terms of the contract, and the oral contract is binding although not so reduced to writing. *Bell v. Offut*, 10 Bush (Kentucky), 632.

But an oral agreement which is to be put into writing and signed next day does not bind either party unless so written and signed. *Riggs v. Magruder*, 2 Cranch (U. S. Circ. Ct.), 143; *Lee v. Parly*, 2 U. C. Q. B. 193.

The precise point has been very recently ruled in *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 New York, 209, in which the Court, citing no other cases than those embraced in their opinion below, observed:—

“When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

“But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. (*Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun, 248; *Pratt v. H. R. R. Co.*, 21 N. Y. 308.) The principle that governs in such cases was clearly stated by Judge SELDEN in the case last cited in these words: ‘A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If therefore it should appear that the minds of the parties had met: that the proposition for a contract had been made by one party and accepted by the other; that the terms of this contract

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were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform.'

"In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject-matter of the contract, and that the consequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market or other events occurring subsequently to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property, while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle therefore, which is involved in the case is this, Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case will be decided. But if at the close of the correspondence the plaintiffs become bound by their offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to

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repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of great confusion and uncertainty into the law of contracts." Three of the seven Judges dissented.

In *Mississippi &c. S. Co. v. Swift*, 86 Maine, 248; 41 Am. St. Rep. 545, *Rossiter v. Miller*, and many other English cases are cited and examined, and the Court conclude: "From all these expressions of Courts and jurists it is quite clear that after all the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party had neither had nor signified such an intention until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if however it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract. Still with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful, and sometimes unsatisfactory. An illustration of this is the case of *Rossiter v. Miller*, 5 Ch. Div. 648; 3 App. Cas. 1124, above quoted from. In that case Lord Chief Justice COLERIDGE, and Lord Justices JAMES and BAGGALLAY, three of England's most distinguished Judges, were clear that there was no contract for want of a formal draft. Lord Chancellor CAIRNS, and Lords HATHERLY, BLACKBURN, and GORDON, equally able and eminent jurists, were confident in the contrary opinion." Citing *Morrill v. Tehama M. & M. Co.*, 10 Nevada, 135; *Eads v. Carondelet*, 42 Missouri, 113; *Water Com'rs v. Brown*, 32 New Jersey Law, 504; *Congdon v. Darcy*, 46 Vermont, 478.

See notes, *ante*, p. 90, sub-div. 4.

No. 18. — *Raffles v. Wichelhaus*, 2 Hurl. & Colt. 906. — Rule.

No. 18. — RAFFLES *v.* WICHELHAUS.

(1864.)

RULE.

WHERE after parties have apparently agreed to the terms of a contract, circumstances disclose a latent ambiguity in the meaning of an essential word by which one of the parties meant one thing, and the other a different thing, the difference going to the essence of the supposed contract, the result is that there is no contract.

Raffles v. Wichelhaus and another.

2 Hurl. & Colt. 906-908 (s. c. 33 L. J. Ex. 160).

Contract (apparent). — Latent Ambiguity. — Absence of Consent.

[906] To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff "to arrive *ex Peerless* from Bombay," the defendant pleaded that he meant a ship called the *Peerless* which sailed from Bombay, in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the *Peerless*, which sailed from Bombay in December. — *Held*, on demurrer, that the plea was a good answer.

Declaration. — For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive *ex Peerless* from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼*d.* per pound, within a certain time then agreed upon after the arrival of the said goods in England. — Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing, and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. — That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the *Peerless* which sailed from Bombay, to wit, in October; and

No. 18. — *Raffles v. Wichelhaus*, 2 Hurl. & Colt. 906-908.

that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the *Peerless*, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

* Milward, in support of the demurrer. — The contract [* 907] was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the *Peerless*. The words "to arrive" *ex Peerless* only mean that if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C. B. It would be a question for the jury whether both parties meant the same ship call the *Peerless*.] That would be so if the contract was for the sale of a ship called the *Peerless*; but it is for the sale of cotton on board a ship of that name. [POLLOCK, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other *Peerless*. [MARTIN, B. — It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. — There is nothing on the face of the contract to show that any particular ship called the *Peerless* was meant; but the * moment [* 908] it appears that two ships called the *Peerless* were about to sail from Bombay there is a latent ambiguity, and parol evidence

may be given for the purpose of showing that the defendant meant one *Peerless* and the plaintiff another. That being so, there was no *consensus ad idem*, and therefore no binding contract — He was then stopped by the Court.

Per CURIAM, POLLOCK, C. B., MARTIN, B., and PIGOTT, B. — There must be judgment for the defendants.

Judgment for the defendants.

ENGLISH NOTES.

The rule embodies, in a case where the intention of two parties has to be considered, a similar principle to that concerning a written instrument (such as a will) embodying the intention of a single person, already treated under (*Doe d. Hiscocks v. Hiscocks*) No. 2 of "Ambiguity," 2 R. C. 718, and notes, pp. 724, 725. The case and notes here referred to further illustrate the circumstances under which parol evidence may be admitted to disclose a latent ambiguity.

The question arising by reason of latent ambiguity in an apparent contract is also very similar to the questions of mistake which are treated of in the notes to Nos. 19, 20, and 21, pp. 202, 204, 211, *post*.

AMERICAN NOTES.

The principle in question is recognized in this country. As where A. agreed to buy of B. a lot on Prospect Street, and there were two streets of that name, and A. meant one and B. the other; *Kyle v. Kavanaugh*, 103 Massachusetts, 356; 4 Am. Rep. 560. And where the price was stated at \$165, but the buyer understood it \$65; *Rupley v. Daggett*, 74 Illinois, 351. And where a blooded cow was sold for \$80, both supposing her barren, whereas she was with calf, and as a breeder was worth from \$750 to \$1000; *Sherwood v. Walker*, 66 Michigan, 568; 11 Am. St. Rep. 531. So where a wrong judgment was assigned by mistake; *Cutts v. Guild*, 57 New York, 229. So on a sale of a drill-machine title does not pass to valuables secreted in it; *Huthmacher v. Harris's Adm'r*, 38 Pennsylvania State, 491; 80 Am. Dec. 502. So where on a sale of No. 1 mackerel some barrels of No. 3 and some of salt are delivered; *Gardner v. Lane*, 9 Allen (Mass.), 492; 85 Am. Dec. 779. See *Byers v. Chapin*, 28 Ohio State, 300. So where at auction one bids off one thing supposing it another; *Sheldon v. Capron*, 3 Rhode Island, 171. So where hides were accidentally left in a tannery sold; *Livermore v. White*, 74 Maine, 452; 43 Am. Rep. 600. So where money was found in an old safe sold; *Durfee v. Jones*, 11 Rhode Island, 588; 23 Am. Rep. 528. See *Ray v. Light*, 34 Arkansas, 421; *Bowen v. Sullivan*, 62 Indiana, 281; *Hogue v. Mackey*, 44 Kansas, 277. So where an assignment of a lease of a water-power was taken under the mutual mistaken impression that the power could be used in making pulp; *Bedell v. Wilder*, 65 Vermont, 406; 36 Am. St. Rep. 871. So where a cow was supposed not to be with calf; *Newell v. Smith*, 53 Connecticut, 72.

In *Hecht v. Butcheller*, 147 Massachusetts, 335; 9 Am. St. Rep. 708, the

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Court said: "It is a general rule that when parties assume to contract and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of the mutual assent necessary to create one; so that in the case of the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or if he receives it, may upon discovery of the mistake return it and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold." And the doctrine was held inapplicable to the case of mistake as to the solvency of the maker of a note sold.

The most singular case in the American books on this subject is *Wood v. Boynton*, 64 Wisconsin, 265; 54 Am. Rep. 610, holding that where one sold and another bought a rough diamond worth \$700 for one dollar, the stone being open to the inspection of both, and both being ignorant of its real value, and supposing the price a fair one, the sale cannot be rescinded. The Court said: "There is no pretence of any mistake as to the identity of the thing sold," and they held that the great inadequacy of price was no evidence of fraud. The action was to recover the stone. The Court remarked that whether the inadequacy of price "would have any influence in an action in equity to avoid the sale, we need not consider." The reporter in the note, 54 Am. Rep. 614, says: "This case seems nearly if not quite unique." A very plausible argument might be made on the question of identity, to the effect that a diamond is not the same thing as a pebble or a bit of glass. In *Sherwood v. Walker, supra*, the Court said: "The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding and of no use as a cow. It is true that she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal. A barren cow is substantially a different thing than a breeding one. There is as much difference between them for all purposes of use as is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal the defendant intended to sell or the plaintiff to buy. She was not a barren cow; and if this fact had been known there would have been no contract. The mistake affected the substance of the whole consideration; and it must be considered that there was no contract to sell, or sale of, the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow and a valuable one." This reasoning seems quite applicable to the diamond case.

No 19. — THOROUGHGOOD'S CASE.

(C. P. 1582.)

No. 20. — COUTURIER *v.* HASTIE.

(1856.)

No. 21. — CUNDY *v.* LINDSAY.(Appeal from LINDSAY *v.* CUNDY.)

(H. L. 1878.)

RULE.

WHERE a person is induced to sign what purports to be a contract through a mistake or fraud going to the essence of the consent, there is no contract to bind him.

And so if A. has been fraudulently induced to make what purports to be a contract with B. under the belief that he is contracting with C., there is no valid contract.

Thoroughgood's Case.

2 Co. Rep. 9 a, 9 b.

Contract (apparent). — Signature induced by Fraud.

[9 a] In trespass *quare clausum fregit*, the defendant pleaded a release from the plaintiff to J. S., and justified as servant to the feoffee of J. S.; the plaintiff replied that he was a layman, not lettered, and that at the time of the release made, divers arrearages of an annuity were due to him; and that one J. W. took the deed, while it was reading, and said to him "You will better understand it by hearing than by reading," and taking it in his hand said "It is but a release of the arrearages;" and he said, "If it be so, I am contented;" held, 1st, That a deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger; 2ndly, That an illiterate man need not execute a deed before it be read to him in a language which he understands: but if the party executes without desiring it to be read, the deed is binding; 3rdly, That if an illiterate man execute a deed which is falsely read, or the sense declared differently from the truth, it does not bind him; and that though it be by a friend of his, unless there be covin.

Thoroughgood brought an action of trespass for breaking of his close against Cole defendant, who pleaded, that long time before the trespass, the plaintiff released to one William Chicken all

No. 19. — *Thoroughgood's Case*, 2 Co. Rep. 9 a, 9 b.

demands whatsoever, &c. whose estate in the land the defendant hath, and justified the trespass, &c. The plaintiff said, that he was a layman, not lettered, and that at the time of the said release made, divers arrearages of an annuity were due to him by the said William Chicken, and that the said writing of release was read and declared to him as a writing of acquittance for those arrearages only; and that he (giving credit thereunto) did seal and deliver the same to the said William Chicken, and so, not his deed; upon which issue was joined; and the jury found a special verdict to this effect; that is to say, that the plaintiff was a layman, not lettered, and that divers arrearages of the said annuity were behind, and that the writing was never read to him; but after that one Thomas Ward had begun to read it to the plaintiff, and before he had read a line of the writing, one John Ward took the writing out of his hands, saying to the plaintiff, "Goodman Thoroughgood, you are a man unlearned, and I will declare it unto you, and make you understand it better than you can by hearing of it read:" and then said further to him, "Goodman Thoroughgood, the effect of it is this, that you do release to William Chicken all the arrearages of rent that he doth owe you, and no otherwise, and then you shall have your land again:" to which the plaintiff said, "If it be no otherwise, I am content;" and thereupon the plaintiff, giving credit to the said John Ward, delivered the said release to the said William Chicken; and whether this, upon the whole

* matter, be the plaintiff's deed, the jury refer to the Court, [* 9 b] &c. And it was adjudged, that it was not the plaintiff's deed; and in this case three points were resolved: first, that although the party to whom the writing is made, or other by his procurement, doth not read the writing, but a stranger of his own head read it in other words than in truth it is, yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it be a layman, and being not lettered, be (without any covin in himself) deceived; and that is proved by the usual form of pleading in such case, that is to say, that he was a layman, and not learned, and that the deed was read to him in other words, &c. generally, without showing by whom it was read. And if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged 45 E. III. 6, a. *Vide* 39 H. VI. 36, a.

No. 20. — Couturier v. Hastie, 5 H. L. Cas. 673.

Secondly, that such layman, not learned, is not bound to deliver the deed, if there be not one present which can read the deed unto him, in such language that he who should make the deed may understand it; and that is the reason, that if it be read to him in other words than are contained in the writing, it shall not bind the party who delivereth it, for it is at the peril of the party to whom the writing is made, that the true effect and purport of the writing be declared, if it be required; but if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning.

Thirdly, although the writing be not read to the party, yet if the effect be declared to him in other form than is contained in the writing, and upon that he deliver it, he shall avoid the deed; for it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing; if the party who maketh the writing (being not learned) desire one to read the writing to him, and he read it, or declare the effect thereof to him in other manner than the writing doth purport, it (unless there be covin betwixt them) shall not bind him.

**Couturier and Others, Plaintiffs in Error v. Hastie and Another,
Defendants in Error.**

5 H. L. Cas. 673-682 (s. c. 25 L. J. Ex. 253; 2 Jur. N. S. 1241).

Contract. — Mistake going to the Essence of the Contract.

[673] A cargo of corn was shipped by A. at Salonica, in February, 1848, for delivery in London. On the 15th of May it was sold by H. a factor, who made the sale on a *del credere* commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27s. per quarter free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c., upon handing shipping documents." In fact the corn had, a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract: In an action for the price brought against the factor: *Held*, that the contract contemplated that there was an existing something to be sold and bought and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.

The plaintiffs were merchants at Smyrna; the defendants were corn factors in London; and this action was brought to recover

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from them the price of a cargo of * Indian corn which [* 674] had been shipped at Salonica, on board a vessel chartered by the plaintiffs for a voyage to England, and had been sold in London by the defendants in error, upon a *del credere* commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "corn warranted free from average, unless general, or the ship be stranded." On the 22nd of that month the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charter-party, with primage and average accustomed." On the 23rd February, the ship sailed on the homeward voyage. On the 1st May, 1848, Messrs. Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo, and sent them the bill of lading, the charter-party, and the policy of insurance, asking and receiving thereon an advance of £600.

On the 15th May the defendants sold the cargo to A. B. Callender, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the *Kezia Page*, Captain Page, from Salonica; bill of lading dated twenty-second February, at 27s. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from this date, or in cash, less discount, at the rate * of five per cent. [* 675] per annum for the unexpired time, upon handing shipping documents."

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into Tunis, where, after a survey and other proceedings, regularly and *bonâ fide* taken, the cargo was, on the 22nd April, unloaded and sold. It did not appear that either party knew of these circumstances at the time of the sale. The contract having been made on the 15th of May, Mr. Callender, on the 23rd of May, wrote to Hastie and Hutchin-

son: "I repudiate the contract of the cargo of Indian corn, per the *Kezia Page*, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo at Tunis, on the 22nd April, was published at Lloyd's and other papers, on the 12th instant, being three to four days prior to its being offered for sale to me."

The plaintiffs afterwards brought this action. The declaration was in the usual form. The defendants pleaded several pleas, of which the first four are not now material to be considered. The fifth plea was that before the sale to Callender, and whilst the vessel was on the voyage, the plaintiffs sold and delivered the corn to other persons, and that since such sale the plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callender on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the defendants were employed by the plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the plaintiffs at Tunis, and that Callender, for that reason, repudiated the sale, &c.

[* 676] * The cause was tried before Mr. Baron MARTIN, when his Lordship ruled, that the contract imported that at the time of the sale the corn was in existence as such, and capable of delivery, and that as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the Court of Exchequer before the LORD CHIEF BARON, Mr. Baron PARKE, and Mr. Baron ALDERSON, when the learned Judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas except the sixth, and that on that plea judgment should be entered for the plaintiffs, *non obstante veredicto*. That the defendants should be at liberty to treat the decision of the Court as the ruling at *nisi prius*, and to put it on the record and bring a bill of exceptions. 8 Exch. 40. This was done, and the LORD CHIEF BARON sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the Court, but that his own opinion was in opposition to such ruling.

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The case was argued on the bill of exceptions in the the Exchequer Chamber, before Justices COLERIDGE, MAULE, CRESSWELL, WIGHTMAN, WILLIAMS, TALFOURD, and CROMPTON, who were unanimously of opinion that the judgment of the Court of Exchequer ought to be reversed. 9 Exch. 102. The present writ of error was then brought.

The Judges were summoned, and Mr. Baron ALDERSON, Mr. Justice WIGHTMAN, Mr. Justice CRESSWELL, Mr. Justice ERLE, Mr. Justice WILLIAMS, Mr. Baron MARTIN, Mr. Justice CROMPTON, Mr. Justice WILLES, and Mr. Baron BRAMWELL, attended.

* Sir F. Thesiger and Mr. James Wilde for the plaintiffs [* 677] in error.

The purchase here was not of the cargo absolutely as a thing assumed to be in existence, but merely of the benefit of the expectation of its arrival, and of the securities against the contingency of its loss. The purchaser bought in fact the shipping documents, the rights and interests of the vendor. A contract of such a kind is valid. *Paine v. Meller*, 6 Ves. 349; 5 R. R. 327; *Cass v. Rudele*, 2 Vern. 280. The language of the contract implies all this. The representation that the corn was shipped free on board at Salonica, means that the cargo was the property of, and at the risk of the shipper. *Cowasjee v. Thompson*, 5 Moo. P. C. 165. The Court of Exchequer proceeded on the words of this contract and gave the correct meaning to them. Mr. Baron PARKE said, (8 Exch. 54; 22 L. J. Ex. 103): "There is an express engagement that the cargo was of average quality when shipped, so that it is clear that the purchaser was to run the risk of all subsequent deterioration by sea damage or otherwise, for which he was to be indemnified by having the cargo fully insured; for the 27s. per quarter was to cover not merely the price, but all expenses of shipment, freight, and insurance." In a contract for the sale of goods afloat, there are two periods which are important to be regarded, the time of sale and the time of arrival. If at the time of the sale there is anything on which the contract can attach it is valid, and the vendee bound. *Barr v. Gibson*, 3 M. & W. 390; 7 L. J. (N. S.) Ex. 124. The goods are either shipped, as here, "free on board," when it is clear that they are thenceforward at the risk of the vendee, or they are shipped "to arrive," which saves the vendee from all risk till they are safely brought to port. *Johnson v. Macdonald*, 9 M. & W. 600, 12 L. J. Ex. 99. The

[* 678] intention * of the parties is understood to be declared by different terms of expression, and the judgment of the Exchequer Chamber here really violates that intention. The case of *Strickland v. Turner*, 7 Exch. 208, which was referred to by the Lord Chief Baron POLLOCK (8 Exch. 49), is not in point, for there the annuity, which was the subject of the sale, had actually ceased to exist when the sale took place; there was nothing whatever on which the contract could attach; and the principles therefore on which all contracts of sale must proceed, as explained and illustrated by Pothier,¹ whose definitions of a sale are literally adopted by Mr. Chancellor KENT, 2 Kent's Com. 468, applied there, but they do not apply here, for here the parties were dealing with an expectation, namely, the expectation of the arrival of the cargo. As Lord Chief Baron RICHARDS said in *Hitchcock v. Giddings*, 4 Price, 135, "If a man will make a purchase of a chance, he must abide by the consequences." Here, however, the chance was only that of the arrival of the cargo, and that chance was covered by the policy, for the cargo itself, as stated in the contract, had been actually shipped. Had the cargo been damaged at the time of this contract, the loss thereby arising must have been borne by the purchaser. Suppose the corn had been landed at Tunis, [* 679] and had remained in the warehouse there, * it would have ceased to be a cargo in the strict and literal meaning of the word, but the purchaser would still have been bound by his contract.

The Court of Exchequer Chamber, admitting that the vendee might have recovered an average loss under the policy on this cargo, said that he could not have recovered if a total loss had occurred, and referred to an admission to that effect supposed to have been made by the present Baron MARTIN when arguing *Sutherland v. Pratt*, 11 M. & W. 296, That admission does not mean what is thus supposed; and after the case of *Roux v. Sel-*

¹ Pothier, *Contrat de Vente*, pt. 1, s. 2 art. 1. "Il faut en premier lieu, une chose qui soit vendue, et qui fasse l'objet du contrat. Si donc, ignorant que mon cheval est mort, je le vends à quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet. Par la même raison, si, me trouvant avec vous à Paris, je vous vends une maison que j'ai à Orléans, dans l'ignorance où nous

sommes, l'un et l'autre, que cette maison a été incendiée pour le total, ou pour la plus grande partie, ce contrat sera nul, parceque la maison qui en faisoit l'objet n'existoit pas; la place et ce qui restoit de cette maison, n'étoient pas tant la chose qui faisoit l'objet de notre contrat, que des restes de ces choses. L. 57, ff. de Contr. Empt."

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vador, 3 Bing. N. C. 266; 7 L. J. Ex. 328, No. 6 of "Abandonment," 1 R. C. 46, where there was a total loss, and the plaintiff recovered on the policy, it is difficult to understand how such an opinion could be entertained. A technical objection arising on the form of the policy would not affect this question. The purchaser's right on this policy would have been complete. 1 Phillips, Insur. 438; 1 Marshall, Insur. 333, and *March v. Pigott*, 5 Burr. 2802.

By what has happened here, the purchaser has been saved the payment of freight. *Vlierboom v. Chapman*, 13 M. & W. 230, 13 L. J. Ex. 384, and *Owens v. Dunbar*, 12 Ir. L. R. 304, shows that he would have been bound to accept the cargo. The contract here was, that the cargo was shipped "free on board." To that extent the vendor was bound, but he was not bound by any farther and implied warranty. *Dickson v. Zirzinia*, 10 C. B. 602.

Mr. Butt and Mr. Bovill for the defendants in error were not called on.

THE LORD CHANCELLOR (LORD CRANWORTH).

My Lords, this case has been very fully and ably argued on the part of the plaintiffs in error, but I understand from an intimation which I have received, that all *the learned [*680] Judges who are present, including the learned Judge who was of a different opinion in the Court of Exchequer, before the case came to the Exchequer Chamber, are of opinion that the judgment of the Court of Exchequer Chamber sought to be reversed by this writ of error was a correct judgment, and they come to that opinion without the necessity of hearing the counsel for the defendants in error. If I am correct in this belief, I will not trouble the learned counsel for the defendants in error to address your Lordships, because I confess, though I should endeavour to keep my mind suspended till the case had been fully argued, that my strong impression in the course of the argument has been, that the judgment of the Court of Exchequer Chamber is right. I should therefore simply propose to ask the learned Judges, whether they agree in thinking that that judgment was right.

[The Judges consulted together for a few minutes, at the end of which time]

Mr. Baron ALDERSON said, — My Lords, Her Majesty's Judges are unanimously of opinion that the judgment of the Exchequer Chamber was right, and that the judgment of the Court of

Exchequer was wrong; and I am also of that opinion myself now, having been one of the Judges before whom the case came to be heard in the Court of Exchequer.

THE LORD CHANCELLOR. — My Lords, that being so, I have no hesitation in advising your Lordships, and at once moving that the judgment of the Court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual for your Lordships to go much into the merits of a judgment which is thus unanimously affirmed by the Judges who are called in to consider it, and to assist the House in forming its judgment. But I [* 681] may state shortly * that the whole question turns upon the construction of the contract which was entered into between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both the learned counsel who have addressed your Lordships showing that there might have been a meaning attached to that contract different from that which the words themselves impart. If this had depended not merely upon the construction of the contract but upon evidence, which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long-continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even to compel your Lordships to adopt a different construction. But, in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. I do not feel pressed by the latter argument, which has been brought forward very ably by Mr. Wilde, derived from the subject of insurance. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May, as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at the time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existed.

No. 21. — *Cundy v. Lindsay*, 3 App. Cas. 459.

I *think the Court of Exchequer Chamber has come to [* 682] the only reasonable conclusion upon it, and consequently that there must be judgment given by your Lordships for the defendants in error.

Judgment for the defendants in error, with costs.

Lords' Journals, 27 June, 1856.

Cundy and Bevington, Appellants v. Lindsay and others, Respondents.

3 App. Cas. 459-472 (s. c. 47 L. J. Q. B. 481 ; 38 L. T. 573 ; 26 W. R. 406).

Contract. — Fraud.

[459]

The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title.

By a purchase in market overt the title obtained is good against all the world.

If not so purchased, though purchased *bonâ fide*, the title obtained may not be good against the real owner.

Where the original owner has parted with the chattel to A. upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bonâ fide* purchaser from A. will obtain an indefeasible title.

The question, therefore, in many such cases will be, was there a contract between the original owner and the intermediate person.

L. was a manufacturer in Ireland; Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letter used this address — "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood Street. L. sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood Street." The goods were received by Blenkarn at that place, and disposed of to the defendants, who were entirely ignorant of the fraud: —

Held, that no contract was made with Blenkarn, that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to the defendants, who were consequently liable to the plaintiffs for the value of the goods.

Appeal from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood Street, Cheapside, — it had two side windows opening into Wood Street, but though the entrance was from Little Love

Lane it was by him constantly described as 37, Wood Street, Cheapside. His agreement for this room was signed [*460] "Alfred Blenkarn." The *now respondents, Messrs.

Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture, — chiefly cambric handkerchiefs. His letters were written as from "37, Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood Street on one side, could only be reached from the entrance in 5, Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood Street, — but at number 123, Wood Street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods, thus fraudulently obtained from Messrs. Lindsay, to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were *bonâ fide* purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice BLACKBURN, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37, Wood Street, — were they the

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same goods as those bought by the defendants — and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as *their debtor. The first [* 461] and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the Court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants. 1 Q. B. D. 348; 45 L. J. Q. B. 381. On appeal, this decision was reversed and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay. 2 Q. B. D. 96; 46 L. J. Q. B. 233. This appeal was then brought.

The Solicitor General (Sir H. S. Giffard) and Mr. Benjamin, Q. C. (Mr. B. Francis Williams was with them), for the appellants: —

The question here is, whether the property in the goods passed from the respondents to Blenkarn. It is submitted that it did.¹

A title to goods may be acquired even where they are obtained upon false pretences. Though it will not be an indefeasible title, and may be voidable, it will, as to third persons at least, be good till it has been avoided. It must in some sense pass the property, for if it did not, it may be doubtful whether a conviction for obtaining the goods could be sustained. Here it is clear that there was in the first instance an intention on the part of the original owner that the property should pass. [LORD PENZANCE: But was it not the intention that it should pass to Blenkiron, but not to Blenkarn?] As to some person in Wood Street the intention plainly did exist that it should pass. [LORD PENZANCE: Is there no distinction between the case of a man who, being deceived, enters into a contract, and that of a man who, being also deceived, does not enter into a contract?] The latter was the case of *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105, so much relied on in the Court below. But that case is distinguishable from the present, for there the facts showed distinctly that the intention was to contract with Thomas Gandell & Co.,

¹ There had been, in the Courts below, a question as to the effect of the statute 24 & 25 Vict. c. 96, with regard to the restitution of the property to the original owner after the conviction of the person

who had fraudulently obtained it. That question was also made the subject of argument in this House, but the judgment did not refer to it.

and with them alone; and the firm of Edward *Gandell & [*462] Todd was a different firm and carried on business at a different place, and was wholly unknown to the plaintiffs, and Edward Gandell having by fraud got hold of the goods sent to the warehouse of Thomas Gandell, carried them off to his own place, and so disposed of them. Here the plaintiffs themselves sent the goods to the person who had corresponded with them, and who did carry on business at 37, Wood Street. The goods reached that destination, and were delivered there according to the address which the plaintiffs had put upon them. The facts of the two cases were unlike, and without in the least doubting the decision in that case, it may well be contended not to be applicable here. Here the original owner allowed the goods to remain in the hands of the person to whom he had sent them, and while there they were sold to the defendants, who were *bonâ fide* purchasers for value. After that the vendor could no longer follow them as his own; his intention had been to transfer them, and the transfer was complete. In no way whatever could the case be compared to one in which money or a bill of exchange was delivered to a person for a particular purpose, and he used it for another, and so could give no title whatever to a third person to whom he passed it. Neither was this a delivery to B., who stated himself to be the agent of some one else when he was not so; it was a delivery to B. himself. Credit was therefore given to him; it was given to Blenkarn & Co., of 37, Wood Street. Then again, in the first instance Mr. Thompson, one of the partners in Messrs. Lindsay's house, made an affidavit of debt against Alfred Blenkarn, which showed that the house recognized Blenkarn as the debtor, and the transaction as one of a sale. That, though not conclusive on the subject, was at least strong evidence of previous intention. It may be admitted that where the authority to part with the property is limited, and the property is parted with in disregard of that limited authority, the title to it would not pass: *Reg. v. Middleton*, L. R., 2 C. C. R. 38; 42 L. J. M. C. 73; but that cannot affect this case, for here the goods were transmitted by the owners themselves to a person and a place described by themselves. The title to the goods was for the time perfect in law, and, being so, the transfer to the defendants made during that time, being made *bonâ fide*, [*463] could not be impeached: *Pease v. *Gloahec*, L. R., 1 P.C.

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219; 35 L. J. P. C. 66. Till the title of *Blenkarn* was disaffirmed it was good, and the property disposed of in the mean time could not afterward be followed in the hands of a third person who had honestly purchased it.

Mr. Wills, Q. C., and Mr. Fullarton, for the respondents: —

Where the circumstances are such that no contract has ever arisen, mere delay in declaring a disaffirmance cannot affect the case. *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J. Ex. 83; *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; see *In Re Reed, Ex parte Barnett*, 3 Ch. D. 123; 45 L. J. Bank. 120; *Hardman v. Booth*. Here there was no contract. The plaintiffs did not know of the existence of two firms of names similar to each other carrying on business in Wood Street; they knew only of *Blenkiron & Co.*, and thought they were dealing with *Blenkiron & Co.*, and sent their goods to that firm. But *Blenkiron & Co.* knew nothing whatever of the matter. There was, therefore, no contract with them. Nor was there any with *Blenkarn*, for by a fraud in using the name of other persons he obtained possession of goods intended for those other persons, and not for him. There was, therefore, no contract with him. If so, no moment existed during which a title to the goods could be given to the defendants. Their conversion of the goods was consequently unlawful.

The Solicitor General replied.

THE LORD CHANCELLOR (LORD CAIRNS): —

My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what * may turn out to be certain infirmities in the [* 464] title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real

owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the mean time, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon [*465] paper. The principal * parties concerned, the respondents and Blenkarn, never came in contact personally, — everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is

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not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn — the dishonest man, as I call him — was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was * merely the one side to a contract, [*466] where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a

case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

Lord HATHERLEY : —

My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here, is this: whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn.

Now the case is simply this, as put by the learned Judge in the Court below; it was most carefully stated, as one might expect it would be by that learned Judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thompson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard," and farther than that, "Did he actually by that fraud induce Mr.

Thompson to send the goods . . . to 37, Wood Street?"

[* 467] * Both these questions were answered in the affirmative

by the jury. What, then, was the result? It was, that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Co., Wood Street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And farther, his letters and invoices were headed "Wood Street," which was not an accurate way of heading them: for he occupied only a room on a third floor, looking into Little Love Lane on

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one side, and looking into Wood Street on the other. He headed them in that way, in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood Street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood Street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkiron of Wood Street, if they had chosen to adopt it, and to no other person whatever, — not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever.

My Lords, it appears to me that that brings the case completely within the authority of *Hardman v. Booth*, where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not to him sold. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman v. Booth* over again.

My noble and learned friend who sits opposite to me (Lord PENZANCE) has called my attention to a case which seems to have been decided on exactly the same principle as *Hardman v. Booth*, and it is worth while referring to it as an additional authority upon *that principle of law. It is the case of [*468] *Higsons v. Burton*, 26 L. J. Ex. 342. There, one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency, — there was no contract, therefore, with the firm; there was no contract ever intended between the vendors of the goods and the

person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron POLLOCK, that I cannot do better than adopt his reasoning: "There was no sale at all, but a mere obtaining of goods by false pretences; the property, therefore, did not pass out of the plaintiffs." The other Judges, who were Barons MARTIN, BRAMWELL, and WATSON, concurred in that judgment. Here, I say, exactly as in those cases of *Hardman v. Booth*, and *Higsons v. Burton*, there was no sale at all; there was a representation, a false representation, made by Blenkarn, by which he got goods sent to him, upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Co. But no contract was made with Blenkarn, nor any contract was made with Blenkiron & Co., because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from [* 469] whom * he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm; or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers;" then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly — I say no more — have passed the property.

But this case is an entirely different one. The whole case, as

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represented here is this; from beginning to end the respondents believed they were dealing with Blenkiron & Co., they made out their invoices to Blenkiron & Co., they supposed they sold to Blenkiron & Co., they never sold in any way to Alfred Blenkarn; and therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

Lord PENZANCE: —

My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by so doing they passed the property in them to Alfred Blenkarn is I conceive the real question to be determined.

The respondents had never seen or even heard of Alfred Blenkarn, when they received a letter followed by several others signed in a manner which was not absolutely clear, but which the writer intended them to take, and which they did take, to be the signature of a well-known house of Blenkiron & Co., which in fact *carried on business at No. 123, Wood [*470] Street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Co. was known to the respondents, and it was also known that they lived in Wood Street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Co. in Wood Street, but in place of No. 123, they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Co., No. 37, Wood Street, London. It is not doubted or disputed that throughout this correspondence and up to, and after, the time that the respondents had despatched their goods to London, they intended to deal and believed they were dealing with Blenkiron & Co., and with nobody else; nor is it capable of dispute that, when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Co., to whom they addressed these goods. The goods, however, were not delivered

to Blenkiron & Co., to whom they were addressed, but found their way to the hands of Alfred Blenkarn, owing to the number in Wood Street being given as No. 37, in place of No. 123,— a mistake which had been purposely brought about by the writer of the letters as I have before mentioned, who was no other than Alfred Blenkarn, and who had an office or room at No. 37, Wood Street.

In this state of things, it is not denied that the contract, or dealing, which the respondents thought they were entering into with Blenkiron & Co., and in fulfilment of which they parted with their goods, and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Co. knew nothing of the transaction. But, say the appellants, it was a contract with, and a good delivery to, Alfred Blenkarn, so as to pass the property in the goods to that individual, although the goods were not addressed to him and the respondents did not know of his existence.

I am not aware, my Lords, that there is any decided case in which a sale and delivery intended to be made to one [*471] man, has *been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there, — whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co."

My Lords, I am unable to distinguish this case in principle from that of *Hardman v. Booth*, to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them; the Court held that there was no contract with Thomas Gandell & Co. as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him.

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In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Co. with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike.

Another case of a similar kind is that of *Higgon's v. Burton*, to which similar reasoning was applied.

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can I think be parallel with that which your Lordships have now to decide. For in the *present case the respondents were [*472] never brought personally into contact with Alfred Blenkarn; all their letters, although received and answered by him, were addressed to Blenkiron & Co., and intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Co., though at a wrong address.

This appeal ought therefore, in my opinion, to be dismissed.

Lord GORDON concurred.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 4th March, 1878.

ENGLISH NOTES.

Mistake *simpliciter* is, as a rule, no defence to an action on a contract. Lord ROMILLY, in *Swaisland v. Dearsley* (1861), 29 Beav. 430, at p. 433, said: "The principle upon which this Court (the Court of Chancery) proceeds in cases of mistake is this: if it appears upon the evidence that there was, in the description of the property, a matter in which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appears on the particulars no grounds for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think that it is sufficient for the purchaser to swear that he made a mistake, or that he did not under-

stand what he was about." This statement of the law was approved in *Tamplin v. James* (1880), 15 Ch. D. 215, 43 L. J. 520, 29 W. R. 311. There a property was put up for sale under the description of "all that Inn with the brew-house, out buildings, and premises known as The Ship, together with the saddler's shop, and premises adjoining thereto, situate at N., Nos. 454 and 455 on the Tithe Map, and containing by admeasurement twenty perches more or less." In the sale-room were plans of the property. At the back of the property were two pieces of garden ground containing together about 20 perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were not divided from the premises with which they were occupied in such a way as to suggest a different ownership. The defendant, who was acquainted with the property and knew that the gardens were occupied along with the inn and the saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants. It was held that mistake was no defence to the action for specific performance. JAMES, L. J., in delivering judgment (p. 221), said: "If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. . . . Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been upheld upon him by holding him to his bargain, and it was unreasonable to hold him to it." See also *Powell v. Smith* (1872), L. R., 14 Eq. 85, 41 L. J. Ch. 734; *Scott v. Littleddale* (1859), 8 El. & Bl. 815; *Preston v. Luck* (1884), 27 Ch. D. 497, 33 W. R. 317, &c., for applications of the same rule.

The principles under which an apparent contract may be avoided by showing mistake entering into the essence of the contract are well expressed by HANNEN, J., in *Smith v. Hughes* (1871), L. R., 6 Q. B. 597, at p. 609, 40 L. J. Q. B. 221, at p. 228: "It is essential," he says, "to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them. *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 33 L. J. Ex. 160 (p. 198, ante).

"But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus, in the case of a sale by sample, where the vendor by mistake

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exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor. *Scott v. Littledale*, 8 E. & B. 815, 27 L. J. Q. B. 201.

“But if, in the last-mentioned case, the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley (ch. 5, p. 85. II.), that a promise is to be performed ‘in that sense in which the promiser apprehended at the time the promisee received it,’ and may thus be expressed: ‘The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time that the promiser did not intend it.’

“If, by any means, he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.”

In the case of *Smith v. Hughes* (*supra*), the action was for breach of contract in refusing to accept a parcel of oats sold to the defendant. The defendant's contention was, that he had intended and agreed to buy old oats, and that those supplied were new. The jury were told that if the plaintiff knew that the defendant thought he was buying old oats, the plaintiff could not recover. But the Court of Queen's Bench held that this was not enough to avoid the sale; that in order to do so the plaintiff must have known that the defendant thought he was being promised old oats.

In contrast with this may be mentioned the case of *Denny v. Hancock* (1870), L. R., 6 Ch. 1, 23 L. T. 686, 19 W. R. 54. That was a case of a sale of a small residential property. The plan exhibited showed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, and including three magnificent trees. He then bid for the property, believing that he was buying everything up to the fence. He afterwards discovered that the three trees and the iron fence stood in the glebe land adjoining the property, the real boundary being denoted by stumps, which were so covered by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not show these trees. The plan was not prepared with an intention to de-

ceive purchasers. The action for specific performance was dismissed on the ground of mistake induced by the plaintiff. See also *Mason v. Armitage* (1806), 13 Ves. 25, 9 R. R. 131; *Higginson v. Clowes* (1808), 15 Ves. 516, 10 R. R. 112; *Clowes v. Higginson* (1813), 1 Ves. & Bea. 524, 12 R. R. 284; *Bascomb v. Beckwith* (1869), L. R., 8 Eq. 100, 38 L. J. Ch. 536.

Mistake will also be a good defence, where the Court has considered that a hardship amounting to injustice would be inflicted on the party by holding him to his apparent bargain, and it is unreasonable to hold him to it. *Payet v. Marshall* (1885), 28 Ch. D. 255, 54 L. J. Ch. 575, 51 L. T. 351, 33 W. R. 608. The plaintiff in that case wrote a letter offering to the defendant to make a lease to him of a portion of a block of three houses, consisting of the first, second, third, and fourth floors of all the three houses at a rent of £500 a year. Defendant wrote in answer accepting the offer, and a lease was executed whereby all the upper floors of the block were demised by the plaintiff to the defendant at the agreed rent. The plaintiff alleged that the first floor of one of the houses was included in the offer and in the lease by mistake, and that he always intended to reserve such first floor for his own use. The defendant denied that he accepted the offer or executed the lease under any mistake. The Court found that there was a mistake on the part of the plaintiff, and gave judgment for rescission with an option to the defendant to accept rectification instead. The same principle runs through the group of cases where the Court orders rescission with the alternative of rectification of the contract on the ground of a mistake of one of the parties. To this class of cases belong *Jones v. Statham* (1746), 3 Atk. 388; *Legal v. Miller* (1750), 2 Ves. Sen. 299; *Ramsbottom v. Gosden* (1812), 1 Ves. & B. 165, 12 R. R. 207; *Townsend v. Stangroom* (1801), 6 Ves. 328, 5 R. R. 312; *Clarke v. Graut* (1807), 14 Ves. 519, 9 R. R. 336; *Lindsay v. Lynch* (1804), 2 Sch. & Lef. 1, 9 R. R. 54; *Davis v. Hone* (1805), 2 Sch. & Lef. 341, 9 R. R. 89; *Garrard v. Grindling* (1818), 2 Swanst. 244; *Howell v. George* (1815), 1 Madd. 1, 15 R. R. 203; *Gordon v. Hertford* (1818), 2 Madd. 106, 17 R. R. 195; *Malins v. Freeman* (1836), 2 Keen. 25; *Manser v. Back* (1848), 6 Hare, 443; *Lestie v. Thomson* (1851), 9 Hare, 268; *Ricketts v. Bell* (1847), 1 De G. & S. 335; *Barendale v. Seale* (1854), 19 Beav. 601; *Webster v. Cecil* (1861), 30 Beav. 62; *Wood v. Searth* (1857), 2 K. & J. 33; *Garrard v. Frankel* (1862), 30 Beav. 445, 31 L. J. Ch. 604; *Bloomer v. Spittle* (1872), L. R., 13 Eq. 427, 41 L. J. Ch. 369; *Olley v. Fisher* (1886), 34 Ch. D. 367, 56 L. J. Ch. 208, 55 L. T. 807, 35 W. R. 301. The case last mentioned shows that where the Statute of Frauds does not interpose a difficulty, the plaintiff in an action, according to the practice since the Judicature Acts, may have

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the instrument which purports to be the contract rectified, and obtain a judgment for specific performance of the contract as so rectified. Or perhaps it is more correct to say that he may have specific performance of the true agreement, notwithstanding an instrument purporting to put the agreement in writing, but which by a mistake embodies a different agreement.

Where a policy of marine insurance is made out in terms which by mistake vary from the terms of the *slip* initiated according to the practice at Lloyd's, questions have arisen similar to the questions above discussed. The principles are really the same, although they have been somewhat obscured by the former distinction between Courts of Law and Equity. In a case of *Mackenzie v. Coulson* (1869), L. R., 8 Eq. 368, there was a suit in Chancery to get a policy of insurance rectified according to the slip. Vice-Chancellor JAMES dismissed the bill, with costs, on the ground that the Court of Chancery does not rectify contracts; and that, in a commercial contract of this kind, a court of law might have been safely left to deal with the contract whatever it was. That was doubtless (in the then state of the courts) the only way to deal with such a case. If the policy was that which the parties adopted as the record of their contract, it could not, according to the well-known legal rule (see notes to *Hussey v. Horne-Payne*, No. 15, p. 168, *supra*), be rectified or varied. If it was not, *cadit questio*, — a Court of law must discover by evidence from other sources what the contract (if there were any contract) was.

As to the true intention and use of the slip and the policy, there has been much discussion. But it has been made clear by the observations of BLACKBURN, J., in the case of *Iouides v. Pacific Fire and Marine Insurance Co.* (1871), L. R., 6 Q. B. 674, 684, 41 L. J. Q. B. 33, 25 L. T. 490, that the slip is that which the parties adopt as the record of their contract, although by reason of the stamp laws the contract cannot be made effectual in a court of law unless expressed in a policy. Therefore a policy which varies from the terms of the slip cannot be conclusive evidence of what the terms of the contract were. If it varies the terms in favour of the plaintiff, the plaintiff can only claim the benefit of the contract contained in the slip. If the policy varied the terms in favour of the defendant, doubtless the plaintiff could not enforce his claim to more than he would be entitled to under the policy; although probably he could use some moral pressure at Lloyd's to get a policy executed according to the slip. What the cases directly decide is that the slip may be used as evidence in any way except to establish the contract to be enforced. *Cory v. Patton* (1872), L. R., 7 Q. B. 304, 9 Q. B. 577, 41 L. J. Q. B. 195 n., 43 L. J. Q. B. 181; *Iouides v. Pacific Fire and Marine Insurance Co.* (1871), L. R., 6 Q. B. 674, 7 Q. B. 517, 41 L. J. Q. B. 33, 190; 25 L. T. 490; 26 L. T. 738.

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When mistake is such as to prevent a *consensus animi ad idem* there is no contract. Such a case arises when the parties to the contract did not intend the same thing. *Raffles v. Wichelhaus*, p. 198, *supra*; *Thorn-ton v. Kempster* (1814), 5 Taunt. 786, 15 R. R. 658. In *Culverley v. Williams* (1790), 1 Ves. Jun. 210, 1 R. R. 118, the bill was for the conveyance of seven acres of copyhold land, part of an estate sold by auction and purchased by the plaintiff, as being comprised in the advertisement of the sale, and described as in the possession of Groombridge. The defendant resisted this claim on the ground that the seven acres were never intended to be included. Lord THURLOW ordered rescission of the contract on the ground of mutual mistake. Where A. proposed certain terms of insurance to the agent of an insurance office, and by mistake wrote down other terms in his proposal, to which the insurance office assented, the Court, at the instance of A., rescinded the contract and ordered repayment of the premium paid. *Fowler v. Scottish Equitable Life Insurance Co.* (1859), 28 L. J. Ch. 225.

Foster v. Mackinnon (1869), L. R., 4 C. P. 704, 38 L. J. C. P. 310, 20 L. T. 887, 17 W. R. 1105, was a case very similar to *Thoroughgood's case* (No. 19, p. 202, *supra*). A very old man was induced to indorse a bill of exchange for £3000, being told that it was a guaranty. The bill was indorsed for value to the plaintiff. It was held that the defendant was not liable. See also *Kennedy v. Green* (1834), 2 My. & K. 699; *Simons v. Great Western Railway Co.* (1857), 2 C. B. (N. S.) 620; *Vorley v. Cooke* (1858), 1 Giff. 230; *In re Victoria Permanent Benefit Building, &c. Society, Empson's case* (1870), L. R., 9 Eq. 597; *Besley v. Besley* (1878), 9 Ch. D. 103. On the other hand, it is decided in *Hunter v. Walters* (1871), L. R., 7 Ch. 84, 41 L. J. Ch. 175, that a person of ordinary intelligence and culture cannot avoid a contract which he signed on the ground that he was misinformed of its contents, or that he did not read it, for it is his own fault to sign without acquainting himself with the contents.

Cundy v. Lindsay (No. 21, p. 211, *supra*) is the type of another class of cases where there is no actual contract owing to mistake in the *personnel* of one of the contracting parties. An earlier instance is furnished by *Boulton v. Jones* (1857), 2 H. & N. 564, 27 L. J. Ex. 117. Jones had addressed an offer of purchase to a firm whose business had been taken over by the plaintiff, who supplied the goods. It was held that there was no contract between the parties. In contrast with such cases must be considered the case of *Hollins v. Fowler*, No. 14 of "Agency," 2 R. C. 410 (L. R., 7 H. L. 757, 44 L. J. Q. B. 169), where there was a real contract, although carried out by a fraud.

Palpable mistake in the quantity contracted for has been held a good

Nos. 19, 20, 21. — *Thoroughgood's Case*; *Couturier v. Hastie, &c.* — Notes.

ground for avoiding the contract. *Henkel v. Pappe* (1870), L. R., 6 Ex. 7, 40 L. J. Ex. 15, 23 L. T. 419, 19 W. R. 106; *Lery v. Green* (1859), 1 El. & El. 969, 28 L. J. Q. B. 319, 7 W. R. 486.

When mistake is such as to cause a failure of consideration, it is fatal to the contract, for instance, where the subject matter of the contract has ceased to exist. *Couturier v. Hastie*, No. 20, p. 204, *supra*; or where a person buys a life interest after the death of the life tenant, *Cochrane v. Willis* (1866), L. R., 1 Ch. 58, 35 L. J. Ch. 36; *Strickland v. Turner* (1852), 7 Ex. 208, 22 L. J. Ex. 115; or where the sale is of a fee simple in remainder expectant on the determination of an estate tail, after the estate has been disentailed, *Hitchcock v. Giddings* (1817), 4 Price, 135 (s. c. Daniell, Ex. Equity 1, 18 R. R. 725); or where a person buys what is already his own, *Cooper v. Phipps* (1867), L. R., 2 H. L. 149; *Beauchamp v. Winn* (1871), L. R., 6 H. L. 223; *Jones v. Clifford* (1876), 3 Ch. D. 779, 45 L. J. Ch. 809, 24 W. R. 979.

AMERICAN NOTES.

The principal cases are all cited by Lawson on Contracts, §§ 212, 213, and their doctrine finds universal support in this country. Mr. Lawson lays emphasis on *Foster v. McKinnon*, and says that its principle has been followed in many American cases. As where one signed a bond which he believed to be a petition; *Schuykill Co. v. Copley*, 67 Pennsylvania State, 386; 5 Am. Rep. 441; or a deed which he believed to be a lease; *McGinn v. Tobey*, 62 Michigan, 252; 4 Am. St. Rep. 848. See also *Bowers v. Thomas*, 62 Wisconsin, 480; *De Camp v. Hanna*, 29 Ohio State, 467; *Cline v. Guthrie*, 42 Indiana, 236; *Baldwin v. Bricker*, 86 Indiana, 221; *Corby v. Weddle*, 57 Missouri, 452; *First Nat. Bk. v. Lierman*, 5 Nebraska, 247.

This principle extends even to negotiable paper in the hands of a purchaser, where the signer without negligence supposed he was signing an instrument of a different character. *Taylor v. Atchison*, 54 Illinois, 196; 5 Am. Rep. 118; *Gibbs v. Linabury*, 22 Michigan, 479; 7 Am. Rep. 675; *Walker v. Egbert*, 29 Wisconsin, 194; 9 Am. Rep. 548; *Briggs v. Ewart*, 51 Missouri, 215; 11 Am. Rep. 445 (overruled in *Shirts v. Overjohn*, 60 Missouri, 305); *Cline v. Guthrie*, 42 Indiana, 227; 13 Am. Rep. 357; *Willard v. Nelson*, 35 Nebraska, 651; 37 Am. St. Rep. 455. Mr. Daniel (Negotiable Instruments, § 851 *a*), cites and approves *Foster v. McKinnon*. That case is also reported in 4 Am. Rep. 240, note, and is cited and approved in *Whitney v. Snyder*, 2 Lansing (New York Supr. Ct.), 477.

So far as can be discovered the signer is always absolved in such cases, unless he has been negligent. He is bound to read for himself if he can, and most cases hold that if he cannot he must procure the paper to be read to him. See Daniel on Negotiable Instruments, *supra*; *Ruddell v. Dillman*, 73 Indiana, 518; 38 Am. Rep. 152; *Williams v. Stoll*, 79 Indiana, 80; 41 Am. Rep. 604. *Chapman v. Rose*, 56 New York, 137; 15 Am. Rep. 401, citing the principal case; *Cannon v. Lindsey*, 85 Alabama, 198; 7 Am. St. Rep. 38; *Ward v. Johnson*,

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51 Minnesota, 180; 38 Am. St. Rep. 515; *Upton v. Tribilcock*, 91 United States, 50. See notes, 11 Am. St. Rep. 309; 37 Id. 458.

Cundy v. Lindsay is approved by Mr. Lawson, and is supported by *Gregory v. Wendell*, 40 Michigan, 413; *Hamel v. Letcher*, 37 Ohio State, 356; *Winchester v. Howard*, 97 Massachusetts, 303; *Randolph Iron Co. v. Elliott*, 34 New Jersey Law, 181. In *Boston Ice Co. v. Potter*, 123 Massachusetts, 28; 25 Am. Rep. 9; P. bought ice of the B. Ice Co., ceased to take it from them on account of dissatisfaction, and contracted to take it from the C. Ice Co. Subsequently the B. Co. bought out the C. Co., and continued to supply P. without notifying him of the change. It was held that the B. Co. could not recover therefor, on the ground that "a party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent;" citing *Boulton v. Jones*, 2 H. & N. 564. To the same effect, *Aborn v. M. T. Co.*, 135 Massachusetts, 283; *Barker v. Dinsmore*, 72 Pennsylvania State, 427; 13 Am. Rep. 697; *McCrillis v. Allen*, 57 Vermont, 595; *Rodliff v. Dallinger*, 141 Massachusetts, 1; 55 Am. Rep. 439. In the last case the Court said: "The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how."

SECTION IV. — *Formal Requirements. — Statute of Frauds.*

No. 22. — WAIN v. WARLTERS.

(1804.)

No. 23. — LAYTHOARP v. BRYANT.

(1836.)

RULE.

THE memorandum in writing required by section 4 of the Statute of Frauds (which applies to contracts for the sale of land, &c.) must show the name or description sufficient to identify the parties, the consideration, the full promise, and any other essential terms agreed upon, the fact of agreement, and the signature of the party to be charged or of his duly authorized agent. Under the 17th section of the Statute of Frauds (now embodied in section 4 of the Sale of Goods Act 1893) the memorandum must at least contain all the terms by which the party to be charged is to be bound.

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5 East, 10-20 (s. c. 1 Smith, 299 ; 7 R. R. 645).

Statute of Frauds. — Promise to pay the Debt of Another. — Memorandum.

No person can, by the Statute of Frauds, be charged upon any promise [10] to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word "agreement" must be understood the consideration for the promise as well as the promise itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that parol evidence of the consideration was inadmissible by the Statute of Frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum* and gave no cause of action.

The plaintiffs declared that at the time of making the promise after-mentioned they were the indorsees and holders of a bill of exchange, dated the 14th of February, 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay to his, Gore's order, £56 16s. 6d.; which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one A. as their attorney to sue Gore and Hall respectively for the recovery of the said sum so due, &c. whereof the defendant, at the time of his promise, &c. had notice. And thereupon, on the 30th of April, 1803, at, &c., in consideration of the premises, and that the plaintiffs, at the instance of the defendant, would forbear to proceed for the recovery of the said £56 16s. 6d., he, the defendant, undertook and promised the plaintiffs to pay them by half past four o'clock on that day £56 and the expenses which had then been incurred by them on the said bill. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto forborne to proceed for the recovery thereof; and that the expenses by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said A., and on account of his having, before the defendant's said promise, *drawn and engrossed certain writs called [*11]

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special *capias*' against Gore and Hall respectively on the said bill, amounted to £20, of which the defendant had notice; yet the defendant did not at half past four o'clock on that day, &c., nor at any time before or since, pay the said sum of £56 and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration the plaintiffs, at the trial at Guildhall, produced the written engagement signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you by $\frac{1}{2}$ past 4 this day fifty-six pounds and expenses on bill that amount on Hall. (Signed) JNO. WARLTERS, (and dated) No. 2, Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, were in writing, as required by the Statute of Frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence, (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum* and void. And Lord ELLENBOROUGH, C. J., upon view of the Statute of Frauds, 29 Car.

II., c. 3, s. 4, which avoids any special promise to answer for [* 12] the debt of another, "unless the agreement upon which * the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c., thought that the term "agreement" imported the substance at least of the terms on which both parties consented to contract, and included the consideration moving to the promise, as well as the promise itself: and the agreement in this sense not having been reduced to writing for want of including the consideration of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the promise or binding

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part of the contract to be in writing, and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and Lawes showed cause against the rule : —

The question is simply this, Whether parol evidence can be given of an agreement which the Statute of Frauds avoids unless it be in writing? The words are “that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, &c.” Now to every agreement there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say that the parol evidence * offered of the consideration, namely, [*13] the forbearance to sue Hall, did not go to contradict the written promise; it is enough that being part, and a material part, of the agreement, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper the debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would before the statute have been void as *nudum pactum* at common law; so it is not made good by the statute without a consideration in law for entering into such an agreement; which agreement, *i. e.*, the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston v. Merceau*, 2 Blac. 1249, where the plaintiff had agreed in

writing with the defendant's testator to let him certain premises at a certain rent; parol evidence, tendered to show that the tenant had agreed to pay a further sum for ground-rent to the ground landlord, was rejected as subversive of the Statute of Frauds; [* 14] although it was there *contended that the evidence offered did not go to alter but to explain the agreement. So in *Gunnis v. Erhart*, 1 H. Blac. 290; 2 R. R. 769, the verbal declaration of an auctioneer at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

Erskine and Marryat, in support of the rule, said that the evidence tendered in the two cases cited went not to explain but to contradict the written agreements; in the one case to increase the quantum of the rent specified, in the other to subtract so much as the charge amounted to from the value of the estate which was offered for sale free from incumbrances. But here the parol evidence went merely to show on what occasion the written agreement had been entered into; and it is in common practice to admit parol evidence for such a purpose: it is part of the *res gestæ*, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the promise by the defendant to pay the debt of Hall. This before the Statute of Frauds might have been proved wholly by oral testimony, but since that statute the promise can only be evidenced by writing signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult indeed to account for the introduction of the word agreement into the latter part of the clause, which in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds in a thing done or to be done, 1 Com. Dig. 311," is more properly applicable to the other branches of the clause, namely, "an agreement on consideration of marriage, or [* 15] *upon contract or sale of lands, &c., or upon any agreement not to be performed within the space of one year, &c.," than to any "special promise by an executor to answer damages out of his own estate," or to any "special promise to answer for the debt, &c., of another." To such promises the word agreement can only be considered applicable so far as it is synonymous to engagement or undertaking, in which sense it is often

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used in common parlance, and therefore means in this respect the agreement or promise to pay the debt of another. Besides, the statute does not require the whole agreement to be set out in form, but it is sufficient if there be a note or memorandum of it in writing; that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words therefore the promise is made, which before the statute would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute under the like circumstances. But in either case the inducement for making such promise, which is part of the *res gestæ*, may be evidenced by parol. Thus suppose a promise in writing to pay the expenses attending a certain bill drawn by another, parol evidence must necessarily be let in to show to what bill the promise was meant to apply, and how the expenses arose, and the bill itself would be produced. And this would be evidence not to vary, but to corroborate the written promise. The 3d, 7th, and 17th sections of the Act all require the signature of the party to some note in writing in order to charge him with the several subject matters of those sections. But in all those cases the party must be charged on the special written agreement; but here he is charged on the promise, of which the writing is only evidence. * Yet the 4th section supposes [*16] that the party is to be charged upon the agreement, "unless the agreement upon which such action shall be brought," &c.; which shows that agreement as there used means no more than undertaking or engagement. And in this sense an agreement signed by one party only on a sale by auction was holden sufficient to charge him within the Statute of Frauds. *Seton v. Slade*, 7 Ves. 265; 6 R. R. 124.

[Lord ELLENBOROUGH, C. J.: There it was deemed sufficient proof of such agreement so as to charge the party signing it. He was estopped by his signature from protecting himself under the statute. But there the consideration appeared in writing.]

They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word "agreement" had never before received such a construction as applicable to this branch of the clause.

Lord ELLENBOROUGH, C. J., after noticing the definition of the word "agreement" by Lord C. B. COMYNS, who considered it as a

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thing to which there must be the assent of two or more minds, and which, he says, ought to be so certain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of Plowden; and better (his Lordship observed) could not be cited:—

In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the Statute of Frauds has the word "agreement" ("unless the agreement upon which the action is brought, or some memorandum or note [* 17] thereof shall * be in writing," &c.). And the question is,

Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord HALE,¹ one of the greatest Judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special promise; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the agreement, by which must be understood the agreement in respect of which the promise was made, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made

¹ Lord MANFIELD expressed a doubt HALE's having left some loose notes behind him, which were afterwards unskilfully digested. 1 Blac. 99.

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upon a condition precedent, which the party *charged may [*18] not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the agreement should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by COMYNS, Plowd. 5 *a*, 6 *a*, 9, to which may be added Dyer, 336 *b*, all show that the word “agreement” is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word “agreement” in the statute, which appears to be most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it.

GROSE, J.:—

It is said that the parol evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself? Now the words of the statute are “that *no action shall be brought whereby to charge [*19] the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the “agreement” upon which such action shall be brought, or some memorandum or note thereof, shall be in writing” &c. What is required to be in writing, therefore, is the “agreement” (not the promise, as mentioned in the first part of the clause), or some note or memorandum of the agreement. Now the “agreement” is that which is to show what each party is to do or perform, and by which both parties are to be bound; and this is required to be in writing. If

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it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged upon it. But if we were to adopt this construction it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the "agreement," by which must be understood the "whole agreement," should be in writing.

LAWRENCE, J. : —

From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my Lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but [* 20] * it goes on to direct that no person shall be charged on such promise unless the "agreement," or some note or memorandum thereof, that is, of the "agreement," be in writing; which shows that the word "agreement" was meant to be used in a sense different from promise, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the "agreement," that ought also to be stated in writing.

LE BLANC, J. : —

If there be a distinction between "agreement" and "promise," I think that we must take it that "agreement" includes the consideration for the promise as well as the promise itself; and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the Act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless the promise or agreement upon which the action is brought, or some note or

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memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word "agreement," which means the consideration for which as well as the promise by which the party binds himself.

Rule discharged.

Laythoarp v. Bryant.

• 2 Bing. N. C. 735-748 (s. c. 3 Scott, 238; 2 Hodges, 25).

Statute of Frauds. — Sale of Interest in Land. — Memorandum.

The defendant purchased certain leasehold premises at an auction, and [735] signed a memorandum of the purchase on the back of a paper containing the particulars of the premises, the name of the owner, and the conditions of sale: *Held*, that the defendant was bound by his contract, notwithstanding it was not signed by the vendor.

This was an action against the defendant to recover damages for loss occasioned to the plaintiff by the defendant's refusing to pay for certain leasehold premises he had purchased at an auction, on the 3rd of December 1833, for £441.

The particulars and conditions of sale announced that the lease and goodwill of the premises, situate in Stoke Newington, in which the coke, coal, and seed * trades had been carried [* 736] on, would be peremptorily sold by auction by Mr. Thomas Ross, at the Auction Mart, on the 3d of December, by order of Mr. W. Laythoarp, the proprietor, retiring from the trade.

The defendant signed a memorandum of the purchase at the back of a paper containing the particulars and conditions of sale, but, being known to the auctioneer, was not required to pay any deposit. On the 12th of December the plaintiff's solicitor sent defendant an abstract of the plaintiff's title, and by letter called on him to proceed with the purchase, when the defendant, saying he had only bid at the plaintiff's request, refused to complete the purchase, and returned the abstract. An assignment of the lease, prepared by the solicitor of the ground landlord, accompanied with a letter from the plaintiff's solicitor, was then sent to the defendant; this he also returned, still refusing to complete the contract, but making no objection to the title. The plaintiff thereupon sold the premises again, for £194 5s., and brought this action to recover the difference between that sum and £441, the price which the defendant had agreed to pay.

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A verdict having been found for the plaintiff,

Acherley, Serjt., pursuant to leave reserved at the trial, moved to set aside the verdict, and enter a nonsuit instead, on the ground that the plaintiff's name was not in the contract, which appeared to be made with Ross the auctioneer: that it was not binding on the plaintiff; that therefore, for want of mutuality, the contract was inoperative; and also as not being signed pursuant to the fourth section of the Statute of Frauds. He relied on *Lawrenson v. Butler*, 1 Sch. & Lef. 13, where Lord REDESDALE refused to en-

force a specific performance, on the ground, that without a [*737] signature to bind the * vendor there was no mutuality in the contract; and said, "I confess I have no conception that a Court of Equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance according to the advantages which it might be supposed that they were to derive from it; because otherwise it would follow that the Court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance. This is not equity as it seems to me. If, indeed, there was a concealment, or an ignorance of the facts on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement executed *cy près*; that is, a new agreement is to be made between the parties."

In *O'Rourke v. Perceval*, 2 Ball & Beatty, 58; 12 R. R. 68, Lord MANNERS approved of that decision; and in *Martin v. Mitchell*, 2 Jac. & Walk. 428, Sir W. GRANT says, "When one party having entered into a contract that has not been signed by the other party, afterwards repents, and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus penitentiae*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual; and how can it be complete as to the one and not as to the other?"

A rule *nisi* having been granted,

Bompas, Serjt., and Steere showed cause. It sufficiently [*738] appears from the particulars of sale, that Ross was * acting

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as agent to the plaintiff, and that the plaintiff was a party to the contract. The contract is complete when the auctioneer's hammer falls. *Payne v. Cave*, 3 T. R. 148; 1 R. R. 679. And a Court of equity will enforce specific performance, where there is an express undertaking on the part of the purchaser. *Palmer v. Scott*, 1 Russ. & Mylne, 391. Under the fourth section of the Statute of Frauds, all that is requisite is, that the agreement should be in writing, and signed by the party to be charged. It is true that to constitute an agreement, the consideration must appear, *Wain v. Warters*, 5 East, 10; 7 R. R. 645, p. 231, *ante*; but an objection on the ground of want of mutuality has never been made before. Agreements similar to the present have been repeatedly enforced in Courts of equity, even under the 17th section of the Statute of Frauds, which enacts that no contract for the sale of merchandise shall be good, unless upon a part delivery, a payment of earnest, or a note in writing of the bargain, "made and signed by the parties to be charged by such contract, or their agents: whereas the 4th section only enacts that no action shall be brought upon any sale of lands, unless the agreement on which such action shall be brought, or some note thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorised. In *Buckhouse v. Crosby*, 2 Equ. Cas. Abr. 33, the LORD CHANCELLOR said, "he had often known the objection taken, that a mutual contract in writing ought to appear on both sides; but that that objection had as often been overruled." In *Ston v. Slade*, 7 Ves. 275; 6 R. R. 129, Lord ELDON said, "This agreement is signed by the defendant only; but that makes him within the statute a party to be charged." In *Coles v. Trecothick*, 9 Ves. 250; 7 R. R. 178, it is said to have been laid down by Lord *HARDWICKE, "that it is not necessary the identical agreement should be signed; but any note or memorandum will do." *Tawney v. Crowther*, 3 Br. Ch. Cas. 161-318, and *Hatton v. Grey*, 2 Br. Ch. Cas. 164, established the same principle. *Lawrenson v. Butler*, goes only to the point of specific performance not to the validity of the contract, and it is the first case in which any doubt has been raised. But in *Lord Ormond v. Anderson*, 2 Ball & Beatty, 370; 12 R. R. 107, Lord MANNERS says, "An objection has been made to the execution of this agreement, on the ground that it has not been signed by the plaintiff, and that the defendant could not have enforced it against the plaintiff. I am

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very well aware, that a doubt has been entertained by a Judge in this Court of very high authority, whether Courts of equity would specifically execute an agreement where one part only was bound. There exists no provision in the Statute of Frauds to prevent the execution of such an agreement; and Sir James MANSFIELD, who certainly had great experience in Courts of equity, lays it down in the case of *Allen v. Bennett*, 3 Taunt. 169, 176; 12 R. R. 633, that a contract signed by one party would be enforced in equity against that party, and that such was the daily practice of that Court." And the same view was taken by Sir W. GRANT who says in *Western v. Russell*, 3 Ves. & Beames, 192; 12 R. R. 179, "after the cases that have been determined, I should hardly be at liberty, notwithstanding the considerable doubt thrown upon that point by Lord REDESDALE in *Clinan v. Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3, No. 70, *post*, to refuse a specific performance upon the ground that there was no agreement signed by the party seeking a performance." In Courts of law the name of the purchaser, written by the auctioneer acting as his agent, has always been held sufficient to bind him, *Emmerson v. Heelis*, 2 Taunt. 38; 11 R. R. 520; and here the plaintiff's name was in the conditions of sale. In *Allen v. Bennett*, 3 Taunt. 169; 12 R. R. 633, [*740] it was held that an order for goods, * written and signed by the seller in a book of the buyers, but not naming the buyers, might be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the Statute of Frauds. And Sir J. MANSFIELD, C. J., said, "It was then objected, that one party who has not signed is not bound; but the fact was the same in the cases of *Egerton v. Matthews*, 6 East, 307; 8 R. R. 489, and *Champion v. Plummer*, 1 Bos. & P. (N. R.) 252; 8 R. R. 795, and the objection was never taken in either of those cases; but the whole of this case supposes that the plaintiff had agreed. Suppose he has not contracted by writing, he has by parol, and he is bound in honour; and it has never yet been decided that an obligation in honour would not be a good consideration. All these cases, *Egerton v. Matthews*, *Saunderson v. Jackson*, 2 Bos. & P. 238; 5 R. R. 580, and *Champion v. Plummer*, suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only;

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and yet a Court of equity can no more dispense with the Statute of Frauds, than a court of law can; there is no reason therefore to set aside the verdict, and the rule must be discharged."

In the present case, the letters of the plaintiff's attorney upon sending the abstract and the assignment, may, according to the foregoing decision, be connected with the defendant's signing the particulars of sale, and constitute an agreement binding on the plaintiff, even according to the view taken by the defendant's counsel.

Atcherley and Busby, in support of the rule.

In order to bind a purchaser of real estate, there must, under the 4th section of the Statute of Frauds, be a mutuality in the contract, as well as a consideration expressed in writing.

Without those ingredients, there can * be no agreement; [* 741] and though the 17th section of the statute requires only a note of the bargain upon a sale of chattels, the 4th section, on a sale of real property, requires a note of the agreement. Here, upon the face of the particulars, the property appears to be sold by Ross the auctioneer, not by the plaintiff, and the plaintiff having omitted to sign, there is no agreement between him and the defendant. There is nothing to fix the plaintiff; nothing on which the defendant could have sued him for a breach of contract. The letters of the plaintiff's attorney accompanying the abstract and the assignment of the lease, are mere offers, and not an engagement to sell. The authorities relied on for the plaintiff are either cases in equity where the question has turned on specific performance, or questions on the 17th section of the statute. Now, upon a demand for specific performance, if the plaintiff alleges a contract in his bill, the defendant, unless he puts himself upon the statute in his answer, admits the existence of the contract. *Roberts on Frauds*, p. 106; *Whitchurch v. Beris*, 2 Br. Ch. Cas. 564. But even in equity it is required that the writing the plaintiff seeks to enforce should import the privity and assent of both parties. *Charlwood v. Duke of Bedford*, 1 Atk. 497. And in *Champion v. Plummer*, 1 Bos. & P. (N. R.) 254; 8 R. R. 797, Sir James MANSFIELD said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs; there cannot be a contract without two parties, and it is customary

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in the course of business to state the name of the purchaser, as well as of the seller, in every bill of parcels. This does not appear to me to amount to any memorandum in writing of a [* 742] bargain." *Gosbell v. Archer*, 4 Nev. & Man. 485, shows that the Courts are not disposed to construe the statute away. Even, independently of the statute, no agreement can be enforced without an actionable mutuality between the parties. In *Lees v. Whitcomb*, 5 Bing. 34, it was held that a written agreement "to remain with A. B. two years for the purpose of learning a trade," was not binding for want of an engagement in the same instrument by A. B. to teach.

TINDAL, C. J. This case comes before the Court on two objections.

First, that when the contract is inspected it does not contain the name of one of the parties. I admit that an agreement is not perfect unless in the body of it, or by necessary inference, it contain the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise. Looking at this contract, as it may be collected from the particular of sale, it appears to be an agreement by which Ross sells property on behalf of Laythorp. When, in the outset, it says that the property will be sold, subject to conditions, we are referred to the conditions in the same paper; and there we see that Ross is an auctioneer who sells for Laythorp. That gets rid of the objection therefore, that Laythorp's name is not contained in the contract.

The second objection is of great importance: that the contract has not been signed by the vendor. In order to determine the validity of the objection we must look to section 4 of the Statute of Frauds. That section directs that "no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to [* 743] charge the defendant upon any special promise *to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the

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party to be charged therewith, or some other person thereunto by him lawfully authorised." And the object of the statute was, that no action should lie unless where it could be proved at the trial that the agreement had been signed by the party to be charged. First, no action against any executor or administrator; that is, where an executor is defendant; then, "or to charge the defendant upon any special promise, &c.," — there, the term is, expressly, defendant, — "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party —" By what party? By "the party to be charged therewith," — the defendant in the action.

But then it is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's. The preamble runs, "For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." And the whole object of the Legislature is answered when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and mutuality of claims. * It is true the consideration [* 744] must appear on the face of the agreement. *Wain v.*

Walters was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth. But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement, in truth, is made before any signature.

Let us apply this to several of the cases pointed out in the fourth section. I agree that the same principle must be applied to all; but let us see whether in any it has been dreamed of that there must be a signature by both parties. In the first place, take the case of a letter from an executor. Who ever heard that in order to charge him there must also be a letter from the party addressed? If the executor's letter contain merely an offer, that offer indeed must be accepted before it can be binding; but if it contain a promise on adequate consideration, no further signature is wanting to its validity. Let us look at the next case, — an engagement to pay the debt of a third person. Is it not every

day's practice to put in a guaranty signed by the surety? but I never heard it objected that unless you show also the signature of the other party the guaranty is void. No such objection was made in *Wain v. Walters*, although it would have afforded an easy answer to the plaintiff's claim.

The word agreement, therefore, is satisfied, if the writing states the subject-matter of the contract; the consideration; and is signed by the party to be charged.

Among the several authorities cited, I will only refer to two, which seem to decide this cause. In *Emmerson v. Heelis* there was a sale by auction of some growing turnips. Upon a bidding

by the defendant's servant, on the part of the defendant, [* 745] the lot was knocked down to * him; the auctioneer wrote

the defendant's name opposite the description of the lot in the particulars of sale; and the contract was held valid notwithstanding there was no signature on the part of the vendor. *Allen v. Bennett* was a decision on the 17th section, but it was held that there was no occasion for a signature by the vendor, although the word in that section is parties; in section 4, party. *Lees v. Whitcomb* does not bear out the point for which it has been cited. For, first, it turned on the want of consideration; and, secondly, on a variance between the record and the evidence. As to the decisions in Courts of equity, I can only say that in the greater number of them there has not been a signature by both parties, and notwithstanding the *dicta* of Lord REDESDALE and Sir T. PLUMMER, — no doubt great authorities, — Courts of equity have continued the same stream of decision as before.

PARK, J. I put out of view the decisions in Courts of equity, although the greater proportion of them is in favour of the construction we now adopt, and those Courts have not followed the *dicta* of Lord REDESDALE and Sir THOMAS PLUMMER. And the cases on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the fourth. But even in those cases, where the language of the section is parties, not party, it was not held necessary that the contract should be signed by both. In *Saunderson v. Jackson*, 2 Bos. & P. 238: 5 R. R. 580, the name of the buyer was not at first inserted in the contract; but a letter was found referring to it, and it was held the two papers might be connected together. And *Bowen v. Morris*, 2 Taunt. 374, confirms

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that decision. Then, with respect to the construction of the fourth section, it *is best not to make fanciful distinctions, but to look at the words of the statute: "No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

This is signed by the party to be charged; the consideration is duly stated, and the name of the auctioneer and of the vendor appears in the conditions. In *Lees v. Whitcomb* the only question was, whether the contract was truly set out in the declaration.

VAUGHAN, J. All the essential requisites of sect. 4, both according to the letter and spirit of the Act, have been complied with. The argument has proceeded on a fallacy arising out of a misconception of the case of *Wain v. Walters*. That decision never turned on the ground that the mutuality of a contract must appear, but only that the note or memorandum must show the consideration as well as the promise, otherwise all the inconveniences would prevail which the statute was meant to obviate.

The present objection has not been taken before, and is not sanctioned by any of the great authorities. In *Seton v. Slade*, 7 Ves. 275, 6 R. R. 129, a signature by one party was held sufficient; and *Fowle v. Freeman*, 9 Ves. 351; 7 R. R. 219, is a decision to the same effect. In *Bowen v. Morris*, 2 Taunt. 387, Sir J. MANSFIELD said, "In equity, a contract signed by one party would be enforced, and it was not clear that it was different in law."

The Courts of equity, with the exception of the *dicta* of Lord REDESDALE and Sir T. PLUMMER, present one uniform stream of authority. There is nothing contrary at *law; [* 747] and looking at the words of the statute, they are, "No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Is not this an agreement which fulfils the requisites of the statute inasmuch as it states the consideration for the contract, and the promise, and is signed by the party to be charged?

BOSANQUET, J. My opinion is founded on the words of the fourth section of the statute, as well taken by themselves as contrasting them with sect. 17. It is said there has been some differ-

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ence of opinion on the subject in Courts of equity ; although the preponderance of authority is in favour of the construction we now adopt ; I find no doubt in Courts of law ; but if there be any, we must revert to the language of the statute : “ No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” This fourth section does not avoid contracts not signed in the manner prescribed ; it only precludes any right of action. The 17th section is stronger, and avoids contracts not made as the section prescribes ; yet even under that section it has been held sufficient if a contract be signed by the party to be charged. In the 4th section, the language is, expressly, the party to be charged. It is said there must be an agreement, and, to be binding, it must be signed. No doubt that is so ; and the question is, is this an agreement ? It states the particulars of the property to be sold ; it incorporates the name of the purchaser, the seller, the [* 748] property, and the price ; it * includes all the requisites of an agreement, and the defendant testifies by his signature that such an agreement exists. The question is, can the vendor enforce it, if it be not signed by himself ?

The statute requires that it shall be signed by the party to be charged ; and it was not intended to impose on the vendor the burthen of the proof of some other paper in the hands of the opposite party, and which the vendor may have no means of producing ; for it often happens that each party delivers to the other the part signed by himself. A common case is, where an agreement arises out of a correspondence ; it often happens that a party is unable to give evidence of his own letter ; and he is not to be defeated because he cannot produce a formal agreement signed by both the parties to the contract.

My opinion being formed on the language of the statute, it is unnecessary to observe on the letters written on the part of the plaintiff ; but if there had been any doubt as to the extent of what the statute requires, I should have thought those letters would have supplied the deficiency.

Rule discharged.

ENGLISH NOTES.

The requisites of a sufficient memorandum are: (a) The Parties; (b) The Promise; (c) The Consideration.

(a) *The Name or Description of the Parties.* In *Vandenberg v. Spooner* (1866), L. R., 1 Ex. 316, 35 L. J. Ex. 201, 14 W. R. 843, "S. agrees to buy the whole of the lots of marble purchased by B. now lying at Lyme Cobb, at 1s. per foot," was held not to be a sufficient memorandum, as B.'s name was not mentioned as a seller. In *Newall v. Radford* (1868), L. R., 3 C. P. 52, 37 L. J. C. P. 1, 17 L. T. 118, 16 W. R. 97, on a purchase of flour the defendant's agent, J. W., made the following entry in a book belonging to N.: "Mr. N., 32 sacks culasses, at 39s. 280ths., to wait orders. J. W." In an action by N. for non-delivery of the flour, this entry was proved, and it was established by parol evidence that N. was a baker and that the defendant was a flour merchant. In the correspondence which ensued N. wrote to J. W. about the flour he "had bought," and J. W. wrote in reply about the flour he "had sold." It was held that the entry was a sufficient memorandum: for that the parol evidence of the relative trades of the parties was admissible, and independently of the correspondence showed that the defendant was the seller and the plaintiff the buyer of the flour. In *Hood v. Barrington* (1868), L. R., 6 Eq. 218, description of the vendors as "executors of F." was considered sufficient. It has been held that the word "vendor" is not a sufficient description to identify the person who contracts to sell, *Potter v. Duffield* (1873), L. R., 18 Eq. 4, 43 L. J. Ch. 472, 22 W. R. 585; *Jarrett v. Hunter* (1887), 34 Ch. D. 182, 56 L. J. Ch. 141, 55 L. T. 727, 35 W. R. 132; but that the word "proprietor" is sufficient. *Sale v. Lambert* (1873), L. R., 18 Eq. 1, 43 L. J. Ch. 470, 22 W. R. 478, *Rossiter v. Miller*, No. 17, p. 174, *ante*, 3 App. Cas. 1124. Where an agreement for the sale of real estate did not disclose the names of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale and that they had carried on operations thereon, the vendors were held to be sufficiently described. *Commins v. Scott* (1875), L. R., 20 Eq. 11, 44 L. J. Ch. 563, 32 L. T. 420, 23 W. R. 498. Description of a vendor as "trustee selling under a power of sale" is sufficient. *Catling v. King* (1877), 5 Ch. D. 660, 46 L. J. Ch. 384, 36 L. T. 526, 25 W. R. 550. In an agreement for sale of land it is sufficient if the name of the agents appear on the receipt for the deposit instead of that of the real purchaser. *Smith v. Breutuell* (1888), W. N. 69.

The names of the parties need not all be in the same document. In *Warner v. Willington* (1856), 3 Drew. 533, 25 L. J. Ch. 662, an agree-

ment for lease signed by the lessee did not disclose the lessor's name, which was, however, mentioned in a letter from the lessee to the lessor. This was held sufficient. In *Burton v. Rust* (1872), L. R., 7 Ex. 1, 41 L. J. Ex. 1, 26 L. T. 502, 20 W. R. 100 (affirmed in Exchequer Chamber, L. R., 7 Ex. 279, 41 L. J. Ex. 173, 27 L. T. 210, 20 W. R. 1014), the vendor's signature was contained in a letter written by him, and the rest of the memorandum in a paper written by the purchaser.

The following cases show that a writing deficient in the name or description of one of the parties is insufficient as a memorandum: *Williams v. Lake* (1860), 29 L. J. Q. B. 1 (absence of creditor's name in a contract of guaranty); *Skelton v. Cole* (1857), 1 De G. & J. 587 (absence of purchaser's name); *Williams v. Jordan* (1877), 6 Ch. D. 517, 46 L. J. Ch. 681 (absence of lessor's name).

(b) *The Promise*, or description of the object dealt with. Nothing less than the full promise or complete description of what is given in return for the consideration will do. Thus in *Fitzmaurice v. Bayley* (1860), 9 H. L. Cas. 78, the omission of the duration of a lease in the agreement for it avoided the memorandum. In *Caddick v. Skidmore* (1858), 2 De G. & J. 52, 27 L. J. Ch. 153, the following receipt was held to be insufficient as a memorandum in writing of a contract to work a mine: "Received from A. B. £250, his share of dividend in instalment due to Messrs. B. (the lessors of the mine) for the T. mine." In *Nesham v. Selby* (1872), L. R., 7 Ch. 406, 41 L. J. Ch. 551, 26 L. T. 568, the memorandum was contained in two letters, the first of which mentioned all the items of an agreed lease, except its commencement, and the second mentioned the commencement with other terms not agreed upon between the parties. Held, that the first letter was insufficient, and as the second introduced other terms it could not cure the defect. In *Marshall v. Berridge* (1882), 19 Ch. D. 238, 51 L. J. Ch. 329, 45 L. T. 599, 30 W. R. 93, omission of the commencement of a lease in the agreement vitiated the latter as a memorandum. In *Shardlow v. Cotterill* (1882), 20 Ch. D. 90, 51 L. J. Ch. 353, 45 L. T. 572, 30 W. R. 143, the conditions of sale of real property by auction did not describe the property to be sold. The plaintiff bought a lot and the auctioneer gave the purchaser the following memorandum signed by himself and receipt signed by the vendor: "The property duly sold to A. Butcher, Pinxton, and deposit paid at close of sale." — "Pinxton, March 29, 1880. Received of A. the sum of £21 as deposit on property purchased at £420, at the Sun Inn, Pinxton, on the above date." Held, that the receipt and memorandum were sufficiently connected, and that the Statute was satisfied.

(c) *The Consideration*. This is considered in the principal case of

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Wain v. Warlters: which, after various conflicting decisions, was confirmed in *Saunders v. Wakefield* (1821), 4 B. & Ald. 595. There the defendant, in consideration of cessation of an action against A. on a bill of exchange by the plaintiff, gave the following memorandum to the plaintiff: “Mr. Wakefield will engage to pay the bill drawn by A. in favour of Stephen Saunders.” This was held to be insufficient as a memorandum owing to the omission of consideration. The necessity for mentioning the consideration in a contract of guaranty has been done away with by the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97, s. 3). There must, however, be a consideration. *Phillips v. Bateman* (1812), 16 East, 356; and this does not appear to be affected by the Act.

(d) *Signature of the Party to be charged*. See Nos. 24 & 25, *infra*.

Any document or documents containing all the above-mentioned requisites is a sufficient memorandum. For instance, in *Sarl v. Bourdillon* (1857), 1 C. B. (N. S.) 188, 26 L. J. C. P. 78, where a buyer of jewelry wrote his address with the articles purchased and their prices on an invoice on which the seller's name was printed; this was held to be a sufficient memorandum. In *Barkworth v. Young* (1857), 4 Drew. 1, 26 L. J. Ch. 153, the affidavit of an intending settlor embodying a verbal promise of settlement made by him was held to be sufficient. In *Parton v. Crofts* (1864), 16 C. B. (N. S.) 11, 33 L. J. C. P. 189, 10 L. T. 34, 12 W. R. 553, the sold note constituted a sufficient memorandum to charge the purchaser. In *Watts v. Ainsworth* (1862), 1 H. & C. 83, 31 L. J. Ex. 448, 6 L. T. 252; *Smith v. Neale* (1857), 2 C. B. (N. S.) 67, 26 L. J. C. P. 143; *Reuss v. Picksley* (1866), 35 L. J. Ex. 218, a written and signed offer verbally accepted was held to be sufficient. So a letter from a purchaser to his agent containing all the terms, *Gibson v. Holland* (1866), L. R., 1 C. P. 1, 35 L. J. C. P. 5, 13 L. T. 293, 14 W. R. 86.

When the agreement is contained in more than one document, they cannot be connected by merely parol evidence so as to constitute a memorandum under the statute. *Boydell v. Drummond* (1809), 11 East, 142, 2 Camp. 157, 10 R. R. 450. There an edition of Shakespeare was to come out in 18 monthly parts. The defendant subscribed his name in a book intituled “Shakespeare subscribers, their signatures,” but the book did not refer to a printed prospectus which contained the terms of the contract. It was held that parol evidence could not be admitted to connect the two. So in *Rishton v. Whatmore* (1878), 8 Ch. D. 467, 47 L. J. Ch. 629, where the auctioneer signed for a purchaser of land in a book which did not refer to the catalogue containing the conditions of sale. So in *Potter v. Peters* (1895), W. N. 37, the memorandum of a contract for the sale of lands was alleged

to be contained in four letters written by the vendor's agent to the vendor or to his solicitor. Two of them were signed by the agent's clerk, and in the last signed by the agent there was no reference to those signed by the clerk. It was held that there was no sufficient memorandum.

But two papers may by intrinsic evidence (with the aid of parol evidence of surrounding circumstances in order to construe them) be so connected as to constitute a memorandum.

The leading case upon this subject is *Ridgway v. Wharton* (1858), 6 H. L. Cas. 238, 27 L. J. Ch. 46, in which the subject was fully discussed. The rule to be extracted from it appears to be the following (see Campbell on Sale, 2nd ed. p. 309): Where there are two (or it may be more) writings, one containing the terms, and the other signed, but not on the face of it containing the terms, and such writings are capable (having regard to the circumstances under which they were respectively written and signed) of being with legal certainty so construed that the latter refers to the former as a document embodying or further setting forth the terms of the contract; then parol evidence is admissible to prove those circumstances in order to establish this construction; and this construction being established, the documents may be read together as a note or memorandum in writing of the contract. This principle is further illustrated by the cases of *Buxton v. Rust* (1872), L. R., 7 Ex. 1, 279, 41 L. J. Ex. 1, 173; *Long v. Millar* (1879), 4 C. P. D. 450, 48 L. J. C. P. 596, 41 L. T. 306, 27 W. R. 720; *Shardlow v. Cotterill* (1881), 20 Ch. D. 90, 51 L. J. Ch. 353, 45 L. T. 572, 30 W. R. 143; *Cave v. Hastings* (1881), 7 Q. B. D. 125, 50 L. J. Q. B. 575, 45 L. T. 348; and *Craig v. Elliott* (1885), 15 L. R. Ir. 257.

The rule is still more elastic where it is merely required to supplement an incomplete memorandum which is signed by the party to be charged with another also signed by him. Here it is sufficient that the papers are (having regard to surrounding circumstances) capable of being with legal certainty so construed as to relate to one and the same transaction, and that when read together they disclose all the essentials of the contract. Illustrations of this are: *Allen v. Bennett* (1810), 3 Taunt. 169, 12 R. R. 633; *Western v. Russell* (1814), 3 Ves. & B. 187, 13 R. R. 178; *Warner v. Willington* (1856), 3 Drew. 523, 25 L. J. Ch. 662; *Baumann v. James* (1868), L. R., 3 Ch. 508; *Studds v. Watson* (1884), 28 Ch. D. 305, 54 L. J. Ch. 626, 52 L. T. 129, 33 W. R. 118; and *Oliver v. Hunting* (1890), 44 Ch. D. 205, 59 L. J. Ch. 255, 62 L. T. 108, 38 W. R. 618.

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AMERICAN NOTES.

The rule probably states the law as it is pronounced generally in this country, except as to the necessity for expressing the consideration. Upon this point the authorities differ. In a few States it is enacted in the statute that the consideration shall be stated, and in many it is enacted that it need not be stated. In New York the consideration must be stated; *Sears v. Brink*, 3 Johnson (New York), 210; 3 Am. Dec. 475; *Justice v. Lang*, 42 New York, 522 (now required by statute); so in Vermont; *Idev v. Stanton*, 15 Vermont, 685; 10 Am. Dec. 698. Mr. Browne (Statute of Frauds, § 390) says: "In this country, such has been the contrariety of opinion upon the doctrine of *Wain v. Warlters*, that it would scarcely afford any useful purpose to attempt to weigh the cases with a view to ascertain which way the balance of judicial opinion may incline. In each of the States the point has been presented, and in each has been decided as seemed to its Courts wisest in point of policy or most commended by authority. Of those States where the word 'agreement' is retained in the clause requiring the memorandum, the doctrine of *Wain v. Warlters*, is repudiated in Maine, Vermont, Connecticut, Massachusetts, North Carolina, Ohio, and Missouri; but it has received the sanction of the Courts in New Hampshire, New York, New Jersey, Maryland, South Carolina, Georgia, Indiana, Michigan, and Wisconsin. In the statutes of some other States the word 'agreement' does not so occur, but the word 'promise' is coupled with it in the clause in question, and the Courts of those States have generally dispensed with the statement of the consideration on the ground of that difference." It would seem that Mr. Browne ranks Vermont on the wrong side, and that if Mr. Lawson is right (Contracts, § 79), the point is regulated by statute in Maine, Massachusetts, New Jersey, and Michigan, among the States enumerated by Mr. Browne as depending on judicial decision.

In the leading case of *Packard v. Richardson*, 17 Massachusetts, 122; 9 Am. Dec. 123, "the varied fortunes of the law of that case" (*Wain v. Warlters*), "both in England and America, are shown with learned and painful elaboration by PARKER, C. J., and the decision disapproved;" *Sheehy v. Adarene*, 11 Vermont, 541; 98 Am. Dec. 623. "In Day's edition (1817), of East's reports is also a very learned, acute, and exhaustive note by Judge SWIFT, and enlarged by the editor, disapproving that decision." Id. Chief Justice PARKER devoted many pages to *Wain v. Warlters*, considered the doctrine of it "novel and unsound," and "does not find that it has been recognised anywhere but in New York," cited Kent's dissatisfaction with it, and observed: "Indeed I cannot but entertain the belief that neither the British Parliament nor the Legislature of New York or Massachusetts ever looked into Plowden or Comyns, or any law dictionary to ascertain the force and meaning of that term, as has been done since to make out the construction of the statute. Sometimes the sense of an instrument or statute is lost by looking too deep for it, as men have been known to impoverish themselves by digging into the bowels of the earth for riches which they would have obtained with less labour by working upon its surface. Not that I am disposed to treat with disrespect the labours and researches of learned and patient jurists in ancient or

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modern times. Certainly the science of the law requires such investigations, but as in other sciences, the object of pursuit has been sometimes lost by reason of its being thought at a distance when all the time it has been near."

It would be interesting, but could hardly be useful, to review the course of the conflict over this question in this country. It reminds one of Milton's opinion of the character of the early battles between the rude inhabitants of England.

Mr. Browne (Statute of Frauds, § 386) remarks that this is the most difficult question relating to the statute, and has occasioned a more marked conflict of judicial opinion than any other arising upon it, and cites and discusses *Wain v. Warlters* at great length, favouring its conclusions.

In general, the memorandum must contain either in itself or by clear reference, the terms of a complete contract, and if any essential term is absent the memorandum is insufficient. *Abeel v. Rutcliffe*, 13 Johnson (New York), 297; 7 Am. Dec. 377; *Wardell v. Williams*, 62 Michigan, 50; 4 Am. St. Rep. 814; *Hazard v. Day*, 14 Allen (Mass.), 487; 92 Am. Dec. 790; *Tice v. Freeman*, 30 Minnesota, 389; *Fry v. Platt*, 32 Kansas, 62; *Peck v. Vandemark*, 99 New York, 29; *Grace v. Denison*, 111 Massachusetts, 16; *Hope v. Dixon*, 22 Grant Chancery (U. C.), 439; *Baker v. Glass*, 6 Munford (Virginia), 212; *Grafton v. Cummings*, 99 United States, 100, disapproving *Salmon Falls M. Co. v. Goddard*, 14 Howard (U. S. Supr. Ct.), 446. In *Ment v. Newitter*, 122 New York, 491; 11 Lawyers' Rep. Annotated, 97; 19 Am. St. Rep. 514, it was held that the memorandum of a sale of land was fatally defective for not containing the name of the vendor, citing *Champion v. Plummer*, 1 B. & P. N. R. 252; 8 R. R. 795. So if the terms of payment cannot be made out therefrom. *Nelson v. Shelby, &c. Co.*, 96 Alabama, 515; 38 Am. St. Rep. 116. See also *Kopp v. Reiter*, 146 Illinois, 437; 37 Am. St. Rep. 156; *Ringer v. Holtsclaw*, 112 Missouri, 519.

But the cases are agreed that the form of the memorandum is not essential. It may be an invoice or bill, a bought and sold note, an entry in a book, or by letters. *Austin v. Davis*, 128 Indiana, 472; 25 Am. St. Rep. 456; *Newberry v. Wall*, 81 New York, 576; *Argus Co. v. Albany*, 55 New York, 495; *Husley v. Brown*, 98 Massachusetts, 545; 96 Am. Dec. 671; *McConnell v. Brillhart*, 17 Illinois, 354; 65 Am. Dec. 661; *Louisville, &c. Co. v. Lorick*, 29 S. C. 533; 2 Lawyers' Rep. Annotated, 212; *Wiener v. Whipple*, 53 Wisconsin, 298; 40 Am. Rep. 775.

See note, 26 Am. Dec. 661; 5 Id. 321; 2 Lawyers' Rep. Annotated, 212.

As to the necessity of signature, the doctrine of *Laythoarp v. Bryant*, that the phrase "party to be charged" or "parties to be charged," means the party sued, and that the signature of the other party is not essential seems to be accepted by the weight of authority in this country. This is the opinion of Mr. Lawson (Contracts, § 80, citing many cases): and of Judge BENNETT (note, Benj. Sales, 6th Am. ed. 220), who says the contrary view "is clearly untenable." The leading case is probably *Justice v. Lang*, 42 New York, 493; 1 Am. Rep. 576; 52 New York, 323; citing *Laythoarp v. Bryant*, and other cases to the same effect are *Sanborn v. Flagler*, 9 Allen (Mass.), 174; *Williams v. Robinson*, 73 Maine, 186; 40 Am. Rep. 352; *Smith v. Smith*, 8 Blackford (Indiana), 208; *Lowber v. Condit*, 36 Wisconsin, 176; *Ivory v. Murphy*, 36

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Missouri, 534; *Lowry v. Mehaffy*, 10 Watts (Pennsylvania), 387; *DeCordova v. Smith's Admr's*, 9 Texas, 129; 58 Am. Dec. 136; *Gartrell v. Stafford*, 12 Nebraska, 545; 41 Am. Rep. 767; *Sabre v. Smith*, 62 New Hampshire, 663; *Ellsworth v. So., &c. Co.*, 31 Minnesota, 543; *Douglass v. Spears*, 2 Nott & McCord (So. Car.) 207; 10 Am. Dec. 588; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.), 25; 66 Am. Dec. 394; *Ives v. Hazard*, 4 Rhode Island, 81; 67 Am. Dec. 500. See note, 25 Am. Rep. 543.

Holding the contrary view are *Thomas v. Trustees*, 3 A. K. Marshall (Kentucky), 298; 13 Am. Dec. 165; *Corbitt v. Gas Co.*, 6 Oregon, 405; 25 Am. Rep. 540; *Krohn v. Bantz*, 68 Indiana, 277; *Wilkinson v. Heavenrich*, 58 Michigan, 574; 55 Am. Rep. 708.

Justice v. Lang was doubted, although followed on the second appeal, and on oral evidence of acceptance it was left to the jury to say whether the defendant had agreed to accept and pay. This doctrine has since been followed in New York. (*Mason v. Decker*, 72 New York, 595; 28 Am. Rep. 190.) The first decision was by the commission of appeals (a temporary tribunal appointed to help the Court with its arrears of business), the second by the Court of Appeals. On the second appeal the Court observed: "Whether therefore the case was well decided as reported in 42 N. Y. will not be considered. The case presented a grave question; and without more consideration than I have now given it, I should have hesitated before assenting to the conclusions of the learned and accurate Judge by whom the prevailing opinion was given, that a promise void in law, made by one party, was a good consideration for a promise by the other. It is not easy to discover any of the elements of a consideration in such a void promise. It is neither a benefit to the one nor a loss to the other party." But this seems to beg the question whether the promise by the one not signing was a void promise.

In *Wilkinson v. Heavenrich*, *supra*, the Court said: "The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other," and the Court held the contract signed by only one of the parties to it to be void for want of mutuality.

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(1867.)

No. 25. — *JONES v. VICTORIA GRAVING DOCK
COMPANY.*

(1877.)

RULE.

A SIGNATURE to satisfy the Statute of Frauds may be anywhere in the document; but it must be there with the intention of verifying the document as a writing containing the terms of the contract.

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L. R., 2 H. L. 127-148 (s. c. 36 L. J. Ch. 886; 16 W. R. 1).

[127] *Statute of Frauds. — Memorandum. — Signature.*

Though it is not necessary that the signature of a party should (within the Statute of Frauds) be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument. Where, therefore, the name of the party against whom specific performance was sought to be enforced, appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking: —

Held, that the paper did not constitute a contract signed within the provisions of the Statute of Frauds.

C. proposing to marry H., wrote out a paper beginning thus: "In the event of a marriage between the under-mentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences, each in this form, "C. to do so and so, H. to have so and so." No name of either party was signed to the paper, which was delivered by C. to H.'s solicitor for the purpose of drawing the settlement. Two of the clauses in it appeared to have been, by mutual arrangement, struck out. No settlement was ever executed; it was dispensed with by H. at C.'s request, upon C.'s verbal promise to give H. certain advantages by his will. C. died, and the will was not found to fulfil the promise: —

Held, that H. was not entitled (independently of the question, whether, as a matter of fact, there had been any waiver) to specific performance of the arrangements mentioned in the written paper, as it did not constitute a contract within the meaning of the Statute of Frauds.

Richard Bewley Caton was a clergyman of the Church of England. In the autumn of 1852, when about seventy-eight years of age, he made proposals of marriage to Mrs. Harriet Henley, widow, then about sixty years of age. Both parties were possessed of property, the lady holding some, hereinafter called the Irish property and producing £80 a year, under a settlement made upon a former marriage, and secured to her separate use. Her other property consisted of money on mortgage and of railway securities. It was arranged that a settlement should be made on the intended marriage, and in December, 1852, Mr. Caton wrote out a paper in the following terms: —

[* 128] "Chester and Holyhead debentures . . . £4,000
 "Manchester and Holyhead 3,000

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“Pickering estate mortgage £2,000

“Mr. Cole’s mortgage 2,000

“Irish property, annual value, say 80

“In the event of marriage between the under-mentioned parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon. Mrs. Henley to have the whole of her fortune settled upon herself (under trustees one to be named by Mrs. H., and the other by Mr. Caton), and to go to the uses of her will. But the annual interest on her fortune to be received and taken by the Rev. R. B. C. for and during his life, with the exception of £80 a year to be paid to Mrs. H. under the denomination of pin-money.”

“The house, coach-houses, and stables, No. 75, Seymour Place, Bryanstone Square, the property of the Rev. R. B. C., is given to Mrs. H. for her life, at her decease to go to the uses of Mr. Caton’s will. Also his household furniture, plate, linen, and china, given, at his decease, to Mrs. H. in whatever house they may reside.”

“Memorandum omitted at the proper place. Mrs. H. to have liberty to withdraw £2000 for the purchase of a house, said house to be settled upon herself.”¹

“All property that may fall into Mrs. H. during our marriage to be her sole property, and subject to the uses of her will, but her husband to have the annual rent or interest of said property during his life.”

“Mrs. H. to be entitled to receive at my death the half-year’s rents that shall then be due, or becoming due, arising from her property.”²

This paper, though in the handwriting of Mr. Caton, was not signed by him, nor was it signed by Mrs. Henley, though she was made aware of its contents, and agreed to them. On the 29th of December, 1852, Mr. Caton and Mrs. Henley attended at the office of Mr. Emmet, solicitor, in Bloomsbury Square, and acquainted him * with their arrangements, and Mr. [* 129] Caton handed to him this paper to prepare a marriage settlement. He was named trustee for Mrs. Henley, and the Rev. Trewell Moore was named trustee for Mr. Caton.

¹ In the copy of this instrument printed in the Appendix to the Cases, and declared by the respondents to be a fac-simile, this

sentence was marked as struck through with a pen.

² This sentence was marked in the same manner.

The draft settlement was prepared, and the two parties saw it at Mr. Emmet's chambers on the 6th of January, 1853. On their way home, Mr. Caton complained of the length of the settlement, and proposed to her that, in order to diminish the expense of it, all mention of her Irish property should be omitted, as that was already settled to her separate use. She consented. The draft was altered accordingly, and a copy sent to Mr. Caton on the 11th of January. Mr. Caton then represented to Mrs. Henley the great expense that the settlement would occasion, which he proposed to save altogether, and, as she alleged, he promised, if she would forego its execution, strictly and faithfully to carry into effect the terms of the memorandum, and to leave to her, by his will, the whole of her then and after-acquired property, and to give her his house in Seymour Place for her life, and to give her absolutely all the furniture, plate, linen, &c., in and about his residence at the time of his death, and promised that she should not in any way be injured by consenting to what he proposed. She did consent to it, and communicated her wishes to Mr. Emmet, who, both by word of mouth and by letter, remonstrated [*130] against her so consenting.¹ She showed *this letter to

¹ His letter was in the following terms:—

“BLOOMSBURY SQUARE,
“4 Feb. 1853.

“MY DEAR MRS. HENLEY, — It would appear strange were I to say that a day has not passed since you left town that my thoughts have not dwelt on our last interview, and I felt and still do feel, the very deepest anxiety for your future welfare. It is however, impossible for me to allow you to change your present state and place yourself in a position by which you will be deprived of all your fortune and left entirely at the mercy of another for your future existence, without once again raising my warning voice against such a very unjust proceeding. Since I saw you, a case has occurred in my own office which fully justifies all I have said on the subject. The marriage took place a year since last October. The gentleman, a widower with three children, aged sixty, and the lady aged about fifty; they have quarrelled and separated. The lady finding it impossible to endure his conduct, left the house and went to her sister's.

Fortunately she had all her fortune (£500 a year) settled, and she is consequently now quite independent of him. What would have been the case had she had no settlement? She must have returned to her husband's house or starved.

“Now, I will suppose, in your case, that the will is duly executed at the time and place named, and that it is to the effect promised; then suppose a quarrel, and the will is thrown into the fire, and another made, leaving you a paltry pittance, perhaps £100 a year; and remember, too, you will be in ignorance of the change until death shall have removed him far beyond the reach of all reproaches. What will you say then, and you incur the possibility of such an event taking place, when (if the gentleman is acting honourably) there cannot be the least objection to your having your fortune settled upon yourself in accordance with his promise to you, and your promise to me. Do let me beg of you to pause and well consider the consequence before you lose all your fortune, and for ever. Once married, and your power is gone. You can do nothing then,

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Mr. Caton, who was very angry that his word should be doubted. She adhered to her promise to Mr. Caton. The marriage took place on the 7th of February, 1853, and, before the ceremony, Mr. Caton produced a will which appeared to be in conformity with his promises, and which he executed as soon as the ceremony had been performed. During his life he took possession of his wife's property, and also received several sums of money which fell to her on the deaths of other people, amounting to £1360. This was shown by a memorandum of his own. He paid her the sum of £80 a year. In one of his own memorandum books was an entry by him in these words: "Mrs. Caton's fortune, Feb. 7, 1853,* and the particulars which followed were added up by him, and were stated at "£14,904." By arrangement between them, the house in Seymour Place was sold, and the proceeds, amounting to £775, were invested in 3 per cent. consols.

Mr. Caton died on the 24th of January, 1864, and it was then found that, on the 4th of May, 1863, he had, without the appellant's knowledge, made a will, revoking all others, and leaving his household furniture, linen, &c., to the appellant absolutely, and two leasehold houses, No. 9, Seymour Place, and No. 2, Mitford Place, to her for life, the income of Cole's mortgage to her for her life, but the principal to the respondents, in equal shares, at her death; and he made other similar dispositions,

* the result of which was, as she alleged, that, under this [* 131] will, the income which she should derive would amount to £400 a year, a sum smaller than that which she had, previously to the marriage, enjoyed from her own fortune. The respondents were made his general devisees and legatees. The gross amount of his property was stated to be, in realty about £50,000, and in personalty about £40,000.

On the 15th of April, 1864, the appellant filed her bill (which was afterwards amended (against the respondents, and prayed that the terms of the agreement contained in the memorandum drawn up by Mr. Caton, and delivered to Mr. Emmet, might be

but utter vain regrets. Pray excuse my writing in this strain, and attribute it to the very great interest I feel in your future welfare as your brother, for you will remember you begged of me years ago to act towards you, and watch over you, as a

brother. With my best wishes for your future happiness in whatever state you may be, and wherever you may be, believe me,

"My dear Mrs. HENLEY, yours truly,
"GEO. N. EMMET."

decreed to be carried into effect, and that she might be declared entitled to the property therein specifically mentioned as the fortune of which she was possessed at the time of her marriage, and to her after-acquired property, and to the annual income thereof accrued since Mr. Caton's death, and to the consols representing the sum of £775, the proceeds of the sale of the house, No. 75, Seymour Place, and for general relief.

The respondents put in their answer, denying the existence of any agreement, and they pleaded the Statute of Frauds.

The cause came on for hearing before Vice-Chancellor STUART, on motion for a decree, in May, 1865, when His Honour pronounced judgment in favour of the appellant. 34 L. J. Ch. 564. On appeal, this decree was reversed by Lord Chancellor CRANWORTH. L. R. 1 Ch. 137.

Sir Roundell Palmer, Q. C., and Mr. C. Locock Webb, for the appellant: —

The Attorney-General (Sir John Rolt), and Mr. Greene, Q. C., (Mr. Elderton was with them), for the respondent: —

[135] Sir R. Palmer replied.

May 20. THE LORD CHANCELLOR (Lord CHELMSFORD): —

My Lords, upon the argument of this appeal the counsel for the appellant abandoned the ground on which her case was [* 136] placed in *the Court below, and raised a question which had not been previously considered, or, at all events, was not decided by the decree appealed from.

The case for the plaintiff, at the hearing before Vice-Chancellor STUART, was founded upon the parol agreement of Mr. Caton, that if the plaintiff would forego the execution of any deed of settlement he would leave to her by will the whole of her then and after-acquired property, and the house in Seymour Place, and the furniture and effects which should be in his residence at the time of his decease, which agreement it was contended had been in part performed by the subsequent execution of a will by Mr. Caton in accordance with his promise. The VICE CHANCELLOR adopted this view, and said: "I am at a loss to know what act of part performance of an agreement to leave a certain provision by will, could be more complete than the execution of a will conformably to that contract. In fact it is, so far, more than a part performance, it a complete performance." And upon the fact, which appears in the case, of the subsequent revocation of

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the will by Mr. Caton, the VICE CHANCELLOR considered that the case was brought within a class of cases in which, to use his words, "the Court has had to consider whether, where a testator has intended to leave by will a sum of money to a particular person, and his executor has undertaken, without its being left by will, to make good to the legatee the intended legacy, and the testator has therefore forborne to execute a will, the Court should, notwithstanding the provisions of the Statute of Frauds, and in order to prevent a fraud, interfere, and give to the legatee who was not named in the will, that which the executor had promised the testator should be given to him out of his estate after his death, just as much as if it had been given by will."

These were the grounds upon which the decree of the VICE CHANCELLOR in favour of the plaintiff proceeded. Upon appeal to the LORD CHANCELLOR, he does not appear to have thought that there were any other than these questions to be decided by him; and, after fully considering them, he reversed the decree of the VICE CHANCELLOR.

If the same questions had been raised on the argument upon this appeal, I should have had no difficulty in agreeing with the *judgment of my noble and learned friend (Lord [*137] CRANWORTH), but the counsel for the appellant distinctly declined to argue the case upon the footing of part performance of the parol agreement, and had thus rendered it unnecessary for me to state any reasons in support of the decree appealed from.

The question which your Lordships are now called upon to determine is, whether the memorandum in the handwriting of Mr. Caton which was delivered to Mr. Emmet as instructions for the preparation of the marriage settlement, is such an agreement in writing, or memorandum, or note thereof, signed by the party to be charged therewith, within the 4th section of the Statute of Frauds, as to amount to a marriage contract which the appellant is entitled to have established by the decree of the Court, according to the prayer of her bill.

The respondents deny that this memorandum is a sufficient agreement within the statute, and contend that, even if it is, it was waived and abandoned by the mutual consent of the parties.

There are very few facts necessary to be adverted to in considering these questions. In the autumn of 1852, the appellant having accepted the offer of marriage made to her by Mr. Caton,

and the parties having arranged between themselves certain terms for the marriage settlement, on the 29th of December, 1852, they went together to the offices of Mr. Emmet, the solicitor and friend of the appellant. Mr. Emmet's account of that interview is in these terms: After stating that, on the 29th of December, Mr. Caton, "accompanied by the plaintiff, called on me at my offices, when he also informed me of the intended marriage, and stated that he had agreed with the plaintiff that all the property of the plaintiff, both present and future, should be settled upon her:" he goes on to say, Mr. Caton "also at the same interview, and in the presence and hearing of the plaintiff, stated that he had himself prepared a memorandum of the terms of the marriage settlement, which had been mutually agreed to between them, and produced and handed over to me such memorandum, and instructed me to prepare a proper deed of settlement in accordance therewith." He afterwards says: "I, under the joint direction of the said Richard Bewley Caton and the plaintiff, at once instructed counsel to settle a proper draft settlement, and for that [* 138] purpose I laid before him the *aforesaid memorandum, two of the clauses therein being, for the purpose of such instruction, struck through by the said Richard Bewley Caton himself, as they now appear." There is no evidence as to the exact time at which those clauses were struck out of the memorandum; but it appears from the evidence that the draft settlement, having been prepared, was, on the 5th of January, 1853, sent by Mr. Emmet to the appellant. Then on the following day, the 6th of January, she and Mr. Caton went to the offices of Mr. Emmet, and they both approved of the draft settlement. On the 7th of January, 1853, Mr. Caton wrote a letter to Mr. Emmet, desiring that certain property in Dublin belonging to the appellant should be struck out of the settlement, and suggesting that a clause ought to be introduced providing for the payment of the interest and the rents and profits of that portion of the property which was to be settled upon her. On the 12th of January the parties agreed to waive, at all events, the execution of the deed of settlement. And upon that subject the evidence of Mrs. Caton, as well as of Mr. Emmet, is important. Mrs. Caton says that Mr. Caton, on the 11th of January, called and had an interview with her, and "represented to me that the engrossment of the settlement, and expense incident to its execution, would cost a

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good deal of money, and that he desired to avoid such expense altogether, and promised me that if I would forego the execution of any deed of settlement, he, the said Richard Bewley Caton would most strictly and faithfully observe and carry out the terms of the said marriage contract so agreed upon between us as aforesaid, and would leave to me by his last will the whole of my then and after-acquired property (if any), and would also thereby give to me the said house, No. 75, Seymour Place, for my life, and all the household furniture, plate, linen, and china, and other effects which should be in his residence at the time of his decease, absolutely."

Mr. Emmet states that, on the 12th of January, Mr. Caton, accompanied by the plaintiff, had an interview with him at his offices, and Mr. Caton then stated to him "that, at his request, the plaintiff had consented to abandon the settlement." I stop here; I do not put an interpretation upon these words which Mr. Caton used upon this occasion, which will be matter for subsequent *consideration. But, in consequence of this, [* 139] no deed of settlement was executed.

On the day of the marriage, the 7th of February, 1853, Mr. Caton made his will, and afterwards executed it in the vestry. He had shown that will to Mrs. Caton, and it seemed to be in entire accordance with this promise. He died on the 24th of January, 1864, having left a will dated on the 4th of May, 1863, under which will the appellant derived less benefit than he had proposed she should have. Under these circumstances, the appellant now insists that the memorandum which served as instructions for the proposed marriage settlement is a binding marriage contract, the performance of which she is entitled to enforce.

It is unnecessary for me to trouble your Lordships with that memorandum, which is familiar to you. Supposing this to be an agreement, the first question to be considered is, whether it is signed by Mr. Caton, as required by the 4th section of the Statute of Frauds.

The cases upon this point cited in the course of the argument (*Stokes v. Moore*, 1 Cox, 219; 1 R. R. 24, and other cases cited below) establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of

“ authenticating the instrument,” or “ so as to govern the whole agreement,” to use the words of Sir WILLIAM GRANT, in the case of *Ogilvie v. Poljumbé*, 3 Mer. 53; 17 R. R. 13, or in the language of Mr. Justice COLERIDGE, in *Lobb v. Stanley*, 5 Q. B. 574; 13 L. J. Q. B. 117, “ so as to govern what follows.” Now I cannot think that the occurrence of Mr. Caton’s name in the manner in which it appears can possibly be taken to govern the entire memorandum, although the whole of it is in his handwriting.

It was argued that the introductory words, “ in the event of a marriage between the under-named parties,” gave to the name of Mr. Caton, however afterwards appearing, the same force and effect as if he had written his own and Mrs. Henley’s name at the beginning of the memorandum, instead of the words, “ the under-named parties.” But these words of reference cannot, in my opinion, have any effect upon the question. The name of the party, and its application to the whole of the instrument, can alone satisfy * the requisites of a signature. In the memorandum in question, Mr. Caton’s name is incidentally introduced with reference to a particular purpose, or as matter of description, and as this mention of his name would clearly be insufficient in itself, it cannot have any new effect given to it by the introductory words of the memorandum.

But, in my opinion, the memorandum did not amount to an agreement, and therefore it is immaterial whether it was signed or not. It was nothing more than, as it imports upon the face of it to be, instructions for a settlement. It contains the conditions agreed upon as the basis of a marriage settlement. That it was not intended as a final agreement appears from the alterations which were made by striking out clauses originally inserted in it. It was intended merely as proposals for a settlement, which were alterable at the pleasure of the parties, and were afterwards actually varied by the alterations made in the draft settlement.

But, assuming it to be an agreement, what was its nature? It was an agreement for a settlement; the words are: “ In the event of a marriage between the under-named parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon. Mrs. Henley to have the whole of her fortune settled upon herself,” &c. Now, supposing this agreement to have been properly signed, and not to have been performed, what

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would the appellant's remedy have been? She might have enforced a specific performance, not of the mere execution of a deed, but of the terms of the settlement agreed upon. Supposing that to be the case, the agreement being of that nature was, in my opinion, most clearly waived and abandoned. Upon that subject a reference again to the affidavit of Mr. Emmet will be important. He says that, on the 12th of January, Mr. Caton "stated to me that, at his request, the plaintiff had consented to abandon the settlement;" and then he goes on to say: "Meaning, as I well knew, from statements made to me by the plaintiff and the said Richard Bewley Caton, in the presence of each other, the execution of any deed of settlement, upon his promise that, upon her so doing, he would leave to her, by his will, the whole of her then and after-acquired property, if any, intact, and would also give to her the premises No. 75, Seymour Place, for her life, and also the whole of his household *furniture, plate, [* 141] and other effects, absolutely and precisely the same as if the proposed deed of settlement had been executed."

Your Lordships will observe, therefore, that the endeavour of Mr. Emmet in this affidavit is to show that the parties did not waive and abandon the settlement altogether, but that they merely consented that there should be no deed of settlement executed. And it is now contended that it was all along the purpose of the parties that this memorandum, which I have shown your Lordships does not amount to an agreement, but merely contained proposals which were used as instructions for the marriage settlement, were in fact marriage articles, which were to continue in effect and to be enforceable, although no deed of settlement was actually executed.

Now, it appears to me that the whole conduct of the parties is at variance with any such understanding, and it is unaccountable, if this had really been the case, that it should never have been insisted upon down to the time of the hearing of the present appeal. But the best answer to such a case, brought forward at this last stage, is to be found in Mr. Emmet's warning letter to the appellant of the 4th of February, 1853, and which has also a bearing upon the objection raised to the abandonment of the settlement, that it was obtained by fraud.

This letter of Mr. Emmet not only cautioned the appellant that if she gave up the settlement she would be at Mr. Caton's mercy,

but also pointed out to her so strongly the effect of relinquishing it, that it is impossible to say that her consent to give up her right to a settlement was obtained from her by contrivance, or that she was ignorant of the consequences which would result from it.

I will draw your Lordships' attention to one or two passages in that letter. Mr. Emmet says: "It is, however, impossible for me to allow you to change your present state, and place yourself in a position by which you will be deprived of all your fortune, and left entirely at the mercy of another for your future existence, without once again raising my warning voice against such a very unjust proceeding." Then, after mentioning a case in which a lady would have been deprived of all her property if no settlement had been executed, he goes on to say: "Now, I [* 142] will suppose in your case * that the will is duly executed at the time and place named, and that it is to the effect promised, — then suppose a quarrel, and the will is thrown into the fire, and another made, leaving you a paltry pittance, perhaps £100 a year; and remember too you will be in ignorance of the change until death shall have removed him far beyond the reach of all reproaches. What will you say then? And you incur the possibility of such an event taking place; when, if the gentleman is acting honourably, there cannot be the least objection to your having your fortune settled upon yourself in accordance with his promise to you and your promise to me." This letter is wholly inconsistent with the idea that all that the appellant consented to abandon was the mere form of the execution of the deed, and that the substance was to remain in the memorandum as marriage articles, enforceable at any time against Mr. Caton or his representatives. My Lords, even supposing that there had been a regularly signed agreement within the Statute of Frauds, I am of opinion that the agreement was waived and abandoned by the mutual consent of the parties, and therefore I advise your Lordships that the decree appealed from ought to be affirmed.

Lord WESTBURY: —

My Lords, my noble and learned friend who sits near me (Lord CRANWORTH) has requested me to address your Lordships before he does; I will therefore proceed to do so. The cardinal question in this case is the inquiry whether the document pleaded as a memorandum of agreement is sufficiently signed to satisfy the

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provisions of the Statute of Frauds. It has been very correctly said that that statute requires a signing and not a subscribing. Hence it has been deduced, and I think correctly, that if the signature be in itself a sufficient signature, it matters not in what part of the instrument it is to be found.

Now, what constitutes a sufficient signature has been described by different Judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of *Stokes v. Moore*, 1 Cox, 219. 1 R. R. 24, the language of the learned Judge is, that the signature *must authenticate [*143] every part of the instrument. Or again, that it must give authenticity to every part of the instrument. Probably the phrases “authentic” and “authenticity” are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir WILLIAM GRANT in *Ogilvie v. Foljambe* is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum.

My Lords, on looking at this memorandum you find that the name (or the initials of the name of Mr. Caton, which might be equivalent to the same thing), occurs four times, I think, in the document. In the first place it occurs in a parenthesis under the reference to trustees, “one to be named by Mrs. H., the other by Mr. Caton.” Plainly there the signature has no other reference than to that portion of the memorandum which is contained within the parenthesis. In the next place it occurs where it says, “the interest on her fortune to be received and taken by the Reverend R. B. C.” There the signature has no other reference to any other part of the instrument than the antecedent words touching the receipt of the income of her fortune. Then a little lower down occur the words “the property of the Reverend R. B.

C." There the name is used in the genitive case, as indicating possession of the property previously spoken of, and its reference is limited to that property. Finally it occurs thus: "at her decease to go to the uses of Mr. Caton's will." There, again, it is used in the genitive case, and relates to the subject-matter with which it is connected. In no place, therefore, is this signature found so situated as to have connection, or reference, or relation to or with anything more than particular portions of the instrument.

[* 144] * Now, an ingenious attempt was made at the bar to supply that defect by fastening on the antecedent words: "In the event of marriage the under-named parties;" and by the force of these words of reference to bring up the signature subsequently found, and treat it as if it were found with the words of reference. My Lords, if we adopted that device we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a signification and effect different from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or a memorandum signed by a party, another document which is specifically referred to by the terms of the memorandum so signed, and which by virtue of that reference is incorporated into the body of the memorandum. There you do not alter the signature; but you apply the signature not only to the thing originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and, by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply. Independently, therefore, of the general principle of not frittering away the requirement of the statute, which, in some respects, I might be of opinion has been done with rather too much freedom, and taking the doctrine in the strict sense in which it has been laid down by Sir WILLIAM GRANT, and also by the Judges of the Exchequer in equity, in deciding the case of *Stokes v. Moore*, and many others which have subsequently followed, there cannot, I think, be brought forward

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any well-founded argument to justify your holding that this memorandum is sufficiently signed to comply with the statute.

My Lords, this point appears scarcely to have been made in the Court below. I regret very much that a case should be brought at your Lordships' bar, and argued here on grounds that were not presented to the Court below. It is not only unfair to the Court *below, but it has a tendency to give to the [*145] Court of Appeal the character of an original jurisdiction, instead of its being confined to the exercise of an appellate jurisdiction. New arguments, undoubtedly, may be presented; but in ordinary fairness a point not brought forward in the Court below ought not to be made the ground of appeal.

My Lords, this is a case in which I have come to this conclusion with reluctance, because I cannot but regard it as a case of some hardship. I desire to give no opinion on the other points in this case. If this had been a memorandum of agreement, signed so as to satisfy the statute, I should have had no difficulty in holding that it was intended as a binding agreement, because the words in the introductory clause are "conditions mutually agreed upon." If it had been such as to satisfy the statute I should have hesitated very much before I could have brought myself to hold that it was effectually revoked and given up by the party in dependence upon a promise that has not been fulfilled. But it is unnecessary to discuss that, because the first point is one which I think your Lordships will agree in accepting as a sufficient ground of decision in this case; and if it be a sufficient ground it supersedes the necessity of considering the other.

My Lords, I would only add that I entirely concur with my noble and learned friend, the LORD CHANCELLOR, in overruling the grounds on which the VICE CHANCELLOR's judgment appears to have proceeded. There is no analogy between the case presented here and the case of an executor promising a testator that if a legacy be not inserted in the will he will pay the money. That is a case of personal liability incurred by the executor. But here the attempt is to follow the property, and to make it subject to an agreement which has no reality. If that could be done, the Statute of Frauds, imposing the necessity of an agreement signed by the parties, would be readily and effectually superseded.

My Lords, I agree entirely in the ground upon which my noble and learned friend rested his judgment in the Court below; and

with regard to the additional ground which has been brought forward here for the first time (and as to which I should have been sorry if it had not been considered by your Lordships, so that the parties may be satisfied that every point in the case has [* 146] received *due attention), I think that, notwithstanding the ingenuity with which the argument has been presented at the bar, there is no foundation here for contending that there ever was a binding agreement such as to satisfy the Statute of Frauds, and that being so, I think it will be your Lordships' duty to dismiss this appeal.

Whether your Lordships will, under the circumstances, deem it right to dismiss it with costs, I must leave entirely to your judgment, expressing only my own, that having regard to the fact that the whole of this lady's fortune has found its way into the possession of her husband, where clearly, according to the moral agreement of the parties, it was not intended to remain, I should be more satisfied if, without injury to the general rule which clearly ought to be abided by in all cases, namely, that costs follow the event, you could find it right to dismiss this appeal without costs.

Lord COLONSAY:—

My Lords, I have had occasion to consider this statute so much less frequently than your Lordships have done, that it is with some distrust of my own judgment that I entered on its consideration, and have endeavoured to satisfy myself as to its interpretation. I think it is very plain looking to the cases which have been decided, and to the meaning of the statute, that it is not necessary that the signature of the party should be placed in any particular position upon the paper, whether it is subscribed or superscribed, or otherwise placed so as to show that it was, in the language of Sir WILLIAM GRANT, intended to govern the matter that is contained in the document. But in this particular case the great difficulty that I have felt has been that, although the name of the party, written by himself, is to be found in reference to particular provisions where it occurs, in places which, taken together, seem to go very nearly to exhaust all the several provisions which the document contains, yet I think it did not exhaust all the several considerations that the parties had in view. I think it is plain from what followed, and from the use that is made of that document, that there were other considera-

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tions which the parties had in view which this document did not give effect to; and therefore I get out of the difficulty which embarrassed me when I considered the several clauses to which signatures were * appended, and I have come to the [* 147] conclusion which has been expressed by both my noble and learned friends, that this document is not one that satisfies the provisions of the statute.

I must say, in reference to the other parts of the case, that I am inclined to think that this document was not only one that did not satisfy the provisions of the statute, but that it was one which the parties never regarded as satisfying the provisions of the statute. I think it was never so treated. I think it is plain that the matters that were set forth here were regarded only as the basis of a settlement, and that they were discussed and considered, and that variations were made according to the views of the parties, and then I think it is probable that when they applied themselves to the consideration of all the various matters, they came to the conclusion that it would be better to have no settlement at all, — that is, not to follow up the purpose for which the memorandum was made. That appears to me to be the fair result of the whole case. I think that was clearly the opinion of Mr. Emmet. I think that letter of his of February the 4th is quite inconsistent with any other view being entertained by the parties at the time. Looking at what passed at the time, that part of the case also leads me to the same conclusion at which I have arrived with reference to the document itself. Therefore, I think the judgment that is proposed by my noble and learned friend is the correct one.

Lord CRANWORTH: —

My Lords, I am well satisfied to take no part in the discussion on this appeal from a decision of my own; but, having heard the whole of the argument, and endeavoured to listen to it with a perfectly impartial mind, I confess that nothing that has been urged (however ably it has been urged at the bar) has at all shaken me in the conclusion at which I arrived in the Court below. It is said that the precise point which has been relied on by the appellant here was not argued below, and I believe it was not; but I should be sorry to pledge myself to that, because, as some time has elapsed since that argument, the matter has gone out of my mind. But if this point had been argued, I think it

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would have been entirely in vain. Without going into [*148] the grounds of my opinion, *I will only say that on all points I think the appellant has failed. I should be very sorry to hold that we are to fritter away the Statute of Frauds, as I think we should do by holding that this is a signature. It seems to me very unlike a signature. But if it was a signature, to what was it a signature? I think that the parties clearly meant that that paper should only be considered a paper containing some directions to Mr. Emmet, to enable him from them to frame a settlement, and that the matter remained all *in fieri*. I think that is clear, from the evidence of Mr. Emmet, which has been already adverted to. I have only to state farther, that I concur in the feeling which has been expressed by my noble and learned friends with respect to this case. I expressed somewhat the same feeling at the hearing below. I wished that I could have given this lady some relief, because I think she has been hardly dealt with; but I did not see my way to do so. Even now, I should be glad to see my way to any mitigation in the shape of costs; but I do not see any reason for departing from the ordinary rule here.

Decree or order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 20th May, 1867.

Jones and others v. The Victoria Graving Dock Company.

2 Q. B. D. 314-331 (s. c. 46 L. J. Q. B. 219; 36 L. T. 144; 25 W. R. 348).

Statute of Frauds, s. 4—Memorandum.—Signature.

The defendants, a company incorporated under the Companies Act 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to the plaintiffs; they objected to some of its terms, and thereupon the directors of the defendants' company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft as modified by this paper. The secretary of the defendants' company entered in the minute book a resolution that the plaintiffs, having signified their willingness to undertake "the management of the company's works upon the terms of the draft agreement submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." At the next meeting of the directors of the defendants' company the chairman signed the above resolution pursuant to the Companies Act 1862, s. 67:—*Held*, in the Queen's Bench, by MELLOR, J., and LUSH J., that there was a valid contract within the Statute of Frauds, s. 4: for

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that the signature of the chairman, having been affixed to the minute book for the purpose of verifying the accuracy of the entry, operated as an admission of the contract contained in the draft agreement as modified by the above mentioned paper; it being proved by parol evidence that the draft, as so modified by the paper, was the "draft agreement submitted to the board."

Jones Brothers, the plaintiffs in this case, had brought an * action against the Victoria Graving Dock Company, the [315] defendants, for damages for having been dismissed from their employment.

By an order of Mr. Justice BLACKBURN, dated the 28th of June, 1875, and expressed to be made by consent, the action was in the usual manner referred to an arbitrator, one of the clauses (on a printed form) being, "And I further order, by and with such consent as aforesaid, that neither the plaintiffs nor the defendants shall bring or prosecute any action or suit at law or in equity against the said arbitrator, or bring any writ of error, or prefer any bill in equity against each other of and concerning the matters so as aforesaid referred."

The arbitrator, on the 30th of May, 1876, made an award that the plaintiffs were dismissed from the service or employment of the defendants under such circumstances that the plaintiffs would be entitled to damages assessed at £1500, provided there was a memorandum of a new agreement to satisfy the 4th section of the Statute of Frauds; and stated the following special case:—

1. The firm of Jones Brothers of Liverpool, the plaintiffs in the action, in 1866 entered into an agreement with the defendants to act as managers of their docks in London for a space of eight years, which would terminate on the 1st of January, 1874. Shortly before the expiration of the term of eight years negotiations were commenced between the parties relative to a continuation of their management by the plaintiffs on certain terms as to remuneration and otherwise.

2. Messrs. Gedge, Kirby, & Millett were the solicitors acting for the defendants, and as such in December, 1873, drew up a draft agreement in duplicate relative to the new terms, one part of which was laid before Messrs. Jones and the other retained by Messrs. Gedge, Kirby, & Millett. Messrs. Jones objected to certain of the proposed terms, and both parts of the agreement were then altered in red ink by Mr. Gedge, who acted throughout on behalf

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of his firm, with a view of meeting Messrs. Jones' objections; and one of such parts, hereinafter called Jones' draft, was towards the end of December, 1873, re-submitted to Messrs. Jones. The other part is hereinafter called Gedge's draft.

[* 316] * 3. By clause 8 of these drafts it was stipulated that an annual account should be taken in January in each year, so as to show among other things the profit and loss of the company in their business.

4. The following is clause 11 as it then stood in both drafts with the red ink alterations (herein printed in italics).

"In taking such annual account as aforesaid, when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. *A sum of £200 in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business.* 2. *A sum of £500 in each year towards the interest paid by the company upon its debentures.* 3. A sum of £600 in each year for the remuneration of the directors and secretary, and for office expenses in London. 4. All law charges incurred or paid by the company in the year. 5. A sum equal to interest at the rate of 10 per cent. per annum upon all the paid capital of the company over and above the sum of £142,000. 6. Two sums, *one of £400, and the other of £300, in each year*, to be dealt with in manner hereinafter mentioned, and the sum remaining to the credit of profit and loss account, after making these deductions, shall be considered and is hereinafter referred to as the net profits of the company for the year, in respect of which any such account shall have been taken." The figure £142,000, in the above clause was, under any view of the circumstances, an error in the statement of the amount of capital, and under any circumstances would require to be largely increased.

5. By clause 12 it was stipulated that the plaintiffs should receive annually one equal eighth part of the net profits of the company up to the sum of £8000, and one equal fourth part of such net profits as should be in excess of £8000.

6. On Jones' draft being re-submitted to the plaintiffs as mentioned in paragraph 2, John Jones, one of the members of Jones Brothers, on their behalf objected to the proposed terms as altered and modified in red ink, and upon the 1st of January, 1874, a board meeting of the company was held, at which A., who was a

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director of the company, and whom the company had authorized to act on their behalf with Mr. Gedge relative to the preparation * and making of the agreement, was present. At [* 317] this meeting Mr. John Jones again refused to agree to the proposed terms. Mr. John Jones thereupon, being requested so to do, retired from the room, and in his absence certain modifications of the proposed agreement were considered.

7. A. then at the board meeting drew up a paper which was intended by him to represent the ultimatum of the board with reference to the various objections and requirements raised by Messrs. Jones and Mr. John Jones on their behalf. It was as follows:—

“That interest be charged at 5 per cent. instead of 10 per cent. on new capital for extending business. The charge of £500 per annum, interest on debentures, not to be made against gross profits. The minimum salary to be £500 per annum. The charges for insurance (£300) and depreciation (£400) to be as in the draft. All other provisions as in draft.”

This paper was, on Mr. John Jones being called into the room, submitted to him as the utmost limit to which the defendants' board would go. Mr. John Jones on reading the paper desired to consult his brothers, the other members of the firm of Jones Brothers who were at Liverpool, on the terms thereof, and took it away with him from the board meeting with that object.

8. The effect of the proposals contained on the paper was to alter the 11th clause of the agreement proposed to Messrs. Jones, as by them understood, and under the circumstances rightly understood, as follows:—

“In taking such annual account as aforesaid when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. A sum of £200 in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business. 2. A sum of £600 in each year for the remuneration of the directors and secretary, and for office expenses in London. 3. All law charges incurred or paid by the company in the year. 4. A sum equal to interest at the rate of 5 per cent. per annum upon all the share or loan capital of the company over and above the sum of £172,000 raised, called up, or issued for the * purpose of enlarging the docks or extending the [* 318] business of the company.”

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The remaining paragraph of the 11th clause was as it already stood in Messrs. Jones' draft.

9. The next meeting of the board was held on the 7th of January, and Mr. John Jones attended and stated that the plaintiffs accepted the terms proposed to them, and on this acceptance the arbitrator found that there was a complete contract between the parties.

10. Mr. Gedge who was ignorant of the terms contained in the paper submitted to Messrs. Jones by A., had in the mean time altered his (Gedge's) draft, so as to embody what he believed was the effect of the negotiations between the parties. The result was that the 11th clause of the proposed agreement was left by him in effect identical with the clause as set out in the 8th paragraph in this case, except that the figure 162,000 was inserted instead of 172,000. This figure of 162,000 was in any case an error on the part of Mr. Gedge, and in any event would require alteration subsequently.

11. After the acceptance mentioned in the 9th paragraph of this case, the following resolution was written by Mr. Gedge on Gedge's draft: —

“Resolved, that the draft agreement with Messrs. Jones be approved and engrossed in duplicate, and that the seal of the company be affixed thereto.”

The resolution was then put to the board, A. being one of it, and carried, whereupon the chairman wrote on Gedge's draft the following: —

“Jan. 7, '74, carried unanimously. Claud Hamilton, chairman.”

12. Before the next meeting, but from notes taken at the preceding one, the secretary of the company entered the following minute in the minute book: —

“Mr. John Jones having attended and signified on the part of himself and brothers their willingness to continue the management of the company's works upon the terms of the draft agreement [* 319] ment * submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed.”

The words “draft agreement” in the above minute, as entered in the minute book, mean “Jones' draft” as altered by the terms expressed on the paper drawn up by A., and hereinafter called B, and by him given to Messrs. Jones.

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13. Lord Claud Hamilton, as the first business at the next board meeting of the company, on the 12th of March, signed the above minute in the words and figures following : —

“ Read and confirmed : Claud Hamilton.”

14. At the meeting on the 7th of January the paper B was not produced by Mr. John Jones. Mr. Gedge, however, obtained from him Jones' draft, and having altered it in accordance with his, Gedge's, idea of what the agreement was, sent it to be engrossed, and sent the engrossment to Messrs. Jones to be signed ; they thereupon objected to the figure of 162,000, which was entered in the 11th clause, and a correspondence ensued between Mr. Gedge, the secretary of the company, and Messrs. Jones, the result of which was that the matter stood over to be discussed at the next board meeting, which took place, as before mentioned, on the 12th of March. The first business thereat was that Lord Claud Hamilton signed the minute of the previous meeting as entered in the minute book by the secretary of the company.

15. At the meeting on the 12th of March, on its being mentioned that Messrs. Jones had taken objection to sign the engrossed agreement containing the figure 162,000, a resolution was passed breaking off all further negotiations.

16. Mr. Gedge, at the time when Lord Claud Hamilton signed the memorandum indorsed on Gedge's draft, did not know of document B, and A. had forgotten its contents. Had A. been aware that the true effect of the proposals mentioned in paragraph 7 was to alter the 11th clause of the proposed agreement, as mentioned in paragraph 8, he would not have made them or assented thereto. When, therefore, the minute states that “ it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed,” the entry as far as A. was concerned, was not a true entry of the facts.

18. The Court to have power to draw inferences of fact.

* The question for the opinion of the Court was, “ Whether, [* 320] under the above circumstances, there is a memorandum of the new agreement such that an action can be brought by Messrs. Jones in respect of the said sum of £1500.”

If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for the said sum of £1500 and costs incurred after the date of award. If the Court should be of opinion in the negative, then judgment is to be entered on

the counts for wrongful dismissal for the defendants, and costs incurred after the date of the award.

The draft agreement drawn up in duplicate, as in the 2nd paragraph of the special case is mentioned, commenced thus: "An agreement made this day of , 187 , between the Victoria Graving Dock Co., Limited, hereinafter called the company, of the one part, and John Jones, Charles Jones, and James Jones, all of Liverpool, and trading under the style or firm of and hereinafter called Messrs. Jones Brothers, of the other part." The draft recited, amongst other things, that the company had been incorporated under the Companies Act, 1862, that the directors did, on the 1st of January, 1866, appoint Messrs. Jones Brothers to be managers of the company for a period of eight years thence next ensuing, and that it had been agreed that Messrs. Jones Brothers should continue to act as managers of the company for the period and upon the terms and conditions therein set forth. By the first clause Messrs. Jones Brothers were constituted the sole agents and managers of the company from the 1st of January, 1874, for a period of five years. In addition to the clauses mentioned in the special case, the draft agreement contained others providing for the conduct and management of the business and funds of the company, and for the submission of disputes to arbitration, and it ended with the words, "In witness, &c."

Jan. 16. A. Wills, Q. C. (Rolland with him), for the plaintiffs cited 2 Taylor on Evidence, ch. 18, par. 937, page 901 (6th ed.); *Birkmyr v. Darnell*, Salk. 27, (1 Sm. L. C. 310, at p. 318, 7th ed., referring to *Shortrede v. Cheek*, 1 A. & E. 57; 3 N. & M. 866, and *Bateman v. Phillips*, 15 East, 272; *Durrell v. Evans*, 1 [* 321] H. & C. 174; 31 L. J. Ex. 337; *Ridgway v. * Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46; The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37.

Benjamin, Q. C. (Holl and Douglas Walker with him), for the defendants, cited *Pierce v. Corfe*, L. R., 9 Q. B. 210; 43 L. J. Q. B. 52; *Baumann v. James*, L. R., 3 Ch. 508; *Hubert v. Treherne*, 3 Man. & G. 743; S. C., *sub nom.* *Hubert v. Turner*, 4 Scott, N. R. 486; 11 L. J. C. P. 78; *Smith v. Webster*, 3 Ch. D. 49; *Caton v. Caton*, L. R., 2 H. L. 127; 36 L. J. Ch. 886, p. 256, *ante*; *Peck v. North Staffordshire Ry. Co.*, 10 H. L. C. 473, at p. 568; 32 L. J. Q. B. 241, at p. 270; 5 R. C. 286, at p. 314; The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67.

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The arguments are sufficiently mentioned in the judgment of the Court.

Cur. adv. vult.

Jan. 23. The judgment of the Court (MELLOR and LUSH, JJ.), was delivered by

LUSH, J. The question submitted to us is, "Whether, under the circumstances above stated, there is a memorandum of the new agreement such that an action can be brought by Messrs. Jones in respect of the said sum of £1500:" the contention on the one hand being that the signature of the chairman to the minutes of the 7th of January does, and on the other that it does not, constitute a signature to the agreement so as to satisfy the requirements of the 4th section of the Statute of Frauds.

Mr. Benjamin's argument on the part of the defendants embraced several heads of objection, which he contended were involved in the answer to be given to the foregoing questions. Each of these objections we proceed to consider.

He contended, first, that notwithstanding the finding in the 9th paragraph, which is, in effect, that upon the acceptance by the plaintiffs of the terms proposed to them as a modification of the 11th clause of the draft, there was a complete contract between the parties, the Court can see that this is a wrong inference from the facts stated, and that we are bound either to disregard that statement, or to construe it in a sense different from what the words ordinarily import, and to hold that the terms agreed on were merely the heads or leading stipulations of the contract, which *were [* 322] to be afterwards elaborated into detail, and supplemented or varied, as the case might be, when the contemplated deed should come to be settled; in other words, that the parties were not to be bound at all except by deed, and that anything preliminary to the execution of that instrument was to be regarded as negotiation only; and, consequently, that the signature, supposing it to be otherwise sufficient, was not the signature to an "agreement," or to a "note or memorandum of an agreement," but to a mere outline which required filling up in order to become an agreement.

We are unable to discover any ground for this objection. The duplicate draft sent to the plaintiffs in the first instance is in the form of a complete contract. It commences in the usual way: "An agreement made between," &c. (naming the parties on both sides); it contains numerous minute stipulations, leaving appa-

rently nothing to be supplied, and concludes with the usual formula, "In witness, &c." The only alteration proposed and agreed to was the series of stipulations contained in the paper drawn up by A., and which was intended to represent the ultimatum of the board with reference to the various objections and requirements raised by the plaintiffs. The paper so drawn up by A. concludes with the words, "all other provisions as in draft:" all the details were settled; and when that paper was categorically accepted by the plaintiffs as the only amendment or alteration in the draft agreement required by them, all discussion as to terms was at an end. Nothing is said in either paper about any further document being prepared, and even the resolution of the company set out in the 12th paragraph, upon which so much stress was laid, does not say that a deed embodying those terms shall be prepared and executed, but that "the said agreement be engrossed in duplicate, signed, sealed, and executed;" not a new document based upon that agreement containing other terms, but a copy of that draft itself, as modified by the paper drawn by A., was to be the one which was to be executed as a deed, and was intended only as a matter ancillary to the actual agreement, which was contained in the original draft as amended by paper B. It does not appear that the plaintiffs contemplated even a sealed agreement, but

whether they did or not, neither party could claim to [*323] * make any alteration in any particular from the draft so agreed upon.

Mr. Benjamin dwelt much upon the fact that the amount of the old capital was not stated in the draft B; but that of itself does not argue that the stipulation was considered imperfect, or show an intention to have anything more explicit. The parties apparently had not agreed what the amount was, and this was left as a matter to be ascertained; and we cannot suppose it could not have been ascertained, in case any difficulty should arise thereafter upon that subject. The defendants, therefore, have failed to show that this was not what it purported to be — a complete "agreement" between the parties.

The next point on which the defendants rely is that the signature of the chairman to the minutes of the meeting of the 7th of January, which minutes were read and confirmed on the 12th of March, was not a signature within the meaning of the Act. This objection was based upon three grounds.

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First, it was contended that the signature of the chairman to the minutes was put in order to verify the proceedings of the board in obedience to the Companies Act, 1862,¹ and not in order to attest or verify the contract, and that as the signature was put *ad intuitu*, it cannot be available for the purpose of satisfying the Statute of Frauds. We think there is more ingenuity than force in this argument. The signature required by the 4th section is not of the substance of the contract; it is matter of procedure only (*Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1), and is required as evidence of the contract. To prevent frauds and perjuries, the Act will not allow any other kind of proof than the writing itself (if it be in writing) or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But so that this kind of *evidence is given, [* 324] it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract. Now the minute affirms that the company at their previous meeting had submitted to the plaintiffs a draft agreement, and that the plaintiffs had expressed their willingness to continue the management of the company's works upon the terms of that draft, and that the company then resolved that "the agreement should be engrossed, sealed, and executed." The chairman attests by his signature the accuracy of the minute, and that it had been at that second meeting read and confirmed. What is this but an assertion, under the hand of the company's agent, that the company had entered into the agreement which was contained in the draft referred to. It is not the less efficient as a signed admission of the contract, because it was made as a record of the proceedings of the company under the obligation of the Companies Act, 1862, s. 67. The question is not what its object was, but whether it is a written and signed statement of the contract.

Secondly, it was objected that the draft, not having been itself signed, could not be connected by parol with the signed statement.

¹ By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67, "Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company, in cases where there are directors or managers, to be duly entered in books to be from time to

time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings."

This point was one of those argued in the House of Lords in *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46, cited in the argument, and conclusively disposed of by the judgment of the House in that case.

The third objection was that the minute verified only draft B, and that was only one of the articles of the agreement, and consequently part only of the contract. But that draft also in terms incorporates itself with the original draft, and there can be no more objection to identifying the draft so referred to by parol than there is to identifying draft B as the draft referred to in the minute. The two together manifestly make up the entire agreement: B being obviously a substitute for the 11th article of the original draft.

Great stress was laid by Mr. Benjamin upon the indorsement on Gedge's draft set out in paragraph 11 of the case and the signature of the chairman thereto, and it was argued that that was the contract, if there was one, which the company signed. It is [*325] clear, upon the statements in the case, that the resolution was indorsed upon that draft by mistake, and upon the supposition that it had been altered in accordance with draft B. Whether that indorsement and signature could have been applied to draft B, if there had been no other signed recognition of it, we need not consider. It is enough to say that it cannot have the effect of neutralizing the signed minute, which in terms referred to the draft agreement submitted by the board to the plaintiffs, and which was without reserve accepted by the plaintiffs.

We therefore give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

The defendants appealed. But the appeal was dismissed on the ground that the parties had, by agreement, precluded themselves from appealing.

ENGLISH NOTES.

Signature of a party need not be in the document containing the other terms of the contract. It may be in another paper, for instance, in a telegram. *Goodwin v. Francis* (1870), L. R., 5 C. P. 295, 39 L. J. C. P. 121, 22 L. T. 338. Where a signed offer was made, and after some alterations by the offeree it was verbally assented to by the offeror, the previous signature was held to govern the altered contract.

Nos. 24, 25. — *Caton v. Caton*; *Jones v. Victoria, &c. Dock Co.* — Notes.

Stewart v. Eddowes (1874), L. R., 9 C. P. 311, 43 L. J. C. P. 204, 30 L. T. 333, 22 W. R. 534.

The signature may be by an authorized agent of one or both the parties. Auctioneer is an agent of the vendor alone up to the moment of sale, *Coles v. Trecothick* (1804), 9 Ves. 234, 7 R. R. 167; on the fall of the hammer he becomes also the buyer's agent for purposes of signing. *Emmerson v. Heelis* (1809), 2 Taunt. 38, 11 R. R. 520.

An auctioneer's clerk has generally no authority to bind either the vendor or the purchaser by his signature. *Coles v. Trecothick*, *supra*; *Pierce v. Corfe* (1874), L. R., 9 Q. B. 210, 43 L. J. Q. B. 52, 29 L. T. 919, 22 W. R. 299; but either party may expressly or by conduct appoint him as the agent to sign, *Coles v. Trecothick*, *supra*; *Bird v. Boulter* (1833), 4 B. & Ad. 443, 1 N. & M. 313; *Sims v. Landray* 1894, 2 Ch. 318, 63 L. J. Ch. 535, 70 L. T. 530, 42 W. R. 621.

A solicitor is not an agent for both parties so as to bind them by inserting their name, *Glengal v. Burnard* (1836), 1 Keen. 769; nor is he presumably an agent of his own client for the purpose of signature. *Forster v. Rowland* (1861), 7 H. & N. 103, 30 L. J. Ex. 396; *Smith v. Webster* (1876), 3 Ch. D. 49.

A house agent has no implied authority to sign for his principal. *Clarke v. Fuller* (1864), 16 C. B. (N. S.) 24, 12 W. R. 671.

A broker is an agent of the vendor alone till the sale; after the sale his signature will bind a purchaser also who by word or conduct authorized him to sign. In *Parton v. Crofts* (1864), 16 C. B. (N. S.) 11, 33 L. J. C. P. 189, 10 L. T. 34, 12 W. R. 553, the sold note signed by a broker and delivered to a purchaser was held to bind him. In *Durrell v. Evans* (1862), 1 H. & C. 174, 31 L. J. Ex. 337, 7 L. T. 97, 10 W. R. 665, the broker, Noakes, drew out the following document:—

“Messrs. Evans.

Bought of J. Noakes,

Bag-Pockets

33

T. Durrell, Ryarsh, }
and Addington } £16 16

Oct. 19, 1860.”

The defendant requested the date to be altered to the 20th, which was done with the consent of all the parties. It was held that Noakes's signature bound the purchaser. In *Thompson v. Gardiner* (1876), 1 C. P. D. 777, a broker signed in his book for both the purchaser and the vendor, and sent a note to each party, but signed only that which he sent to the seller, the plaintiff. The defendant kept this note without objection until called upon to accept the goods. He then repudiated the contract on the ground that the note sent to him was not signed. It was held that his conduct amounted to an admission that

the broker had authority to make the contract for him, and the signature of the broker to the sold note therefore bound him.

A traveller of the vendor is not an agent to sign for the purchaser of goods from him. *Murphy v. Boese* (1875), L. R., 10 Ex. 126, 44 L. J. Ex. 40, 32 L. T. 122, 23 W. R. 474. Nor can the plaintiff upon the record avail himself of his own signature as that of an agent to charge the defendant. *Sharman v. Brandt* (1871), L. R., 6 Q. B. 720, 40 L. J. Q. B. 312, 19 W. R. 956.

In *Hubert v. Treherne* (1842), 3 M. & Gr. 743, 4 Scott, N. R. 486, it was held that if parties show an intention of affixing their signature in a particular place, the memorandum is not complete in absence of the signature in that place.

In *Coles v. Trecothick* (1804), 9 Ves. 234, 7 R. R. 167, Lord ELDON (at 9 Ves. p. 251, 7 R. R. p. 179) said: "It is true that where a party, or principal, or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal." This *dictum* has been disapproved of in *Gosshell v. Archer* (1835), 2 Ad. & El. 500, 508, where, however, there were other words negating the intention to sign as principal.

AMERICAN NOTES.

The doctrine of the principal case is uniformly held here. *Clason v. Bailey*, 14 Johnson (New York), 484; *Coddington v. Goddard*, 16 Gray (Mass.), 436; *McConnell v. Brillhart*, 17 Illinois, 261; 65 Am. Dec. 661; *O'Donnell v. Brechen*, 36 New Jersey Law, 257; *Barry v. Coombe*, 1 Peters (U. S. Supr. Ct.), 617. The doctrine is carried to its extreme limit in *Drury v. Young*, 58 Maryland, 516; 42 Am. Rep. 313, where it is held that the name printed in a letter-head, the contract being underwritten but not otherwise signed, is sufficient. Citing *Higdon v. Thomas*, 1 H. & G. 152; *Schneider v. Norris*, 2 M. & S. 286; 15 R. R. 250. The like was held in *Argus Co. v. Mayor of Albany*, 55 N. Y. 495; 14 Am. Rep. 296, of the official minutes of a resolution of a common council of a city, signed by the clerk. So a bill of goods, "A. bought of B." will suffice. *Hawkins v. Chace*, 19 Pickering (Mass.), 502. In *Clason v. Bailey*, *supra*, Clason's agent made a memorandum in his book, "Bought for Isaac Clason for Bailey & Voorhees;" KENT, C. J., held this sufficient.

But where the statute requires that the memorandum shall be "subscribed," the signature must be at the end. *James v. Patten*, 6 New York, 9; 55 Am. Dec. 376.

Although the doctrine is found above that the name of the contracting party in a letter-head is sufficient, yet the Supreme Court of Illinois has recently held (*Summers v. Ibbard*, 38 N. East. Rep'r. 899), that where a printed letter-head contained the words, "All sales subject to strikes and accidents," this formed no part of an express and complete offer underwritten, and containing no such limitation. This would imply a decision that a signing could not be construed from the name in a letter-head, and the soundness of it may well be doubted.

No. 26. — **Lakeman v. Mountstephen**, L. R., 7 H. L. 17.

No. 26. — **LAKEMAN v. MOUNTSTEPHEN.**

(1874.)

RULE.

A PROMISE, upon which the promisor is intended to be primarily liable, is an original promise and not a promise to answer for the debt, default, or miscarriage of another within the 4th section, subsection 2, of the Statute of Frauds.

A. requests B. to do work for C. and verbally promises that he (A.) will see B. paid for it. C. is expected to pay for the work, but is not under contract to do so. The promise made by A. is an original promise, and B., having done the work, may enforce it by action against A.

Lakeman (Appellant) v. Mountstephen (Respondent.)

L. R., 7 H. L. 17-26 (s. c. 43 L. J. Q. B. 188 ; 30 L. T. 437 ; 22 W. R. 617.)

Promise to pay. — Statute of Frauds.

[17]

A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment;" and L. replied, "M., go on and do the work, and I will see you paid." M. did the work, and, the board refusing to pay, sued L. for the amount: —

Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds.

Per Lord SELBORNE: There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*.

This was an appeal against a judgment by the Court of Exchequer Chamber, which had reversed a previous judgment of the

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Court of Queen's Bench. L. R., 5 Q. B. 613; 7 Q. B. 196; 39 L. J. Q. B. 275; 41 L. J. Q. B. 67. The following is a summary of the facts: Lakeman was the chairman of the Board of Health of the town of Brixham. Mountstephen was a builder and contractor at Torquay, and had often executed works for the board. He had in the early part of 1866 completed for the board a main sewer for the town, and the board had directed him to make a purchase of pipes, and had given notice under the 11 & 12 Vict.

c. 63, s. 69 (the Public Health Act of 1848) to the owners of [* 18] certain houses *near this main sewer to connect the drains of their houses with it, or that the board would make the connections at their expense. These persons had not obeyed the notice, and the board therefore possessed the power to make the connections and to charge the inhabitants, to whom notice had thus been given, with the cost thereof. The board, however, had not passed any resolution so to do. Adams, the surveyor of the board, had proposed to Mountstephen to construct these connections. The latter did not do so, as he had no orders from the board. On the 5th of April, 1866 (which was before the expiration of the notice given to the householders), according to Mountstephen's evidence, he, after finishing the main sewer, was about to take away his carts and building materials, when, after some talk with Adams, a conversation ensued between him and Lakeman. The latter said, "What objection have you to making the connections?" Mountstephen answered, "None, if you or the board will order the work or become responsible for the payment;" to which Lakeman replied, "Go on, Mountstephen, and do the work, and I will see you paid." Mountstephen did the work, but the board, alleging that no orders had been given for the work, declined to pay for it. Mountstephen then brought an action against Lakeman for the amount due for the work.

The declaration contained three counts. The first stated that the defendant was the chairman of the board, and that in consideration that the plaintiff would do and provide certain work and materials for the board at the request of the defendant, as and assuming to be agent for the board, the defendant promised the plaintiff that he was authorized by the board to make the request; that the plaintiff, relying on the defendant's promise, did the work; breach, that the defendant was not so authorized.

The second count stated that the defendant, being such chair-

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man, in consideration that the plaintiff would do and provide work and materials for the board, at the request of the defendant, the defendant promised to obtain for the plaintiff from the board a contract whereby the board should be legally bound: breach, that the defendant did not obtain such contract. The third count was for work and materials done and supplied by the plaintiff to the defendant at his request.

The defendant pleaded, 1, to the first and second counts, that *the defendants did not promise as alleged; 2, that the [* 19] plaintiff did not do the work for board at the defendant's request; and 3, never indebted.

The cause was tried before Lord Chief Baron KELLY at the Devon Summer Assizes, 1870, when, by the permission of the learned Judge, a count was added alleging that the defendant promised that in consideration that the plaintiff would do the work for the board, the defendant promised to pay for the work if the board should at any time refuse to pay.

At the close of the plaintiff's case the defendant's counsel submitted that, on the declaration and the evidence (as it then stood), there must be a nonsuit. The learned Judge declined to nonsuit, being of opinion that there was evidence to go to the jury, and he gave leave to the plaintiff to add the count as above stated. The defendant's case was then entered on, when the statement of the conversation, as detailed in plaintiff's evidence, was denied. At the close of the case the LORD CHIEF BARON left it to the jury to say whether the conversation, as deposed to by the plaintiff, but denied by the defendant, had taken place. The jury returned a verdict for the plaintiff for £287, and leave was then reserved to the defendant to move to set aside this verdict and enter a nonsuit, if the Court should be of opinion that there was no evidence, either upon the original or amended declaration, which ought to have been left to the jury. A rule for that purpose was obtained and was made absolute, L. R., 5 Q. B. 613, the Court being of opinion that, coupling the expressions used with the conduct and position of the parties, the defendant's words did not amount to an engagement to be primarily liable for the work, but only to a promise that if the plaintiff would do the work on the credit of the board the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within sect. 4 of the Statute of Frauds, though in fact the board had

never been indebted, and as this promise was not in writing it could not be enforced.

On appeal to the Exchequer Chamber this decision was reversed, that Court being of opinion that there was evidence to [*20] *go to the jury on the question whether the defendant had not by his words made himself primarily liable. L. R., 7 Q. B. 196.

This appeal was then brought.

Mr. Cole, Q. C., and Mr. Francis Pinder, for the appellant, insisted that this was a promise to pay the debt of another, and, not being in writing, was void under the Statute of Frauds; that it was a contract of guaranty only, for that there was enough to show that the board required the work to be done, and that there was no evidence under either the original or the amended declaration to go to the jury showing that the defendant had in any way made himself primarily responsible for the work; but that the words themselves proved that the defendant meant, and the plaintiff must so have understood them, that if the plaintiff would do the work for the board the defendant would see that he got paid.

Mr. Lopes, Q. C., and Mr. Arthur Charles, for the respondent, were not called on.

THE LORD CHANCELLOR (LORD CAIRNS): —

My Lords, the question, and the only question, which your Lordships are called upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff in the action for the work to be done. I begin by pointing out to your Lordships that that is the question, and the only question in the action, for the purpose of reminding you that we are not embarrassed here by any consideration as to whether the precise sum for which the verdict of the jury was returned, is the sum which ought to have been assessed as the amount to be paid in the action. Whatever questions might have been raised, whatever distinctions might have been made as to different items of the demand, this is not the time or the place for making them. If it was desired to make them, and if there was room for making them (which I am far from saying there was not), it ought to have been done at an earlier stage in these proceedings.

My Lords, taking the question raised by the rule which [*21] was *obtained in the first instance, whether there was or

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was not evidence of an original liability on the part of the defendant to pay the plaintiff for the work to be done, I may remind your Lordships that that question falls to be determined really upon the consideration of the evidence of the plaintiff in the action himself. It is true that another witness was called on behalf of the plaintiff, but his evidence on this subject is quite immaterial, and we have the evidence of the plaintiff only to deal with. My Lords, that evidence might have been accepted by the jury or it might have been rejected; they might have been so satisfied with the evidence adduced on the other side as to lead them to disbelieve the evidence of the plaintiff, but the question, I repeat, is, whether or not in this case the learned Judge would have been right in directing a nonsuit on the ground that there was no substantial evidence to go to the jury.

Now I will call your Lordships' attention, for a few moments, to what the plaintiff really did say, because, I think, if the two portions of his evidence, which at first sight appear rather disconnected, are brought into their proper order, a very clear and intelligible account of the origin of this contract will be given. The plaintiff says in his cross-examination, referring to the 19th of March and to the resolution of the board of that date, "that notices should be served by the board," that is, notices upon the owners of houses who were to be required to connect their drainage with the main drainage of the town; "I knew nothing of this." And then, at another part, "Adams asked me if I would procure 1300 feet of pipes, and if I would do the work." He was asked two things; if he would procure the materials, and if he would do the work. "I said 'not unless the board would be responsible for the payment, for I would not take orders from the owners of the property.' I know they must have notices before they are liable. I think it is twenty-one days notice." Then a resolution of the board was put in "for notice to owners and occupiers, and that Mountstephen procure 1300 feet of pipes." That appears to have been communicated to him, as I gather from the next portion of his evidence, for he continues, "I proceeded then according to that order, but I refused to do the work unless the board would make themselves responsible."

*I understand that as being a very clear statement; it [*22] may be accurate or inaccurate, that is another question; but it is a very clear statement by the plaintiff, that he had his

attention called to the danger of proceeding in these cases without a distinct formal authority from a board, like the local board in this case, and that in the first instance he would neither procure materials nor do the work without the order of the board; that he got from the board a proper order with which he was satisfied with regard to the materials. He may have been right or wrong in thinking it a proper order, but he was satisfied with it; but he had no order of the board with regard to the work to be done, and he refused, therefore, to do that work.

Then, turning to another part of the evidence, we have from him an account of a conversation which took place between him and Mr. Lakeman, the appellant, which must have been some days afterwards. He had finished some works connected with the main drainage, and he says: "We had just finished everything." Lakeman (the defendant) said: "What objection have you to make these connections?" From which I should infer that Adams had told Lakeman that although the materials had been supplied, there was an objection to doing the work, "meaning the laying down of the junction pipes. I said: 'I have no objection to do the work, if you or the local board will give me the order.' He" (that is, Mr. Lakeman) "was chairman of the Local Board of Health for Brixham. He said: 'Mountstephen, you go on and do the work, and I will see you paid.'"

Your Lordships have had very ingenious arguments addressed to you, putting various constructions upon these few words. It has been suggested that the effect of these words was that Mountstephen must be taken to have asked Mr. Lakeman first for an order from the board, and to have been satisfied that he, as chairman of the board, could then and there give the order, and to have had through him then and there an order from the board, and yet that, not being satisfied with that order then and there thus obtained, he desired to superadd, and he had superadded to it, a virtual guaranty by Lakeman that he, personally, would guarantee that the board would pay the money. My Lords, I must say that

that does appear to me to be a most strange and violent construction [* 23] placed upon a few simple words. As it appears

to me, a very natural meaning (and it is quite sufficient for the present purpose) of these words is this, that Mountstephen, following up that course of action which he had previously pursued with Adams, stated to Lakeman that the reason why he

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refused to do the work was, that he had got no order from the board to do it, that he would do the work if he had a formal order from the board, or if he had a personal order from Lakeman himself, and that thereupon Mr. Lakeman — who for some reason, the stringency of which it is not for your Lordships now to inquire into, wished the work to be immediately done — that thereupon Mr. Lakeman said: “ You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work, and I will be your paymaster. I will see you paid.” Now, my Lords, if that is the meaning of these words, and it appears to me certainly to be the *primâ facie* and natural meaning of the words, I think there was ample and strong evidence to go to the jury that the go-by was entirely given to the question of an order of the local board, and that Mr. Lakeman stepped in and undertook himself, as a matter of primary liability, to pay for the work that would be done. Against that primary liability he might afterwards, as chairman of the board, have sheltered himself by obtaining from the board the consent to make a formal order, and acting upon and paying under that formal order. But that was for him to consider; he did that which the contractor required to be done — he put the contractor in the position of having then and there an absolute contract made — and the only contract which then and there absolutely could be made, would be a personal and primary contract by him to pay the contractor for the work to be done. My Lords, it appears to me that there was clearly substantial evidence in the case to go to the jury, and that any Judge who had to try this case would have miscarried, if upon this evidence he had held that there was no case to go to the jury.

I shall, therefore, submit to your Lordships that the decision of the Court of Exchequer Chamber is correct, and that this appeal should be dismissed.

* Lord HATHERLEY: —

[* 24]

My Lords, I entirely concur with my noble and learned friend on the woolsack, and I look upon the case exactly in the same way as he does, namely, that there is contained in the conversation which is deposed to by the plaintiff evidence sufficient for the jurors, if they thought fit to act upon it.

Lord O'HAGAN: —

My Lords, I am of the same opinion as the noble and learned Lords who have preceded me, and substantially for the same reasons.

It is enough to say that in my mind, there was ample evidence to go to the jury, and upon which the verdict of the jury could properly be pronounced. I think it right to say that our judgment does not in the slightest degree fritter away the Statute of Frauds, or weaken any substantial principle of law. It proceeds merely upon the ground that there was evidence to go to the jury. It is upon that ground that I understand the House to say that this appeal must be dismissed.

LORD SELBORNE: —

My Lords, I am of the same opinion.

There are some observations in the opinions of the learned Judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned Judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guaranty for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned Judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee any-

body else's debt unless there is a debt of some other person [* 25] to be *guaranteed. The tendency, therefore, of any view of

this contract which would place it in the position of a guaranty for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de presenti* for the express purpose of inducing him at once to go on.

The next construction suggested was one which would make it fulfil, as has been said by my noble and learned friend on the woolsack, the double office of an order given by the chairman on behalf of the board, to do the work, and a personal guaranty for the liability of the board so engaged in by the chairman on their behalf. Upon that view, which is certainly put as a possible construction of this conversation by Mr. Justice BLACKBURN, I

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cannot but observe that the argument founded upon it seems to me to be *felo de se*; because, if I rightly understand the law laid down in the case of *Cherry v. The Colonial Bank of Australasia*, L. R., 3 P. C. 24, the necessary result of such a construction of the words would be, to make the defendant liable upon the first count in this declaration. The words so used, if that was the sense in which they were understood and intended by both parties, would have been in no degree less strong, for that purpose, than the words which were held to be a warranty of authority in the case of *Cherry v. The Colonial Bank of Australasia*. There two directors signed a paper in these words: "Sir, we have to inform you that we, as directors of the company," naming it, "have appointed Mr. Clarke to be legal manager of the company, and have authorized him to draw cheques upon the account of the company." They had not *per se*, by the constitution of the company, power to give that authority; and they did not take the necessary steps to get it from the company. Those words, though expressly saying that they had done this as directors, were held to be a representation, making themselves personally liable, that they possessed the authority which they did not possess. And if the first words of this conversation could properly have been held to bear the construction suggested by Mr. Justice BLACKBURN, then, unless the board had been really *and [*26] truly liable, which I do not collect to have been the view of any one of the learned Judges in the Court of Queen's Bench, I apprehend that the verdict of the jury would still have been right, and the case could not have been withdrawn from the jury, because, in that view, the evidence would have been strong in support of the first count of the declaration.

It has been argued at your Lordship's Bar by Mr. Pinder, feeling, no doubt, the force of that view, that there is matter upon this evidence — and I suppose it must be upon the plaintiff's evidence — from which your Lordships ought to conclude that the board was actually liable. My Lords, I must say I cannot see a particle of evidence which justifies any such argument; and it does not appear to me that in either of the Courts below any learned Judge thought that there was any such evidence.

*Judgment of Court of Exchequer Chamber affirmed,
and appeal dismissed with costs.*

Lords' Journals, 5th May, 1874.

ENGLISH NOTES.

The question whether particular words, like those in the principal case, make the promisor primarily liable or not depends on the sense in which both parties understood them at the time of their utterance. For instance, in *Keate v. Temple* (1797), 1 Bos. & P. 158, the plaintiff, a tailor, supplied clothing to the crew of H. M.'s ship *Boyne*, of which the defendant was the first lieutenant, on the latter's assurance, "I shall see you paid at the pay-table." In the event the vessel was burnt, the crew lost their kits and declined to have their pay stopped to satisfy the slop-seller. In the trial at *nisi prius* the Judge left it to the jury to find whether the goods were supplied on the credit of the defendant as immediately responsible, or not, and the jury found in the affirmative with damages £576 7s. 8d. On a rule *nisi* for a new trial being obtained, EYRE, C. J., said: "There is one consideration, independent of everything else, which weighs so strongly with me that I should wish this evidence to be once more submitted to a jury. The sum recovered is £576 7s. 8d., and this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of the slop-seller to furnish the goods on his credit to so large an amount. I can hardly think that had the *Boyne* not been burnt down, and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. . . . The question is, whether the slop-man did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum."

The rule in the principal case was also laid down in *Birkmyr v. Darnell* (1705), Salk. 27, 1 Smith's Lead. Cas.; *Rothery v. Curry*, Bull. N. P. 276; *Kirkham v. Morter* (1819), 2 B. & Ald. 613, 21 R. R. 416; *French v. French* (1841), 2 M. & Gr. 644, 3 Scott, N. R. 121; *Tomlinson v. Gell* (1837), 6 Ad. & El. 564, 1 N. & P. 588, W. W. & D. 229.

It has been decided that the undertaking given in Court by an attorney to answer for a payment to be made by another will be enforceable though not in writing. *Erons v. Duncan*, 1 Tyrwh. 283; *In re Hilliard* (1845), 2 Dowl. & Lowndes, 919, 14 L. J. Q. B. 225.

An instance of an agreement required to be in writing within the subsection is *Mallett v. Bateman* (1866), L. R., 1 C. P. 163, 35 L. J. C. P. 40, 13 L. T. 410, 14 W. R. 225. There the plaintiff had contracted to supply goods to C. and Co., to be paid for in cash on each

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delivery. C. and Co. being desirous of obtaining the goods at a month's credit, instead of cash, the defendant, who had an interest in the performance of the agreement, promised the plaintiff, in case of his acceding to C. and Co.'s request for credit, to pay him in cash and to take C. and Co.'s bill "without recourse," in other words, to buy the bill of him. Held, this came within section 4, subsection 2, and ought to have been in writing.

The subsection does not apply to (1) *Contracts of indemnity*, including every case where the promise is made, not to the creditor, but to the debtor, in the principal obligation. *Thomas v. Cook* (1828), 8 B. & C. 728. There A. at the request of B. entered into a bond with B. & C. to indemnify D. against certain debts due from C. & D., and B. promised to save A. harmless from all loss by reason of the bond. It was held that B.'s promise being one of indemnity was enforceable though not in writing. So in *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438, 3 P. & D. 276, where the alleged promise was to relieve the plaintiff of certain debts. This case is set forth as a ruling case upon another point, No. 3, p. 23, *ante*. So in *Batson v. King* (1859), 4 H. & N. 739, 28 L. J. Ex. 327, where the plaintiff became party to a bill for the accommodation of the defendant on the latter's verbal promise of indemnity. So in *Wildes v. Dudlow* (1875), L. R., 19 Eq. 198, 44 L. J. Ch. 341; *Sutton v. Grey* (1894), 1894, 1 Q. B. 285, 63 L. J. Q. B. 633, 69 L. T. 673, 42 W. R. 195; *Guild v. Conrad* (1894), 1894, 2 Q. B. 885, 63 L. J. Q. B. 721, 71 L. T. 140, 42 W. R. 642, approving *Thomas v. Cook*, *supra*. (2) Where the principal debtor is legally incapable of incurring contractual liabilities, as an infant, the promisor's undertaking need not be in writing, *Harris v. Huntback*, 1 Bac. Abr. 163. (3) The rule laid down in *Thomas v. Cook* and *Eastwood v. Kenyon*, *supra*, extends to every case where the promisee is not the original creditor in the obligation. So where the plaintiff assigns a contract made with himself and guarantees performance of it to the assignee, *Hargreaves v. Parsons* (1844), 13 M. & W. 561, 14 L. J. Ex. 250. So where the plaintiff, bailiff to a County-Court, had arrested a person at the suit of a creditor, and released him on the promise by a third person (defendant in the action) to pay the debt. *Reeder v. Kingham* (1862), 13 C. B. (N. S.) 344, 22 L. J. C. P. 108. (4) Where the promisor or his property is liable, his promise to pay, though it may discharge the liability of other persons to the creditor, need not be written. *Fitzgerald v. Dressler* (1859), 7 C. B. (N. S.) 374, 29 L. J. C. P. 113. There A. sold linseed through B. & Co. to C., who resold it to D. at a profit. The time of payment agreed between D. & C. was earlier than that agreed between C. and A. A. had the lien for his unpaid purchase-money. D. through his clerk obtained the delivery order for

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A. on a verbal promise to pay the purchase-money to him. Held, this was not a contract of guaranty. (5) Where the effect of the promisor's undertaking is to discharge the principal debtor from liability, the contract is not within the statute. *Goodman v. Chase* (1817), 1 B. & Ald. 297, 19 R. R. 322. There A., being taken under a writ of *ca. sa.* issued by B., was discharged from custody with the assent of B. on the strength of a promise given by C. to pay B. on condition of such discharge. Held, that the contract was not within the statute. On the same principle, where a debt is purchased from the creditor by a third party in consideration of a promise by the latter of a composition; such a promise may be enforced although it is not in writing. *Anstey v. Marsden* (1804), 1 Bos. & P. (N. R.) 124, 2 Smith, 426, 8 R. R. 713. (6) The engagement of a *del credere* agent is not within the statute. This was decided in a reasoned judgment delivered by PARKE, B., in *Couturier v. Hastie* (1852), 8 Ex. 40, 22 L. J. Ex. 97, No. 20, p. 204, *ante*. The decision followed the decision of an American Judge (COWEN, J.) in *Wolff v. Koppell*, 5 Hill, N. Y. Rep. 458. The argument to bring the case within the statute was rested on the decision of the Exchequer Chamber in *Morris v. Cleashy* (1816), 4 M. & S. 566, 16 R. R. 544, from which it was argued that the obligation of the *del credere* agent is in effect a guarantee. The answer to this given by COWEN, J., and adopted by PARKE, B., is that the agent undertakes responsibility for the solvency of, and performance of contracts by, the vendee (whose character is presumably unknown to the vendor), and that although this may terminate in a liability to pay the debt of another, this is not the immediate object of the contract. The reasoning is subtle, but sound; and the decision is obviously consonant to mercantile convenience.

AMERICAN NOTES.

The principle of the Rule is the law in this country. The distinction between original and collateral promises is well explained in *Leonard v. Vredenburg*, 8 Johnson (New York), 29; 5 Am. Dec. 317; *Farley v. Cleveland*, 4 Cowen (New York), 432; 15 Am. Dec. 387; *Nelson v. Boynton*, 3 Metcalf (Mass.), 396; 37 Am. Dec. 148; *Mallory v. Gillett*, 21 New York, 412.

In some of the earlier cases, it was said, by way of illustration, that if the party requesting the service or sale, said: "I will see you paid," this made the promise collateral. But the present doctrine is that the test is, to whom was credit given? If the charge is made to the promisor, that is very strong evidence, although not conclusive, and on such a request the charge may be so made. Some cases hold that if the charge is made at the promisor's request to the receiver and the promisor jointly, or even to the receiver alone, that does not render the promise collateral. See notes, 95 Am. Dec. 252; 2 S. W. Reporter, 37; *Morrison v. Baker*, 81 North Carolina, 76; *Larson v.*

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Jensen, 53 Michigan, 427; *Winslow v. Dakota Lumber Co.*, 32 Minnesota, 237; *McTighe v. Herman*, 42 Arkansas, 285; *Hartley v. Varner*, 88 Illinois, 561; *Rhodes v. Lee*, 3 Stewart & Porter (Alabama), 212; 24 Am. Dec. 744; *Wallace v. Wortham*, 25 Mississippi, 119; 57 Am. Dec. 197; *Clark v. Waterman*, 7 Vermont, 76; 29 Am. Dec. 150; *Lance v. Pearce*, 101 Indiana, 595; *Boyce v. Murphy*, 91 Indiana, 1; 46 Am. Rep. 567; *Sanford v. Howard*, 29 Alabama, 684; 68 Am. Dec. 101; *Maurin v. Fogelberg*, 37 Minnesota, 23; 5 Am. St. Rep. 814. In *Boyce v. Murphy*, *supra*, the promisor directed a charge to himself and the dealer jointly; in *Maurin v. Fogelberg*, *supra*, he directed a charge to the dealer alone.

In *Cowdin v. Gottgetren*, 55 New York, 650, it was held that to whom was credit given is a question of fact: charging to the promisor is not conclusive; but here part of the debt had already been incurred and a new charge of the whole was made to the promisor. See *Myer v. Grafflin*, 31 Maryland, 359; 100 Am. Dec. 66.

The conclusion from a consideration of the American cases is that the test is, to whom was credit given? that if credit is given wholly to the promisor the promise is original; that charging to him alone is not conclusive to that effect; that charging to him and the receiver jointly or to the receiver alone, at the promisor's request, does not imply that any credit is given to the receiver; but that charging to the receiver alone without such request implies credit to him and renders the promise collateral.

In the note, 95 Am. Dec. 260, it is said: "The rules applicable to promises made before trust or 'credit' is given to pay for goods delivered to another may be summed up thus: Was trust, or 'credit,' as the books use it, given to the one to whom the goods were delivered? If so, then the one who promised to pay for them is a guarantor only, undertaking to pay another's debt. If no trust or 'credit' was given to the person receiving the goods, then the promisor is himself debtor for goods sold to him, and delivered to another person by his order. If the whole trust or credit be not given to the person who comes in to answer for another, his undertaking is collateral and must be in writing." Citing *Cahill v. Bigelow*, 18 Pickering (Mass.), 371; *Cole v. Hutchinson*, 34 Minnesota, 410.

No. 27. — PETER v. COMPTON.

(1694.)

No. 28. — DONELLAN v. READ.

(1832.)

RULE.

AN agreement to be performed upon a contingency which may take place within the year, is not an agreement that is not to be performed within the space of one year from

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the making thereof" within the 4th section, subsection 5, of the Statute of Frauds.

Neither is an agreement within this clause, if it is capable of being performed on one side within the year and if the terms do not show an intention of postponing such performance beyond the year.

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Skinner, 353.

[353] The question upon a trial before HOLT, C. J., at *nisi prius* in an action upon the case, upon an agreement, in which the defendant promised for one guinea, to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing, for the marriage did not happen within a year: The Chief Justice advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra*) where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise not.

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3 Barn. & Ad. 899-906.

Statute of Frauds. — Agreement not to be Performed within a Year.

[899] A landlord who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work: —

Held, that the landlord, having done the work, might recover arrears of the £5 a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the Statute of Frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord.

Assumpsit. The declaration stated that the defendant held a messuage and premises as tenant thereof to the plaintiff under a

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lease, for the residue of a term, at £50 a year rent, and had applied to the plaintiff to make certain improvements on the said premises; and that in consideration that the plaintiff would make the same at his, the plaintiff's expense, the defendant promised to pay him the yearly rent or sum of £5 in addition to the above-mentioned annual rent of £50, making together the yearly rent or sum of £55, to *commence on the 29th of September, 1827, and to be paid [*900] thenceforth at the days appointed in the lease for payment of the rent thereby reserved. Averment that the plaintiff made the improvements; but that afterwards, and while the defendant continued tenant to the plaintiff, the said additional rent for two years and three quarters, amounting to £13 15s., was and continued in arrear and unpaid. The second count described the promise as made upon an executed consideration, and there were also a count on a *quantum meruit* for use and occupation, and the money counts. Plea, the general issue. At the trial before ALDERSON, J., at the assizes for Somersetshire, in August, 1831, the following facts appeared: —

The defendant was tenant to the plaintiff of a house and bake-house under a lease for twenty years, commencing from the 7th of June, 1822, at the yearly rent of £50, payable at the usual quarter days. The defendant, being desirous of some improvements in the house, proposed to the plaintiff in August or September, 1827, to lay out £50 on such alterations, which the plaintiff consented to do; and the defendant thereupon undertook to pay him an increased rent of £5 a year during the remainder of the term, to commence from the quarter preceding the completion of the work. A memorandum in writing was prepared to that effect, but the defendant for some reason refused to sign it. The alterations were completed in November, 1827, at an expense of £55; and the defendant, after Christmas, 1827, paid the increased rent for the first quarter, but afterwards refused to pay any more than the original rent of £50. The present action was brought for the increased rent.

It was objected, on behalf of the defendant, that this * case came within the Statute of Frauds, 29 Car. II. c. 3, s. 4, [*901] which enacts, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof,

unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised;” and that this was a contract or agreement for an interest in or concerning land, and was in effect a purchase of an increased rent. It was also contended that the agreement was not to be performed within a year, inasmuch as it was to have continuance to the end of the lease. It was further urged that there was a variance between the promise as laid in the declaration, which was to pay the additional rent quarterly, and the promise proved, which it was said was to pay the rent of £5 yearly, to begin on a particular quarter day, but not to pay a rent reserved quarterly. On the part of the plaintiff it was answered that this was a mere agreement collateral to the lease, and that it came within the principle of *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433, 17 R. R. 477; and on the second point under the Statute of Frauds, that the whole agreement on one side was executed during the year, and that therefore the clause cited did not apply. On the point of variance ALDERSON, J., was of opinion that the agreement meant an additional rent payable on the quarterly days of the old rent. But on the question under the Statute [*902] of Frauds, he thought that *as the plaintiff had in his declaration expressly claimed this as an additional yearly rent, there was a distinction between *Hoby v. Roebuck* and this case; that this was the purchase of a rent issuing out of the premises, and therefore within the provisions of the Statute of Frauds; and he nonsuited the plaintiff, with liberty to move to enter a verdict for him. A rule *nisi* was accordingly granted. On a former day in this term,

Manning and Follett showed cause.¹ As to the first point, *Hoby v. Roebuck* does not govern this case. The question there was not put to the Court upon the ground that the purchase was of “an interest in or concerning lands” within s. 4 of the Act: it was merely insisted, that the contract for an additional rent was, in effect, a demise of the new buildings erected by the plaintiff; and the Court held that there was no contract for a rent, but merely a collateral agreement for so much money to be paid during the term. They observed that it could not have been dis-

¹ Before LITTLEDALE, PARKE, and TAUNTON, JJ. Lord TENTERDEN had gone to attend the Privy Council.

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trained for. But here the agreement is expressly for an increased rent, and it is so stated in the declaration. There clearly might have been a distress for it. This contract, then, would have operated to charge the land if a written memorandum had been executed. It was equivalent to a new demise at the rent of £55. [PARKE, J. Even if there had been a note in writing, would the £55 have become a rent, unless the transaction had amounted to a surrender of the former term?] It would have had that effect. Secondly, this was not an agreement to be completely performed *within the space of one year from the making [* 903] thereof, and it was therefore void for want of a memorandum in writing. *Boydell v. Drummond*, 11 East, 142; 10 R. R. 450. The word agreement comprehends what is to be done by both parties: unless the promise of each is to be fulfilled within a year, there must be a memorandum in writing. [PARKE, J. If goods are sold, to be delivered immediately, or work contracted for, to be done in less than a year, but to be paid for in fourteen months, or by more than four quarterly instalments, is that a case within the statute?] It is within the policy of the act as stated by HOLT, C. J., in *Smith v. Westall*, 1 Ld. Raym. 316, viz. "not to trust to the memory of witnesses for a longer time than one year." [PARKE, J. In *Bracegirdle v. Heald*, 1 B. & Ald. 722; 19 R. R. 442, ABBOTT, J., takes the distinction, that in the case of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen, all that is to be performed on one side is to be done within a year; which was not so in the case then before the Court.] It is only assumed here that the plaintiff's part was to be executed within a year. [TAUNTON, J. Unless the contrary is expressly agreed, the statute does not apply, *Fenton v. Emblers*, 3 Burr. 1278.]

Merewether, Serjt., *contra*. In the first place, this was not a contract giving any interest in or concerning lands. The defendant is lessee of a house, and the landlord undertakes, in consideration of £5 a year to be paid during a certain period, to improve it. The case is just the same as if any other person had entered into that engagement. There would, then, clearly have been no new interest created in the land. And it makes no difference

* that, in one case or the other, the sum to be paid is called [* 904] rent. It is a mere collateral agreement, like that in *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433; 17 R. R. 477. No inten-

tion appears of superseding the original written contract; nor is it likely that these parties should have contemplated a surrender, by which the landlord would lose the covenants of the lease, and the tenant his term in the premises. As to the second point, *Boydell v. Drummond*, 11 East, 142; 10 R. R. 450, is a very different case. There, neither the delivery of the work nor the payment was to be completed in a year; here the work was actually finished on one side in less than that period; and it has never been held that in such a case the statute shall attach, and the party performing his contract lose his remedy, merely because he has agreed that the payment shall be postponed beyond a year.

On this last point, the Court intimated their opinion to be in favour of the rule; as to the other, *Cur. adv. vult.*

The judgment of the Court was now delivered by LITTLEDALE, J., who, after stating the case, proceeded as follows:—

We are of opinion that the case does not fall within the Statute of Frauds. The most favourable words for the defendant are, that it is a contract for an “interest in or concerning land.” But no additional interest in the land is given to the defendant by this contract; for his interest is the same as before; it is only that there are bricks and other materials removed from the house, and some others substituted in their room. Then is [* 905] *there any additional interest in the land given to the landlord? It is said to be a purchase of a rent of £5 a year for the sum of £50, and therefore an interest in or concerning the land; but though it be called a rent in the present contract and also a rent in the declaration, yet we are of opinion that it is not rent in the legal sense and understanding of the word rent; and that the word is not to be understood in its legal sense either in one or the other. It could not be distrained for, for there is no lease which embraces it; the lease is for £50 a year, and there is no lease at £55. If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional £5. The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it, because it is not annexed to the reversion: if the lessor should die, the rent of £50 would go to his heir or devisee, but the right to this additional £5 being a mere matter of personal contract would go to his executor. The

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only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that therefore, by operation of law, the old lease is surrendered by such new demise; but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which being only by parol could only have the effect of a lease at will: and as it is quite improbable that such should be the intention of either party, we think that though the word rent has been used, it is too much to treat it as rent in the technical strict meaning of the term, and that all that the parties meant was a personal contract to *pay an additional £5 a year; and we [*906] think this case is to be governed by *Hoby v. Roebuck*; for though the agreement there was to pay ten per cent. upon the money laid out, and it was not called rent, yet that was in truth the same thing, and it only amounted to a collateral contract.

As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part. In the case of *Boydell v. Drummond* the contract was not completely executed on one side, and the case was such that in the common course of the publication it was not expected that it should be completed in a year.

With regard to the variance as to the time of payment of the rent, we think there is no ground for that objection.

On the whole, therefore, we are of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

ENGLISH NOTES.

In *Cherry v. Hemming* (1849), 4 Ex. 631, 19 L. J. Ex. 63, it was decided that an agreement which is wholly performed by one of the parties within the year is not within the subsection. This case and the principal case of *Donellan v. Read* were both confirmed in *Smith*

v. *Neale* (1857), 2 C. B. (N. S.) 67, 26 L. J. C. P. 143, where the defendant made a written proposal to have a certain patent of the plaintiff assigned to her (the defendant) in trust for a charity. The defendant was to pay the fees for renewal of the patent, and the plaintiff was to have five per cent. of the profits, provided the percentage did not fall below a minimum per annum, in which case the plaintiff could reclaim the patent. The plaintiff accepted the proposal verbally. It was held (1) that the contract was not within this subsection, as all that had to be done by the plaintiff could be done within a year, and there was no intention to postpone the performance beyond that time; (2) that verbal acceptance of a written proposal constituted a sufficient memorandum to charge the proposer. In *Dobson v. Collis* (1856), 1 H. & N. 81, 25 L. J. Ex. 267, there was an agreement between A. and his traveller for service for twelve months from October, 1854, but if three months' notice was not given before the 1st of September, 1855, the service was to be continued for another twelve months. It was held that this was a contract not to be performed within a year. In *Cawthorn v. Cordery* (1863), 13 C. B. (N. S.) 406, 32 L. J. C. P. 152, a contract for service for a year was entered into on a Sunday, the service to commence from the following Monday, which it did. WILLES, J., at the trial stated his opinion that a contract to serve for twelve months from the following day was not within the subsection, but he left it to the jury to say whether a new contract was not implied by the plaintiff, with the knowledge and consent of the defendant, commencing the service on the Monday. The jury found this in the affirmative, and the Court held that the evidence supported the verdict. The decision of the Court of Appeal in *Britain v. Rossiter* (1879), 11 Q. B. D. 123, 48 L. J. Ex. 362, 40 L. T. 240, 27 W. R. 482, must be considered to overrule the above *dictum* of Mr. Justice WILLES. There it was held that a contract made on a Saturday for a year's service to commence on the following Monday was within the section, and that a fresh contract cannot be implied from acts done in pursuance of such a contract. The point of distinction in *Cawthorn v. Cordery* (*supra*) was the fact that the contract was entered into on a Sunday. The decision of HAWKINS, J., in *Darey v. Shannon* (1879), 4 Ex. D. 81, 48 L. J. Ex. 459, 40 L. T. 628, 27 W. R. 599, that a contract for partial restraint of trade during the joint lives of the plaintiff and defendant was within the subsection, must be considered to be overruled by the judgments of the Lords Justices of Appeal, ESHER, M. R., LINDLEY, L. J., and BOWEN, L. J., in *McGregor v. McGregor* (1888), 21 Q. B. D. 424, 57 L. J. Q. B. 591, 37 W. R. 45.

Further illustrations of the principle are furnished by *Knouelmann v. Bluet* (1873), L. R., 9 Ex. 1, 43 L. J. Ex. 15, 29 L. T. 462, 22 W. R.

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77; *Banks v. Crossland* (1874), L. R., 10 Q. B. 97, 44 L. J. M. C. S., 32 L. T. 226, 23 W. R. 414; and *Erans v. Hoare* (1892), 1892. 1 Q. B. 593, 61 L. J. Q. B. 470, 66 L. T. 345, 40 W. R. 442.

In *Birch v. Lord Liverpool* (1829), 9 B. & C. 392, it was decided that a condition of defeasance which may happen at any time does not take out of the statute a contract, the performance of which is fixed for two years.

AMERICAN NOTES.

The first principal case is thoroughly accepted in this country. Mr. Lawson cites both, and carefully classifies the cases (Contracts, § 74). In respect to the second there is some conflict.

The doctrine of *Peter v. Compton* is adopted in *Lyon v. King*, 11 Metcalf (Mass.), 411; 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray (Mass.), 170; 71 Am. Dec. 696; *Blainding v. Sargent*, 33 New Hampshire, 239; 66 Am. Dec. 720; *Moore v. Fox*, 10 Johnson (New York), 244; 6 Am. Dec. 338; *Linscott v. McIntire*, 15 Maine, 201; 33 Am. Dec. 602; *Gadsden v. Lance*, 1 McMullan Equity (So. Car.), 87; 37 Am. Dec. 548, citing *Peter v. Compton*; *Horner v. Frazier*, 65 Maryland, 1; *Kent v. Kent*, 62 New York, 560; 20 Am. Rep. 502; *Fraser v. Gates*, 118 Illinois, 99; *McPherson v. Cox*, 96 United States, 404. As, for example, a promise to pay for work on the death of the employer; *Kent v. Kent*, *supra*; or to pay for past services by will; *Jilson v. Gilbert*, 26 Wisconsin, 637; 7 Am. Rep. 100 (citing *Peter v. Compton*, and observing that there are no decisions to the contrary). So of a contract for services for a year to begin the next day. *Dickson v. Frisbee*, 52 Alabama, 165; 23 Am. Rep. 565. See also *Warren Chemical, &c. Co. v. Holbrook*, 118 New York, 586; 16 Am. St. Rep. 788; *Thomas v. Armstrong*, 86 Virginia, 323; 5 Lawyers' Rep. Annotated, 529; *Brown v. Throop*, 59 Connecticut, 596; 13 Lawyers' Rep. Annotated, 646; *Arkansas, &c. R. Co. v. Whitley*, 54 Arkansas, 199; 11 Lawyers' Rep. Annotated, 621.

The doctrine of *Donellan v. Read* finds support in *Blainding v. Sargent*, 33 New Hampshire, 239; 66 Am. Dec. 720; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267 (citing *Donellan v. Read*); *McClellan v. Sanford*, 26 Wisconsin, 595; *Wolke v. Fleming*, 103 Indiana, 110; *Jones v. Hardesty*, 10 Gill & Johnson (Maryland), 404; 32 Am. Dec. 180; *Berry v. Doremus*, 30 New Jersey Law, 399; *Holbrook v. Armstrong*, 10 Maine, 31; *Dant v. Head*, 90 Kentucky, 255; 29 Am. St. Rep. 369; *Sheehy v. Adarene*, 41 Vermont, 541; 98 Am. Dec. 623, citing both principal cases.

The statute has no application to a contract fully performed by one party although not to be performed by the other within a year. *Dant v. Head*, *supra*, and cases cited therein; *Washburn v. Dosch*, 68 Wisconsin, 436; 60 Am. Rep. 873; *Smalley v. Greene*, *supra*.

Other cases hold, in respect to an executory contract, that if the promise of either is not capable of performance within a year, it is within the statute. *Whipple v. Parker*, 29 Michigan, 375; *Frery v. Sterling*, 99 Massachusetts, 461; *Pierce v. Paine*, 28 Vermont, 34 (pronounced in *Whipple v. Parker*, *supra*, to be "the clearest and ablest exposition of the whole subject to be found in any one decision"); *Montague v. Garnett*, 3 Bush (Kentucky), 297;

Broadwell v. Gelman, 2 Denio (New York), 87. In the last case the Court cited *Donellan v. Read*, and acknowledging that its principle "has no application to the present case," added *obiter*: "But I would not be understood as yielding my assent to the principle stated. It seems to me in plain violation of the statute. Every verbal contract which is not to be performed in a year from the making thereof is declared to be void. Although the terms of the agreement may require full performance on one side within a year. I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully, on both sides, within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within the year? Such an agreement is not in terms excepted from the statute, and the reason for the enactment applies to it with full force." The same view is taken on a very learned examination, in *Marcy v. Marcy*, 9 Allen (Mass.), S. A. D. 1864. BIGELOW, C. J., observes: "It is immaterial that performance by one party of his part of the contract is to be complete within the prescribed period. It is none the less on that account a part of the original agreement. Nor can it be properly said that an agreement, if the word is used as applicable to the subject-matter of a contract consisting of mutual obligations, is performed within a year, when it has been fulfilled by one side only; such a conclusion would seem to involve the absurdity expressed in the language of a learned Judge: 'It cannot be said that an agreement is performed when a great part of it remains unperformed; in other words, that part performance is performance.' In the sense then of a mutual contract, importing reciprocity of obligation by which two parties are bound, an agreement is required to be in writing if the undertaking of either party is not to be fulfilled within the year. But in the more restricted meaning of the word, as signifying the promise or contract of one party only, it would seem to be equally clear that it would apply to and include every stipulation the performance of which is to be postponed beyond the expiration of a year." The Court point out that although the English doctrine is different, yet, "Smith, in his note to *Peter v. Compton*, directly impugns it, and asserts that the doctrine is inconsistent with that held in the earlier cases;" that COLTMAN and MAULE, JJ., hesitate about accepting it; that Browne in his treatise on the Statute of Frauds, expresses a doubt as to its soundness; and adds that "the subject has never been fully discussed in England." One reason for this may be that in every case in which the question has been presented, the stipulation sought to be enforced has been for the payment of a money consideration, where the defendant has received the full benefit of the performance of the contract by the plaintiff. In all these cases a count in *indebitatus assumpsit* has been inserted in the declaration, so that the plaintiff would be entitled to recover the value of the executed consideration, although the contract itself might be within the statute. Indeed it may still be an open question whether any case in England goes further than to hold that a party may recover the value of a consideration of which the defendant has received the benefit.

Donellan v. Read, and *Cherry v. Hemming*, 4 Exch. 631, are cited and approved

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in *Smalley v. Greene, supra*. In *Washburn v. Dosch, supra*, the Court said: "Several years ago, and after mature deliberation, this Court concluded to follow the rule sanctioned in England and several of our sister States, instead of the one adopted in New York and some of the New England States." In *Dant v. Head, supra*, the Court observe: "In fact, the statute applies to agreements that are wholly executory; and one which has been performed by one of the parties within a year is to that extent executed, and cannot with propriety be called an agreement to be performed within a year." In *Sheehy v. Adarene, supra*, the Court say: "Looking to the reason of the law, under the statute, this case stands for the same consideration as any case in which the cause of action should arise from the breach of an agreement which had no relation to the Statute of Frauds. Upon the occurring of such breach, the right of action would be perfected; but the party would be at liberty to delay bringing his suit to the last hour allowed by the Statute of Limitations without affecting the right to maintain the action. The purpose of the Statute of Frauds is to provide for a class of cases in which there cannot be an actionable breach within the specified time. That class embraces only agreements that are not to be performed within a year. Such agreements as may be wholly broken within the year, and thereby give a cause of action for such complete breach, do not fall within either the letter or the reason of the statute." "It is proper further to remark that in all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year."

An oral contract for services not to be completed in a year is void, although made subject to determination sooner on the happening of a certain event. *Meyer v. Roberts*, 46 Arkansas, 80; 55 Am. Rep. 567, citing *Peter v. Compton*.

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(EXCH. 1840.)

No. 30. — SOUTH OF IRELAND COLLIERY COMPANY v.
WADDLE.

(C. P. 1868 & EX. CH. 1869.)

RULE.

GENERALLY, corporations can contract only under their common seal; but commercial corporations may, for the purposes for which they are incorporated, contract by their agents without seal.

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Ludlow (Mayor, &c.) v. Charlton.

6 M. & W. 815-824 (s. c. 8 C. & P. 242; 4 Jur. 657; 16 L. J. C. P. 75).

Corporation. — Contract under Seal.

[815] A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal.

Covenant. — The declaration stated a demise dated the 25th day of March, 1820, by the bailiffs, burgesses, and commonalty of the borough of Ludlow, of certain lands called the Foldgate Farm, to the defendant, for a term of twenty-one years, at a yearly rent of £150, and a covenant by the defendant for payment of such rent. Breach, in nonpayment of arrears of rent, to the amount of £375 13s. 5d. Pleas, 1st, payment; 2ndly, a set-off for £500, agreed to be paid by the corporation to the defendant, for pulling down and altering the site of a house called the Charlton Arms, in the town of Ludlow, and for altering a roadway there, and also for work, labour, and materials, and for money lent; 3rdly, a special plea, stating in substance that it was agreed between the old corporation of Ludlow (before the passing of the 5 & 6 Will. IV. c. 76), and the defendant, that the defendant should alter the situation of the Charlton Arms, and should be paid by them the sum of £500 for making such alterations, which should be set against the rent payable by the defendant to the corporation; and the plea then went on to aver, that the defendant had made the alterations accordingly. Replications, taking issue on each of the pleas.

At the trial before GURNEY, B., at the last Shrewsbury [* 816] *Summer Assizes, 1839, the defendant offered in evidence the following resolution, entered in the corporation books at a meeting of the old corporation: —

“28th October, 1835.

“Resolved — That £500 be paid to Mr. Charlton, to alter the Charlton Arms according to the plan produced by Mr. Atkins, if he will give his consent to the alteration.

“Mr. Charlton then addressed the meeting, and stated that he had no objection to the Charlton Arms Inn being altered according to the plan produced, and on receiving £50 to alter the present road

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to the stables, if Mr. Stead thought that such sum would be necessary to make a convenient approach to the stables.

“The thanks of the meeting were then given to Mr. Charlton, for the readiness he has shown to accommodate the public.”

The plaintiff's counsel objected to the reading of this entry, on the ground that it ought to have been stamped as an agreement. The learned Judge received the evidence, subject to the objection. It was proved also that the defendant had made the alterations agreed on, at the Charlton Arms and in the road, which were finished early in the year 1836, and that the expense of them exceeded £500. The learned Judge, in summing up, expressed his opinion that the third plea was not proved, and left it to the jury, upon the second issue, to say whether there was an agreement between the old corporation and the defendant, whereby they agreed to pay the defendant the sum of £500 to alter the Charlton Arms, and whether the defendant had performed the agreement on his part. The jury found these questions in the affirmative; and the learned Judge then directed a verdict to be entered for the plaintiffs for £300 (the balance of rent in *arrear, after de- [*817] ducting payments proved by the defendant), giving the defendant leave to move to enter a verdict for him on the second issue, if the Court should be of opinion that the entry in the corporation book did not require a stamp.

In Michaelmas Term, Talfourd, Serjt., obtained a rule *nisi* accordingly; against which, in Easter Term last,

Ludlow, Serjt. (Whateley with him), showed cause. — [The argument on the question as to the stamp is omitted, as the judgment of the Court turned on another point.] Assuming that there was evidence of a contract between the old corporation and the defendant, it was invalid, not being under the corporation seal. It is clear law, according to all the authorities, that a corporation cannot bind itself by a contract which is to have the effect of vesting or divesting corporation property, except under its common seal. 1 Black. Comm. 475; Com. Dig., “Franchise,” (F) 12, 13, 14; Bac. Abr. “Corporation,” (E) 3; *Wilmott v. Coventry*, 1 Y. & C. 518. It is laid down, indeed, in the books, that certain small insignificant acts, not affecting the revenues of the corporation, may be done by the head alone, without using the common seal; such as appointing a butler, cook, or bailiff. *Carey v*

Matthews, 1 Salk. 191; *Smith v. Birmingham Gas Light Co.*, 1 Ad. & E. 526; 3 Nev. & M. 771. The only other exception to the general rule is in cases where the legislature has invested particular officers of trading corporations with the power of drawing bills in the name of the entire body. *Slark v. Highgate Archway Co.*, 5 Taunt. 792; *Broughton v. Manchester Waterworks Co.*, 3 B. & Ald. 1. In this case, the contract devests a considerable interest out of the corporation. [PARKE, B. I [* 818] doubt * whether any case has gone so far as to show that a corporation can bind itself by such a contract as this, not under seal. The old cases permitted it as to certain small things, which must of necessity be done without that formality, and this exception has been extended by the modern cases to things which the corporation, by the nature of its constitution, must do to carry on its concerns: but that principle does not apply to the case of a municipal corporation; it cannot be necessary for the purposes of its constitution, that it should part with so much of its property. The cases decided in the Court of King's Bench, *Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Church v. Imperial Gas Co.*, 6 Ad. & E. 846, have broken in upon the old law, but not to this extent. The American law has entirely abrogated the old doctrine,¹ but we have not.] — The Court then called on —

Talfourd, Serjt., and R. V. Richards, to support the rule. — The distinction on this subject is between contracts executed and executory. A corporation cannot be sued on an executory contract, unless it were entered into by an instrument executed under the common seal; but where the contract has been actually executed, and the corporation has enjoyed the benefit of the consideration for it, an implied assumpsit arises against them. *East London Water Works Co. v. Bailey*, 4 Bing. 283; 12 Moore, 533; 5 L. J. (N. S.) C. P. 175; *Mayor of Stafford v. Till*, 4 Bing. 75; *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608. Suppose, instead of agreeing with Mr. Charlton, the corporation had contracted by parol with a road contractor who did the work, — could he not have sued them in assumpsit? In the case last cited, the subject of the action was tolls, — things incorporeal, which could not properly be let at all without deed; yet the benefit of [* 819] the parol demise having been enjoyed by the * defendant, they were held to be recoverable in assumpsit. The law

¹ See Story's Commentaries on the Law of Agency, pp. 45, 46.

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on this subject has been much relaxed since Blackstone's work was written, and exceptions have been introduced quite beside the old notion of small insignificant matters, which must be done in haste. Where is the line to be drawn between important and unimportant acts? is it to vary with the wealth and greatness of the corporation? There are, indeed, cases where trading corporations have even been held suable on executory contracts. *Church v. Imperial Gas Light Company*, 6 Ad. & E. 846; 3 N. & P. 35. [ALDERSON, B. Those are cases in which the corporation is called into existence solely for the purpose of trading. The case of *Taylor v. The Dulwich Hospital*, 1 P. Wms. 655, is an authority against the general proposition you contend for. Is not this a contract binding the corporation to pay money out of their revenues?] So would every contract of every kind. The argument for the plaintiffs would go to this, that in no case could repairs, however trifling, be done for a corporation, unless the order or contract were under seal. The solution of the difficulty appears to be contained in the observation of COLERIDGE, J., in *Church v. Imperial Gas Light Company*, 6 Ad. & E. 853: "The truth seems to be, that the rule on this subject has been relaxed, in consequence of the necessity produced by changes in the circumstances of the times. It is difficult to reconcile all the decisions with strict legal principles." Actions may be maintained against a board of guardians. [ROLFE, B. They are only corporations for particular purposes. The cases in which it has been said that a cook or butler need not be appointed under the common seal, rest on a fiction that some individual has been duly authorized to make contracts of that nature on behalf of the corporation.]

Cur. adv. vult.

*In this term, the judgment of the Court was delivered [*820] by —

ROLFE, B. The principal point on which we reserved our judgment in this case, was as to the right of the defendant to set off a sum of money, alleged to be due to him from the plaintiffs, against their demand for rent sought to be recovered in this action. It appeared at the trial, that, after the rent in question had become due from the defendant to the corporation, a resolution was entered into at a corporate meeting, holden soon after the passing of the Municipal Reform Act, whereby it was resolved, that a

sum of £500 should be paid to the defendant, in consideration of certain improvements to be made by him in altering the Charlton Arms Inn. To this resolution the defendant, who was present, assented, and a memorandum of such assent was duly entered in the books of the corporation. The defendant has since made the proposed alterations, and he now seeks to set off the £500 against the sum due for rent.

Whether the resolution of the corporation required a stamp as an agreement, or as evidence of it, was one point reserved by my Brother GURNEY, and discussed at the bar.

It becomes unnecessary to decide that point; because we are of opinion that, if the agreement be taken to have been duly proved, the defendant has no right to make such a set-off; and we come to this conclusion upon grounds wholly independent of any considerations arising from the Municipal Reform Act. The alleged contract between the corporation and the defendant is not founded on deed, but rests wholly on what is to be found in the corporate books; and we are of opinion that such a contract does not bind the corporation.

The rule of law on this subject, as laid down in all the old authorities, is, that a corporation can only bind itself by deed. See Comyns' Digest, tit. "Franchise," (F) 12, 13, [* 821] *and the authorities there referred to. The exceptions pointed out rather confirm than impeach the rule. A corporation, it is said, which has a head, may give a personal command, and do small acts; as it may retain a servant. It may authorize another to drive away cattle *damage feasant*, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems, from the earliest time, to have been considered as delegated by the rest of the members to act for them.

In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by Royal Charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the con-

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stant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench, in *Beverley v. Lincoln Gas Light and Coke Company*, 6 Ad. & El. 829.

The present case, however, was argued at the bar, as if, by the decision in that last case, the old rule of law was to be considered as exploded, and as if, in all cases of executed contracts, corporations were to be deemed bound in the same manner as individuals. But this would be pressing the decision in question far beyond its legitimate consequences; and that the Court of Queen's Bench had no such *meaning, is plain from the subse- [* 822] quent case of *Church v. Imperial Gas Light Company*, 6 Ad. & El. 846. Lord DENMAN, in delivering the judgment of the Court in that case, says, (p. 861), "The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

To every word of this we entirely subscribe, and, applying the language of Lord DENMAN to the present case, it is quite clear that there was nothing to enable the corporation of Ludlow to contract

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with the defendant otherwise than in the ordinary mode, under the corporate seal.

In contracting without a seal, there was no paramount convenience so great as to amount almost to necessity. To have required a seal would certainly not have tended to defeat the object for which the corporation was formed, nor was the subject-matter of the contract one either of frequent ordinary occurrence, or of urgency admitting no delay.

[* 823] * Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the Legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation know, that by such an act the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

We have made these remarks, in consequence of the very great length to which some of the arguments addressed to us, as to allowing corporations to contract otherwise than under seal, would

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go. The case, however, under discussion *does not call [* 824] on us to do more than say, that none of the authorities warrant us in giving effect to the resolution relied on by the defendant, and consequently the rule *nisi* for setting aside the verdict must be discharged. *Rule discharged.*

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L. R., 3 C. P. 463; 4 C. P. 617, 618 (s. c. 37 L. J. C. P. 211; 38 L. J. C. P. 338; 18 L. T. 405; 16 W. R. 756; 17 W. R. 896).

Trading Corporation. — Contract not Under Seal.

Whether a trading corporation can contract without seal or not, depends, [463] not upon the magnitude or the insignificance of the subject-matter, but upon whether or not the contract be for a purpose connected with the objects of the incorporation

A company incorporated under the Companies Act, 1862, for the working of collieries, contracted with an engineer for the erection of a pumping-engine and machinery for that purpose, and paid him part of the price. In an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery: —

Held, that the action was maintainable, though the contract was not under seal.

By the articles of association of the company it was provided that the business thereof should be carried on under the management of the board of directors; and that the board, in addition to the powers and authorities by the statutes, and by those presents expressly conferred upon them, might execute all such agreements, and generally do all such acts and things as were by the statutes and those presents directed or authorized to be executed or done by the company in meeting, &c.: —

Held, by BOVILL, C. J., and BYLES, J., that the contract in question was warranted by the articles of association, and that there was nothing in them or in the statute requiring it to be under seal.

The first count of the declaration claimed damages for breach of an agreement to deliver certain machinery which the plaintiffs had purchased of the defendants and partly paid for.

There was also a count for money had and received and money found due upon accounts stated.

Pleas: 1. That the defendant did not agree as alleged. 2. That the plaintiffs were not ready and willing to accept the goods or to pay for the same according to the terms of the contract. 3. Except as to £500, never indebted. 4. As to £500, parcel, &c., payment of that sum into Court. Issue thereon.

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The cause was tried before MONTAGUE SMITH, J., at the sittings in London after last Trinity Term. The plaintiffs were a company incorporated under the Companies Act, 1862, 25 & 26 Vict. c. 89, for the purpose, as expressed in the memorandum of association, of purchasing, renting, or otherwise acquiring certain collieries and mines of coal under certain lands therein [* 464] named, near * Carrick-on-Suir, in the county of Kilkenny, and opening up, excavating, mining, working, and utilizing all or any of the said collieries and coal mines and premises, and generally doing and executing all such acts and things as should or might be or seem necessary or expedient or incidental to the objects aforesaid, or any of them.

By the articles of association, clause 3, it was provided that the business of the company should include the several objects expressed in the memorandum of association, and all matters which from time to time might appear to the directors expedient for attaining those objects.

Clause 4 provided that the business should be carried on by or under the management of the directors, subject only to such control of meetings as was provided by those presents.

Clause 77 was as follows: "The business of the company shall be managed by the board, who, in addition to the powers and authorities by the statutes or by these presents expressly conferred upon them, may exercise all such powers, give all such consents, make all such arrangements, and generally do all such acts and things as are or shall be by the statutes and these presents directed or authorized to be executed, given, made, or done by the company in meeting, but subject, nevertheless, to the provisions of the statutes and of these presents, and subject also to such, if any, regulations as are from time to time prescribed by the company in meeting."

The directors having advertised for tenders for the construction of machinery necessary to enable them to commence working, the defendant, an engineer at Llanelly, on the 5th of March, 1864, offered to construct the required engines and gearing, to be delivered free at Waterford, for £1550.

By a resolution of the board of directors on the 4th of April, 1864, the defendant's tender was accepted, with £50 additional for the erection of the machinery; the terms of payment to be as follows: £500 in cash on the shipment of the pumping-engine;

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£500 by three months bill on shipment of the remainder of the order; and £600 by four months bill on the erection of the engine, &c., and on their being pronounced in working order by the company's manager.

On the 7th of March and 7th of June, 1865, respectively, the *defendant received from the company in cash [* 465] £300 and £200 on account; but, after considerable delay, the defendant declined to deliver any part of the machinery contracted for, unless security were given for payment of the remainder of the price, and the plaintiff's works were consequently delayed.

On the part of the defendant it was objected that the contract, not being under the seal of the company, was void as against them, and therefore not binding on the defendant, for want of mutuality; and the case of *East London Waterworks Company v. Bailey*, 4 Bing. 283; 12 Moore, 533; 5 L. J. (N. S.) C. P. 175, was relied on.

Under the direction of the learned Judge a verdict was taken for the plaintiffs (damages £500), leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if the Court should be of opinion that the contract required a seal.

Day, in Michaelmas Term last, obtained a rule *nisi* accordingly.

After argument, —

BOVILL, C. J. I am of opinion that the plaintiffs are [468] entitled to the judgment of the Court, and that the rule should be discharged. The plaintiffs are a corporation established, according to their memorandum of association, for the purpose of acquiring collieries and mines in the south of Ireland, and working the same, and selling the produce, and generally of doing all such acts and things as should be necessary for the purpose of carrying out the objects of their association or any of them. This company, therefore, is in the nature of a trading company. The mode of carrying on their business is defined in article 4 of the memorandum of association; and the duties of the directors are defined by article 77. Subject, therefore, to exceptions which do not apply to this case, this is a corporation established for carrying on business under the control and management of the directors. The contract declared upon is admitted to have been made by the directors with the defendant. The objection is, that it is not under the corporate seal of the company; and it is contended on

the defendant's behalf, that, by reason of the absence of a seal, there is no mutuality, that the plaintiffs are not bound by it, and therefore are not entitled to sue upon the contract. It appears further that the contract had been partly performed, and that the company were ready and willing to perform the rest. It [* 469] had in fact been adopted and acted upon by * both parties.

The objection is entirely a technical one; but, though technical, if it be in accordance with law, the Court is bound to give effect to it. Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, — managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of a contract for £50,000 or £100,000. I will in the first instance refer to the case of *Henderson v. Australian Royal Mail Steam Navigation Company*, 5 E. & B. 409; 24 L. J. Q. B. 322, where, though one of the learned Judges somewhat differed as to the application of the modern rule, yet all affirmed its existence as well as its propriety. WIGHTMAN, J., said: "I adhere to the opinion which I expressed in *Clarke v. Cuckfield Union*, 1 Bail. C. C. 85; 21 L.

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J. Q. B. 349, 'that the general rule that a corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts is necessary * and incidental to the purposes for which the [* 470] corporation was created.'” And, after adverting to the ancient rule and to the earlier and more trifling instances of its relaxation, he goes on: “But, in later times, the decisions have sanctioned a much more extensive relaxation, rendered necessary in consequence of the general establishment of trading corporations. The general result of those cases seems to me to be, that, whenever the contract is made with relation to the purposes of the corporation, it may, if the corporation be a trading one, be enforced, though not under seal.” And ERLE, J., agreed, “on the ground that the contract was made for a purpose directly connected with the object of the incorporation,” viz., the carrying on trade. Further on, the same learned Judge says: “I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. No doubt, when the exception originated, it was applied only to small matters, such as the appointment of servants, being all that municipal corporations required. But, as soon as it became extended to trading corporations, it was applied to drawing and accepting bills to any amount; and this shows that insignificance is not an element. Neither, I think, is frequency. The first time a company makes a contract of any kind, that contract must have been unprecedented. The question is, I think, whether the contract in its nature is directly connected with the purpose of the incorporation.” And CROMPTON, J., agreed in the principles laid down by the other two Judges, but seemed to doubt whether it would not have been more proper to decide in conformity with some of the earlier cases in the Exchequer. But he says: “I perfectly agree in the principles laid down by my Brothers, and more especially I concur in that important principle suggested in *Broughton v. Manchester Waterworks Company*, 3 B. & Ald. 1, that a modern incorporation incorporated for trading purposes may make binding contracts in furtherance of the purposes of their corporation, without using their seal.” Lord CAMPBELL was not present when that case was decided. But, in the following year, reference being made to it in a case of *Reuter v. Electric Telegraph Company*, 6 E. & B. 341; 26 L. J. Q. B. 46, his Lordship said: “I was not a party

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to that judgment; but I highly approved of it. The [* 471] decision in it must, at all events, be * binding on us."

We have been much pressed by several cases in the Court of Exchequer. But, in *Australian Royal Mail Steam Navigation Company v. Marzetti*, 11 Ex. 228; 24 L. J. Ex. 273, — a case which occurred a few days after the case first mentioned, — the rule I have referred to was unanimously adopted. "It is now perfectly established," said POLLOCK, C. B., "by a series of authorities, that a corporation may with respect to those matters for which they are expressly created deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense." And MARTIN, B., said: "The case of *Fishmongers' Company v. Robertson*, 5 M. & G. 131; 12 L. J. C. P. 185, is precisely in point, and, if it were not, good sense would lead us to the same conclusion." These principles are now too firmly settled to be shaken. The case of *London Dock Company v. Sinnott*, 8 E. & B. 347; 27 L. J. Q. B. 129, is distinguishable, on the ground which was alleged and adopted by the Court, viz., that it was not a contract of a mercantile character; it was not a contract for work to be done by the defendant for the company, but a contract to enter into another contract. At all events, if it is not distinguishable, it is contrary to the other cases; and it certainly was not intended to throw any doubt upon them.

In most cases, a trading company must carry on its business by means of agents; and in those cases there is an implied authority in the agents to make contracts on behalf of the company in the ordinary course of business. The business of a trading corporation could not otherwise be carried on. In the present case it does not seem to me to be necessary to go the length of relying upon the general exception to which I have adverted, inasmuch as the very constitution of the company is that the directors should have power to make contracts such as was made here. In pursuance of the 77th article of the memorandum of association, the directors have carried on the business of the company and have entered into this contract. Mr. Day says there is nothing in the articles of association to dispense with the ordinary rules of the common law or with the Act of Parliament. But I do not assent to that remark. The memorandum and articles of association are required by the Companies Act, 1862, 25 & 26 Vict. c. 89. The pro-

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visions on the subject are * contained in Part I. The 14th [* 472] section provides that the memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: and the articles may adopt all or any of the provisions contained in Table A. in the first schedule thereto. And, when we refer to Table A., we find that one of the matters with regard to which the articles may make regulations is the powers of the directors. Article 55 is as follows: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting." By s. 15 of the act, it is enacted that, in the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in Table A., the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered." This is a *quasi* incorporation under the Act and subject to its provision. If there had been no articles of association, those given in the schedule would govern its dealings. By s. 16 it is provided that the articles of association, when registered, "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act." This is the constitution of the company itself by which all its * members are bound. I am of opinion, [* 473]

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therefore, that the directors were authorized to make the contract in question by force of the Act of Parliament and of the articles of association, and that there are no provisions in either which required it to be under seal. Upon the general ground therefore I first adverted to, as well as upon the latter and more limited ground, I am of opinion that the contract entered into by the directors with the defendant in this case was valid without seal.

BYLES, J., and MONTAGUE SMITH, J., concurred.

Rule discharged.

The defendant appealed from the above judgment of the Court of Common Pleas, and the appeal was argued in the Exchequer Chamber.

[L. R., 4 C. P. 617] Maurice Powell (W. H. Clay with him), for the defendant, contended that the plaintiffs, being a corporation, could only contract under their common seal, unless in regard to matters of trivial amount and of every-day occurrence. He cited *East London Waterworks v. Bailey*, 4 Bing. 283; 12 Moore, 533; 5 L. J. (N. S.) C. P. 175; *Copper Miners' Company v. Fox*, 16 Q. B. 229; 20 L. J. Q. B. 174; *Lamprell v. Billericay Union*, 3 Ex. 283; 18 L. J. Ex. 282; *Diggle v. London and Blackwall Railway Company*, 5 Ex. 442; 19 L. J. Ex. 308; *Homer-sham v. Wolverhampton Waterworks Company*, 6 Ex. 137; 20 L. J. Ex. 193; *London Docks Company v. Sinuott*, 8 E. & B. 347; 27 L. J. Q. B. 129; *Finlay v. Bristol and Exeter Railway Company*, 7 Ex. 409; 21 L. J. Ex. 117; *Smart v. West Ham Union*, 10 Ex. 867; 24 L. J. Ex. 201. And he sought to distinguish the following cases, on the ground that they fell within the exception as to matters of daily necessity: *Beverley v. Lincoln Gas-Light Company*, 6 Ad. & E. 829; *Clarke v. Cuckfield Union*, 1 Bail. C. C. 85; 21 L. J. Q. B. 349; *Church v. Imperial Gas-Light Company*, 6 Ad. & E. 846; *Australian Royal Mail Steam Navigation Company v. Marzetti*, 11 Ex. 228; 24 L. J. Ex. 273; *Nicholson v. Bradfield Union*, L. R., 1 Q. B. 620; 35 L. J. Q. B. 713.

[* 618] *Huddleston, Q. C. (Philbrick with him), for the plaintiffs, was not called upon.

COCKBURN, C. J. We are asked to overrule a long series of decisions in all the Courts, which, in accordance with sound sense, have held that the old rule as to corporations contracting only under seal does not apply to corporations or companies constituted

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for the purpose of trading, and we are invited to re-introduce a relic of barbarous antiquity. We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of BOVILL, C. J., which seems to us to exhaust the subject. In early times, no doubt, corporations could only, subject to the well known exceptions, bind themselves by contracts under seal. And for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases, and may now be considered settled law. The machinery contracted for in this case was clearly necessary for the purpose for which the company was formed, viz., the working of coal-mines.

KELLY, C. B., CHANNELL, B., LUSH and HAYES, JJ., and CLEASBY, B., concurred. *Judgment affirmed.*

ENGLISH NOTES.

Corporations may for present purposes be divided into (1) Trading; (2) Created for special purposes; (3) Those not created for definite public purposes, such as municipal corporations. As regards the first or trading corporation, the law was definitely settled in the principal case of *South of Ireland Colliery Co. v. Waddle*, p. 315, *ante*.

The law as regards the second class of corporations is to be gathered from *Nicholson v. Bradfield Union* (1866), L. R., 1 Q. B. 620, 35 L. J. Q. B. 176, 14 L. T. 830, 14 W. R. 731; *Young v. Mayor, &c. of Leamington* (1883), 8 App. Cas. 517, 52 L. J. Q. B. 713, 49 L. T. 1, 31 W. R. 925; and *Eaton v. Basker* (1881), 7 Q. B. D. 529, 50 L. J. Q. B. 444, 44 L. T. 703, 29 W. R. 597. In the first case, in which most of the former cases are discussed, it was held that a corporation created for special purposes is liable on a contract not under seal, for goods of a kind which must from time to time be required for corporate purposes, especially where they have been supplied and accepted. The second case decided that performance of a contract over a certain value not under seal, where a statute requires such contracts to be under seal, gives no right of action against the corporation, even though the contract was within the special purposes for which the corporation was created. In the third case, it was held that a statutory provision of the kind last mentioned applies only to contracts the value of which is known at the time of making them to exceed the specified amount.

As regards the third class of corporations, the law as to seals is still very strict. The passage in the principal case of *Ludlow (Mayor, &c.) v.*

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Charlton, "the seal is required, as authenticating the concurrence . . . is a necessity inherent in the very nature of a corporation" (6 M. & W. 823, p. 314, *ante*), was adopted in *Mayor of Kidderminster v. Hardwick* (1873), L. R., 9 Ex. 13, 43 L. J. Ex. 9, 29 L. T. 612, 22 W. R. 160, where an agreement not under seal for the purchase of tolls was held not to give rise to a cause of action. In *Austin v. Guardians of Bethnal Green* (1874), L. R., 9 C. P. at p. 95, 43 L. J. C. P. 100, 29 L. T. 807, 22 W. R. 406, KEATINGE, J., cites from William Saunders (p. 616, ed. 1871), the following summary of the principles laid down by the Court of Exchequer in *Ludlow (Mayor, &c.) v. Charlton*: "The exceptions to the general rule that a corporation can only bind itself by deed are confined to — First. Cases so constantly recurring, or of so small importance, or so little admitting of delay, that to require, in every such case, the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object; in which instances the head of the corporation is considered as delegated by the rest of the members to act for them. Second. The instances above mentioned (*i. e.* in the judgment of BOVILL, C. J., pp. 318 *et seq.*) of trading corporations."

Wells v. Mayor, &c. of Kingston-upon-Hull (1875), L. R., 10 C. P. 402, 44 L. J. C. P. 257, 32 L. T. 615, 23 W. R. 562, decided that a municipal corporation owning a graving dock could contract without seal to let the dock for the use of a ship.

In *Mayor, &c. of Oxford v. Crow* (1893), 3 Ch. 535, 69 L. T. 228, a corporation could not enforce an agreement not under seal for the lease of corporate property.

Seal is requisite for appointment to corporate offices other than menial. See *Arnold v. Mayor, &c. of Poole* (1842), 2 M. & Gr. 860, 12 L. J. C. P. 97, where previous cases are reviewed.

AMERICAN NOTES.

"In *Bank of Columbia v. Patterson*, 7 Cranch (U. S. Supr. Ct.), 299, the question whether a corporation could make a contract legally binding, except under its seal, was fully examined. It was considered as sound law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises by the corporation; and all duties imposed on them by law, and benefits conferred by their request, raise implied promises for the enforcement of which an action may well lie." *Mott v. Hicks*, 1 Cowen (New York), 513; 13 Am. Dec. 550, holding that a negotiable note given by a corporation is binding. Mr. Daniel says this doctrine "may be regarded as settled" (Negotiable Instruments, § 382). In a note, 13 Am. Dec. 562, it is said, "The doctrine that a corporation cannot make or authorize a contract, except under its corporate seal, is entirely exploded in this country." This is fully

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sustained by *Chestnut Hill T. Co. v. Rutter*, 4 Sergeant & Rawle (Pennsylvania), 6; 8 Am. Dec. 675; *Canal Bridge Co. v. Gordon*, 1 Pickering (Mass.), 296; 11 Am. Dec. 170; *Everett v. United States*, 6 Porter (Alabama), 166; 30 Am. Dec. 584; *Lathrop v. Commercial Bank*, 8 Dana (Kentucky), 114; 33 Am. Dec. 481; *Ross v. City of Madison*, 1 Indiana, 281; 48 Am. Dec. 361, citing *Ludlow v. Charlton*; *Banks v. Poitauac*, 3 Randolph (Virginia), 136; 15 Am. Dec. 706 (contract to convey land); *Came v. Brigham*, 39 Maine, 35; *Thompson v. Lambert*, 44 Iowa, 239; *New Athens v. Thomas*, 82 Illinois, 259; *Stratton v. Allen*, 16 New Jersey Equity, 229; *Buckley v. Briggs*, 30 Missouri, 452; *Clarke v. School District*, 3 Rhode Island, 199; *Muscatine Water Works v. Muscatine Lumber Co.*, 85 Iowa, 112; 39 Am. St. Rep. 284, and note, 289.

SECTION V. — *Illegality and Duress.*No. 31. — *FEATHERSTONE v. HUTCHINSON.*

(1590.)

No. 32. — *PEARCE v. BROOKS.*

(1866.)

RULE.

IF any part of the consideration for an agreement is illegal, the agreement is wholly illegal, and void as a contract.

And where the whole promise is tainted with an illegal or immoral purpose known to both parties, the whole agreement is illegal, and likewise void.

Featherstone v. Hutchinson.

Cro. Eliz. 199, 200.

Contract. — Consideration. — Illegality.

A promise by a third person to pay the sheriff the debt of his prisoner in consideration of his being set at large, is void by 23 Hen. VI. c. 10.

Assumpsit. And declares, That whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff; the defendant, *in consideration he would permit him to go at large, and [* 200] of two shillings to the defendant paid, &c., promised to

 No. 32. — *Pearce and another v. Brooks*, L. R., 1 Ex. 213, 214.

pay the plaintiff all the money in which H. was condemned. Upon *non assumpsit*, it was found for the plaintiff. It was moved, in arrest of judgment, that the consideration is not good, being contrary to the statute of 23 Hen. VI. c. 10, and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet, being void and against the statute for part, it is void in all. *Vide Dire et Manningham's Case, in Comment*, s. 60.

Pearce and another v. Brooks.

L. R., 1 Ex. 212–221 (s. c. 35 L. J. Ex. 134; 12 Jur. n. s. 342; 14 L. T. 288;
14 W. R. 614).

Contract. — Illegality. — Immoral Purpose.

[213] One who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral purpose cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.

The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment: but the jury found that they knew her to be a prostitute, and supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men: —

Held, that the plaintiffs could not recover.

Declaration stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase-money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay £50 down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid [* 214] *in addition to the £50, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, non-payment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement, the defendant was to the knowledge of the plaintiffs, a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and

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to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before BRAMWELL, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned Judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding, the learned Judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q. C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected *to be paid out of the receipts of defendant's [*215] prostitution was a material allegation, and had not been proved. *Bowry v. Bennett*, 1 Camp. 348; 10 R. R. 697.

[POLLOCK, C. B., referred to *Cannon v. Bryce*, 3 B. & Ald. 179.]

Digby Seymour, Q. C., and Beresford, showed cause. No direct evidence could be given of the plaintiffs' knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[BRAMWELL, B. At the trial I was at first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, showed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of *Bowry v. Bennett* falls short of proving that the plaintiff must intend to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiffs' knowledge of the defendant's way of life was "very slight;" and Lord ELLENBOROUGH appears to have referred to the intention as to payment not as a legal test, but as a matter of evidence with reference to the particular circumstances [*216] *of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shown that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is *Lloyd v. Johnson*, 1 Bos. & P. 340; 4 R. R. 822, cited in the note to the last case, an authority for the plaintiffs, for there part of the contract would have been innocent, and all that the Court says is, that it cannot "take into consideration which of these articles were used by the defendant to an improper purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, where the plaintiff was not allowed to recover for the use

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of lodgings let for the purpose of prostitution. *Appleton v. Campbell*, 2 C. & P. 347, is to the same effect.

M. Chambers, Q. C., and J. O. Griffiths, in support of the rule. As to the first point, the expressions of BULLER, J., in *Lloyd v. Johnson*, 1 Bos. & P. at p. 341, are strongly in the plaintiff's favour, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of enabling two persons to meet there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material, the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord ELLENBOROUGH in *Bowry v. Bennett*, are very plain, the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[BRAMWELL, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall *use it. Suppose, however, a person were to buy [*217] a pistol, saying to the seller that he means with it to shoot a man and rob him, is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he *shall* be so paid?]

Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[BRAMWELL, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test.

therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[MARTIN, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C.B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say, that since the case of *Cannan v. Bryce*, cited by Lord ABINGER in delivering the judgment of this Court in the case of *MP Kinnell v. Robinson*, 3 M. & W. at p. 441, and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose,

cannot recover the price of the thing so supplied. If, to [*218] create that incapacity, it was ever *considered necessary

that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in *Cannan v. Bryce*; that was a case which, at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned Judge (then Sir CHARLES ABBOTT) who decided it, though not distinguished as an advocate, nor at first eminent as a Judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land.

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If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my Brother BRAMWELL that the verdict was right, and that the rule must be discharged.

MARTIN, B. I am of the same opinion. The real question is, whether sufficient has been found by the jury to make a legal *defence to the action under the third plea. The [*219] plea states first the fact that the defendant was to the plaintiffs' knowledge a prostitute; second, that the brougham was furnished to enable her to exercise her immoral calling; third, that the plaintiffs expected to be paid out of the earnings of her prostitution. In my opinion the plea is good if the third averment be struck out; and if, therefore, there is evidence that the brougham was, to the knowledge of the plaintiffs, hired for the purpose of such display as would assist the defendant in her immoral occupation, the substance of the plea is proved, and the contract was illegal. When the rule was moved I did not clearly apprehend that the evidence went to that point; had I done so, I should not have concurred in granting it. It is now plain that enough was proved to support the verdict.

As to the case of *Cannon v. Bryce*, I have a strong impression that it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But, no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal.

PIGOTT, B. I am of the same opinion. I concurred in granting the rule, not on any doubt as to the law, but because it did not

seem clear whether the evidence would support the material allegations in the plea. Upon this point, I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman, who is known to be a prostitute, wants an ornamental brougham, there can be very little doubt for what purpose she requires it. Then the principle of law expressed in the maxim which my Lord has cited governs the case. It cannot be necessary that the plaintiffs should look to the proceeds of the immoral act for payment; the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiffs knew the woman's mode of life, and where the means of payment would come [* 220] from, *and to require the proposed addition to the rule would be to make it futile. As to the expressions of Lord ELLENBOROUGH which have been relied on, I think they were only meant to give an illustration of what would be evidence of the plaintiffs' participation in the immoral act, and that we are not overruling anything that he has laid down.

BRAMWELL, B. I am of the same opinion. There is no doubt that the woman was a prostitute; no doubt to my mind that the plaintiffs knew it; there was cogent evidence of the fact, and the jury have so found. The only fact really in dispute is for what purpose was the brougham hired, and if for an immoral purpose, did the plaintiffs know it? At the trial I doubted whether there was evidence of this, but, for the reasons I have already stated, I think the jury were entitled to infer, as they did, that it was hired for the purpose of display, that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it.

That being made out, my difficulty was, whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense, it was not for the same purpose. If a man were to ask for duelling pistols, and to say: "I think I shall fight a duel to-morrow," might not the seller answer: "I do not want to know your purpose; I have nothing to do with it; that is your business: mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it

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would be illegal; and I should still feel it, but that the authority of *Cannan v. Bryce*, 3 B. & Ald. 179, *M'Kinnell v. Robinson*, 3 M. & W. 434, concludes the matter. In the latter case the plea does not say that the money was lent on the terms that the borrower should game with it; but only that it was borrowed by the defendant, and lent by the plaintiff "for the purpose of the defendant's illegally playing and gaming therewith." The case was argued by Mr. Justice CROMPTON against the plea, and by Mr. Justice WIGHTMAN in support of it, and the considered judgment of the Court was delivered by Lord ABINGER, who says (3 M. & W. p. 441): "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith, at the *illegal game of 'Hazard,' this money cannot be [* 221] recovered back, on the principle, not for the first time laid down, but fully settled in the case of *Cannan v. Bryce*. This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced." This Court, then, following *Cannan v. Bryce*, decided that it need not be part of the bargain that the subject of the contract should be used unlawfully, but that it is enough if it is handed over for the purpose that the borrower shall so apply it. We are, then, concluded by authority on the point; and, as I have no doubt that the finding of the jury was right, the rule must be discharged.

With respect, however, to the allegation in the plea, which, as I have said, need not be proved, and which I refused to leave to the jury, I desire that it may not be supposed we are overruling anything that Lord ELLENBOROUGH has said. It is manifest that he could not have meant to lay down as a rule of law that there would be no illegality in a contract unless payment were to be made out of the proceeds of the illegal act, and that his observation was made with a different view. In the case of the hiring of a cab, which was mentioned in the argument, it would be absurd to suppose that, when both parties were doing the same thing, with the same object and purpose, it would be a lawful act in the one, and unlawful in the other.

POLLOCK, C. B. I wish to add that I entirely agree with what has fallen from my Brother MARTIN, as to the case of *Cannan v. Bryce*. If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied;

but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards it was turned to that use, neither *Cannan v. Bryce*, nor any other case, decides that his act would be illegal. The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose.

Rule discharged.

ENGLISH NOTES.

The converse of the rule in *Featherstone v. Hutchinson*, that if any part of the promise given for a consideration is unlawful, the whole promise is illegal and void, does not hold true. The rule is "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, you may reject the bad part and retain the good." *Per WILLES, J.*, in *Pickering v. Iffracombe Railway Co.* (1868), L. R., 3 C. P. at p. 250, 37 L. J. C. P. 118, at p. 123, 16 L. T. 650, 16 W. R. 458; *Pigott's Case* (1615), 11 Co. Rep. 27 b; *Bank of Australasia v. Breillat* (1847), 6 Moore P. C. 152, 201; *Odessa Tramway Co. v. Mendel* (1878), 8 Ch. D. 235, 47 L. J. Ch. 505, 38 L. T. 731, 26 W. R. 887; *Baines v. Geary* (1887), 35 Ch. D. 154, 56 L. J. Ch. 935, 56 L. T. 567, 36 W. R. 98.

The second question left to the jury in the principal case of *Pearce v. Brooks*, whether the plaintiff knew of the immoral or illegal object, is material in determining whether the contract is void or voidable. If both parties are aware of the illegality, it is void. *Gaslight and Coke Co. v. Turner* (1839), 6 Bing. N. C. 324, 8 Scott, 609 (a demise of a building contrary to the Building Act); *Smith v. White* (1866), L. R., 1 Eq. 626, 35 L. J. Ch. 454, 14 L. T. 350, 14 W. R. 510 (assignment of a lease with a knowledge of its being used for immoral purposes); *Pearce v. Brookes* (*supra*). If the illegal intention is not known to the other party, the contract is voidable at his option. *Cowan v. Milbourn* (1867), L. R., 2 Ex. 230, 36 L. J. Ex. 124, 16 L. T. 290, 15 W. R. 750. There A. contracted to let his premises to B. for the purposes of a meeting; and on learning that the meeting was to be of a blasphemous kind, he refused possession to B. Held he was justified. So an insurance of a ship or goods, when the voyage insured against is unlawful to the knowledge of the owner. *Wilson v. Rankin* (1865), L. R., 1 Q. B. 162, 35 L. J. Q. B. 203, 13 L. T. 564, 14 W. R. 198.

Where a contract which in itself might have been lawfully performed is impeached on the ground of unlawful purpose, the fact is material whether the parties knew the law, the infringement of which is in question. For instance, in *Wauagh v. Morris* (1873), L. R., 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438, a ship was char-

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tered to take a cargo of hay from Trouville to London, and the cargo was to be brought and taken from the ship alongside. Before the date of the charter-party, landing of hay from France was prohibited by an Order in Council; but the master of the ship did not know of it until he arrived in the Thames. The charterer, after considerable delay, took the hay from the ship alongside and exported it. When sued for demurrage, he pleaded that the contract as originally intended to be performed by the parties was illegal. The Court overruled the plea, and said: "We quite agree that where a contract is to do a thing which cannot be performed without the violation of the law, it is void, whether the parties know the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance."

In *Fisher v. Bridges* (1854), 3 El. & Bl. 642, 23 L. J. Q. B. 276, the plaintiff assigned a leasehold property to the defendant for the purpose of selling it by lottery, and the defendant covenanted to pay the purchase-money. The action was on this covenant. The Exchequer Chamber, reversing the decision of the Queen's Bench, held "that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement; and as the law could not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase-money, which by the original bargain was tainted with illegality." The principle laid down in the latter part of the passage cited has been repeatedly acted upon, and securities given for an illegal contract have been held to be void. *Graeme v. Wroughton* (1855), 27 L. J. Ex. 265 (agreement to resign a public employment for a pecuniary consideration); *Geere v. Mare* (1863), 2 H. & C. 339, 33 L. J. Ex. 50 (policy of assurance assigned as security for a bill of exchange given by way of fraudulent preference to a creditor); *Clay v. Ray* (1864), 17 C. B. (N. S.) 188 (promissory notes given for similar purpose). The cases (*Holman v. Johnson, &c.*), as to contracts made abroad for the purpose of smuggling goods into this country, have been dealt with under No. 11 of "Conflict of Laws," 5 R. C. p. 864.

AMERICAN NOTES.

Mr. Lawson cites *Pearce v. Brooks* (Contracts, § 345), but says the American doctrine is in conflict with it, "and agrees substantially with the remarks of BRAMWELL, B., in that case," and he concludes: "Though there is some conflict in the decisions, the weight of authority in the United States sustains the distinction, and lays it down that the mere knowledge of a vendor of property that the vendee intends to make an illegal use of it is no defence to an

action for the price." The present writer (Browne on Sales, p. 114) says: "A sale of property with knowledge and intention that it is to be used for an immoral or illegal purpose is void. As, for example, to the public enemy for war purposes, *Hanauer v. Doane*, 12 Wallace (U. S. Sup. Ct.), 342; *Clements v. Furria*, 81 New York, 285; or for furnishing a house of prostitution, *Hubbard v. Moore*, 24 Louisiana Annual, 591; 13 Am. Rep. 128; *Michael v. Bacon*, 49 Missouri, 474; 8 Am. Rep. 138; or a sale of intoxicating liquors, *Green v. Collins*, 3 Clifford (U. S. Cir. Ct.) 494; or a gambling implement, *Rose v. Mitchell*, 6 Colorado, 102; 45 Am. Rep. 520. But to render the sale void, the knowledge must combine with an intention to promote the illegal purpose. The mere knowledge of the purpose is not sufficient. Cases above; *Tracy v. Talmage*, 14 New York, 162; 67 Am. Dec. 132, and note 153. 'The participation of the vendor must be active to some extent; he must do something, though indirectly, in furtherance of the vendee's design to violate our law.' *Gaylord v. Sowagen*, 32 Vermont, 110; 76 Am. Dec. 154. So it is no defence to an action for the price of a billiard table that it may be used in gambling, unless it was sold under a contract that it was to be so used. *Brunswick v. Vallean*, 50 Iowa, 120; 32 Am. Rep. 119, and note, 122. And so it is no defence to a note given for the price of a horse that it was bought for use in, and was actually used against the government in, the Confederate Civil War. *Wallace v. Lark*, 12 South Carolina, 576; 32 Am. Rep. 516; *Tedder v. Odom*, 2 Heiskell (Tennessee), 68; 5 Am. Rep. 25; *Hedges v. Wallace*, 2 Bush (Kentucky), 442; 92 Am. Dec. 497; to the same effect *Sprague v. Rooney*, 82 Missouri, 493; 52 Am. Rep. 383. *Contra*: *Tatum v. Kelley*, 25 Arkansas, 209; 94 Am. Dec. 717 (sale of guns with knowledge that they were to be used against the government). And so where beer is sold to the keeper of a house of prostitution with knowledge that it was to be resold in the brothel, *Anheuser-Busch B. Ass'n v. Mason*, 44 Minnesota, 318; 20 Am. St. Rep. 580; 9 Lawyers' Rep. Annotated, 506, in the absence of proof that the seller intended it to be so used, and did something actively to promote it. This distinction is thoroughly settled by judicial authority from Lord Mansfield down to the present day; but it seems a distinction without a difference. There could apparently be no stronger proof of intention that an article should be used for an immoral or illegal purpose than the sale of it with full knowledge that the buyer intended to use it for that purpose. Especially is this true where the article could hardly be used for any other purpose, as in the case of the sale of intoxicating liquors to be sold in violation of statute. We fully agree with Mr. Bennett (notes, Benj. Sales, 6th Am. ed. 505), that the distinction is 'very subtle,' 'not very satisfactorily established, nor always observed.' If the article sold may be used innocently, as well as in violation of statute, the sale is valid, unless the sale is for the purpose and with the intention of promoting the unlawful use, — as in the case of a billiard table, or of liquors sold at one place where the sale is lawful to be resold where it is unlawful. Cases above, and *Hill v. Spear*, 50 New Hampshire, 253; 9 Am. Rep. 205. But the contract is void where the seller actively participates in effecting the illegal design, — as for example, where he lawfully sells intoxicating liquors in one State knowing that they are to be unlawfully sold in

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another State, and forwards them in concealed packages to a fictitious assignee, and furnishes false invoices to aid the buyer in committing perjury: or sells American sardines labelled as French. *Kohn v. Milcher*, 43 Federal Reporter, 641; 10 Lawyers' Rep. Annotated, 439; *Skiff v. Johnson*, 57 New Hampshire, 475; *Hull v. Ruggles*, 56 New York, 424; *Materne v. Horwitz*, 101 New York, 469. And it has been held that where a sale was made 'with a view' to an unlawful resale, or 'with intent' to that end, or 'in a manner to aid it,' or so inseparably connected with it as necessarily to aid it, the sale is void. *Webster v. Munger*, 8 Gray, 384; *Davis v. Bronson*, 6 Iowa, 110; *Foster v. Thurston*, 11 Cushing (Mass.), 322; *Tatum v. Kelley*, *supra*. So in *Graves v. Johnson*, 156 Massachusetts, 211; 32 Am. St. Rep. 446, the case of a sale of intoxicating liquors in Massachusetts to be resold in Maine, it was held, that as the 'seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so,' and 'was known by the buyer to have that intention,' the sale was void. A valuable opinion by HOLMES, J., and a valuable note, 32 Am. St. Rep. 450."

Mr. Lawson adds some illustrations. — as where goods were sold to a prostitute with knowledge that they were to be used by her in her occupation, *Hubbard v. Moore*, 24 Louisiana Annual, 591; 13 Am. Rep. 128; or where a house was sold with knowledge that the buyer intended to use it with his mistress, *Armfield v. Tate*, 7 Fredell Law (Nor. Car.), 258; or where money was lent with knowledge that it was to be used in gambling. *Waugb v. Beck*, 114 Pennsylvania State, 422; 60 Am. Rep. 354.

Mr. Lawson also points out an exception, "where the contemplated illegal act is of a highly heinous nature," — as the selling of poison with knowledge of its intended felonious use, and the selling of arms to enemies of the government. *Hanauer v. Doane*, 12 Wallace (U. S. Sup. Ct.), 342, where the Court said: "It is certainly contrary to public policy to give the aid of the Court to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members." Followed, *Carlisle v. United States*, 16 Wallace (U. S. Supr. Ct.), 147.

A sale of several articles at one time for an entire price is wholly void if any of the articles are forbidden. *Holt v. O'Brien*, 15 Gray (Mass.), 311. Otherwise, if separate prices are agreed on. *Coburn v. Odell*, 30 New Hampshire, 557; *Foreman v. Ahl*, 55 Pennsylvania State, 325. So, although a note given for such entire price would be void, *Deering v. Chapman*, 22 Maine, 488; *Widoe v. Webb*, 20 Ohio State, 431; 5 Am. Rep. 664 (see however *Hguds v. Hays*, 25 Indiana, 31), yet a recovery may still be had for the legal items of the account, where separate prices were stated, although a note had been given for the whole. *Coburn v. Odell*, *Foreman v. Ahl*, *supra*. See also *Filson v. Himes*, 5 Pennsylvania State, 452; 47 Am. Dec. 422; *Bishop v. Palmer*, 146 Massachusetts, 469; 4 Am. St. Rep. 339; *Santa Clara, &c. Co. v. Hayes*, 76 California, 387; 9 Am. St. Rep. 211; *McNamara v. Gargett*, 68 Michigan, 434; 13 Am. St. Rep. 355; *Handy v. St. Paul, &c. Ra.*, 41 Minnesota, 188; 16 Am. St. Rep. 695, — all holding that if any part of the entire consideration is illegal, the whole contract is void.

No. 33. — **Blachford v. Preston**, 8 T. R. 89, 90. — Rule.

No. 33. — **BLACHFORD v. PRESTON.**

(1799.)

RULE.

AN agreement tending to interfere with the selection by merit of the person best qualified to fill an office in a public service, is illegal and void as contrary to public policy.

D. Blachford and another, Executors of G. Blachford, v. Preston.

8 T. R. 89-95 (s. c. 4 R. R. 598).

Contract. — Illegality. — Public Service.

[89] A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the company, is illegal; and the contract of sale cannot be the foundation of an action.

This was an action of assumpsit, on an agreement entered into between the testator and the defendant on the 1st of July, 1786, in which, in consideration that the testator had paid to the defendant £5000 for the command of a ship called the *Foulis*, in the East India Company's service, the defendant promised to pay to the testator in his lifetime, or to his executors after his decease, the sum of £5000 "upon the appointment of another person to succeed him (the testator) in the command of the said ship, or of any other ship that should be thereafter built on the same bottom, in lieu and stead of the testator." The declaration, after setting forth the agreement, stated that the testator died on the 8th of March, 1792, and that afterwards, on the 8th of July, 1795, another ship was built on the bottom of the *Foulis*, called the *Cirencester*, to which M. Lindsay was appointed as the commander, in lieu and stead of the testator; but that the defendant on [* 90] such * appointment refused to pay the sum of £5000 to the plaintiffs, the executors. The second count stated the agreement thus: That the defendant promised that the testator in his lifetime, or his executors after his death, should receive £5000 from the person appointed to succeed him in the command of the *Foulis*, or of any other ship that should thereafter be built on the same bottom, in lieu of the testator. The third count alleged that the agreement was, "that the defendant should pay such sum and sums of money and securities for money not exceeding £5000 as

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he (the defendant) should receive from the person appointed to succeed the testator in the command of the *Foulis*, or any other ship," &c. &c.; averring that M. Lindsay was appointed, &c. from whom the defendant received £2500 in money and a bond for the payment of another sum of £2500, which he (the defendant) had refused to pay and deliver to the plaintiffs, &c.

At the trial before Lord KENYON at the sittings in London, the case appeared to be this: In the year 1783, the testator was appointed to the command of the *Foulis* East Indiaman, on the recommendation of the defendant, the husband or managing owner; for which he paid the defendant £5000. On his appointment he and the defendant entered into a charter-party with the East India Company, in which it was agreed that "neither he nor the defendant should sell, or permit or suffer any other person to sell to the master, or any other officer of the ship, his or their place or office, or take any promise or reward for or in respect of any place or office in or belonging to the ship," &c. In 1791 the *Foulis* was lost at sea, with the captain on board, in her passage from Madras to Bencoolen. In 1794 the defendant obtained leave from the East India Company to build another ship, (the *Cirencester*) in lieu and on the bottom of the *Foulis*, and appointed Captain Lindsay to the command, in consideration of £2500 paid in money, and of a bond for £2500 more, which he (the defendant) afterwards paid to the widow and children of Captain Blachford, not to the plaintiffs his executors. For a long time prior to the testator's appointment to the *Foulis*, it had become usual for the captains of East India ships to purchase their commands, though it was contrary to the by-laws of the Company. In February, 1796, the Court of Directors came to a resolution, which was afterwards confirmed by the proprietors, to abolish the practice, "long known to have been privately carried on, and at last publicly avowed, of the sale of commands," and to make a pecuniary

compensation to those who had paid for their commands. [91] And in consequence of this the Company afterwards allowed Captain Lindsay £4833, as a compensation for what he had paid to the defendant. Under the above resolution the Company also made allowances to the executors of some late commanders. There was no written contract between the testator and the defendant, but it seemed admitted that the former had paid the latter £5000 under a promise that it should be returned when his successor was

appointed. A verdict was taken for the plaintiffs, damages £4833, with liberty to the defendant to move to enter a nonsuit, if this Court should be of opinion that the plaintiffs were not entitled to recover.

Such a rule was accordingly obtained in last Easter term, on the ground that the contract on which the action was founded was illegal, because it was not only contrary to the by-laws of the East India Company, and to the charter-party, which had been executed both by the testator and the defendant, but was also inconsistent with public policy. The case was shortly spoken to in last Trinity term; but its further discussion was then postponed, under an expectation that a compromise would take place. That failing,

Erskine, Gibbs, and Skermer, now showed cause against that rule. 1st. It is too much for the defendant to contend that this contract is void, as having been entered into contrary to the by-laws of the East India Company, because the agreement was founded on a practice that had universally obtained for a long period, and that prevailed even with the knowledge of the East India Company, who so lately as the year 1796 (subsequently to the time when this transaction took place) came to certain resolutions on the subject, with a view of making a pecuniary satisfaction to those captains who had purchased their commands on the strength of the usage. 2ndly. Still less ground is there for saying that this contract is void because contrary to the stipulations of the charter-party, for the contract was entered into before the charter-party was in existence. 3rdly. Nor can it be said that the agreement is illegal and void as being against the principles of sound policy; for though it may be admitted that there are other offices, besides those that are enumerated in the stat. 3 & 6 Ed. VI. c. 16, that cannot legally be sold, they must be offices respecting which the public are concerned. But the employment in question does not concern the public, but is a mere private appointment by a great commercial company. But even [*92] if this contract were illegal on *either of the above grounds, still it must be observed that the plaintiffs do not come to enforce the illegal contract; that agreement has been executed, and this action is brought against the defendant to recover the money that he has received. It is admitted that he received this money not for himself, but as a trustee under his contract with

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the testator; and having so received it after the testator's death, he must be taken to have received it for the legal representatives of Captain Blachford.

LORD KENYON, Ch. J. (stopping the counsel on the other side). There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*; on principles of public policy no money-consideration ought to influence the appointment to such offices. This principle was much considered by the late Lord Chancellor THURLOW, in a case that came before him on an injunction bill, where a noble Lord having, in consequence of his own office in the King's household, recommended another person to the appointment of another place in the household, and having made that recommendation in consideration of an annuity to be granted to a third person, not to himself, the contract was considered as illegal; and a perpetual injunction was granted to the party suing on that contract in a court of law. *Hanington v. Du Chatel*, 1 Bro. Ch. Cas. 124. Up to a certain extent the Legislature have interfered and prohibited (by the stat. 5 and 6 Ed. VI.) the sale of some offices; but whether or not that Act of Parliament were necessary for the purpose, I will not now inquire. If the contract, which is the foundation of this action, were legal, and the question were, Whether the executors or the widow of the late Captain Blachford were entitled to the money in dispute? the right of the former must have prevailed. But a plaintiff who comes into a Court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed, whatever the private wishes of the Court may be. In this case the plaintiffs have relied on the practice that (as it is said) had so long prevailed of selling the commands of ships; but that practice is in violation of the laws and regulations of the East India Company. And it appeared in this case that in the year 1783 a charter-party was entered into, to which the plaintiffs' testator, the defendant, and the East India Company, were parties, and by the express stipulations of that contract it was agreed that no place or office in the ship should be sold. I may again resort to *that with [* 93] which I set out, that public policy requires that there should be no money consideration for the appointment to an office in which the public are interested, the public will be better served by having persons best qualified to fill offices appointed to

them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons. The East India Company is a limb of the government of the country; and on the ground that this contract was a fraud on the East India Company, from which much mischief to the public may ensue, I am of opinion that it cannot be made the basis of an action.

ASHMURST, J. It is a clear rule of law that no right of action can spring out of an illegal contract. This contract is illegal, as being against the principles of public policy, and therefore I agree with my Lord that the plaintiffs cannot recover upon it.

GROSE, J. This is an attempt, by the executors of Captain Blachford, to recover a sum of money which (they say) is due to them, under a contract entered into by him in violation of another contract that he and the defendant made with the East India Company. Now it has been holden, that where puffers have been employed at an auction, it is a fraud upon the buyers; and no sale at such an auction can be enforced in a Court of justice. So this contract is a fraud on the East India Company; it was entered into in defiance of the salutary regulations which were made by a great commercial company for the benefit of the public. It was also decided a few years ago in the Court of Common Pleas (*Vide Garforth v. Fearon*, 1 H. Bl. 327; 2. R. R. 778), that no action could be maintained on an illegal contract, respecting the appointment to an office which is not saleable. And it seems to me that the principle on which that case was determined, also applies to and must govern the present case. Therefore, I am of opinion that the plaintiffs cannot recover on this agreement.

LAWRENCE, J. The case is shortly this: The late Captain Blachford paid the defendant £5000 to procure him the appointment to the command of a ship in the East India Company's service; in consideration of which the defendant promised to repay him, or his representatives, the same sum when any other person should be appointed to the command of that ship, or of any other ship built upon her bottom; and the title of the present plaintiffs is founded on that contract. After this agreement was entered into, the ship was lost, with Captain Blachford on board [* 94] her; and Captain Lindsay was appointed to the *ship which was built upon her bottom, for which appointment Lindsay paid the defendant a large sum of money; subsequent to this the East India Company came to a resolution, for the purpose of

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abolishing the practice of selling the commands of ships, and of making compensation to some of the officers in their service who had paid for their commands; they allowed Captain Lindsay, among the rest, a certain sum of money; but no compensation was made to the representatives of Blachford; but this resolution was not made in approbation of the practice that had prevailed before; but feeling that they were blameable for not having put a stop to it sooner, they came to a resolution of abolishing the practice that had obtained in defiance of the by-laws of the Company. Then this action is founded on the contract of the defendant to repay to Blachford, or his representatives, the sum of £5000 on the appointment of a successor to Blachford, and not on the receipt of money by the defendant from Captain Lindsay; for the plaintiff's right of action against the defendant would have been equally good though he had received nothing from Lindsay. It is not a contract to pay such money as the defendant should receive from any other captain, but to repay a certain sum, at all events, on the appointment of another; and therefore the argument at the bar, that this action is bottomed on a contract that has been executed, is not well-founded. Then the short question here is, Whether or not a contract, entered into between two individuals in direct violation of the orders of the East India Company, and against public policy, can be enforced in a Court of justice? With regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute 5 and 6 Edw. VI. This point was much considered in *Parsons v. Thompson*, 1 H. Bl. 322; 2 R. R. 773, where an officer in the dock-yard at Chatham agreed to give another officer there a certain share of the profits, if the latter would procure himself to be superannuated, and retire on the usual pension, to make way for the former; and it was holden that such agreement, having been made without the knowledge of the Navy Board, to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy. There a distinction was taken between those offices that cannot be legally sold, and those that may be the object of sale, where the sale takes place under the authority and with the consent * of [* 95] those who have the power of appointment, as commissions in the army. Now the principle on which that case and the cases there referred to was decided, must govern the present, unless it

can be shown that there is some distinction between offices held under the East India Company and those under Government; but I think no such distinction can be established as far as respects this purpose. But independently of that ground, a plaintiff cannot recover in a Court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice, of third persons. Such is the case alluded to by my Brother GROSE, of puffers at an auction; it is a fraud upon the buyers. So here this contract is a fraud on the East India Company, and cannot be the foundation of an action. On this ground, therefore, as well as because it is contrary to principles of public policy to allow of such contracts as the present, I am of opinion that the plaintiffs cannot maintain this action.

Rule absolute.

ENGLISH NOTES.

The same principle was applied in *Card v. Hope* (1824), 2 B. & C. 661, to a deed founded on a contract for the sale of shares in an East Indiaman with a stipulation for the appointment to the command. It was held that such a contract was void as being contrary to the interests of the charterers and other owners. In the judgment of the Court (delivered by ABBOTT, C. J.), the opinion was also intimated that such an agreement was void as a breach of duty towards the persons whose life or property might be embarked in her; and that the contract would have been equally void if the ship had been chartered by private merchants instead of being employed by the East India Company.

A similar principle has been acted on in the following (amongst numerous other) cases: *Flarty v. Odum* (1790), 3 T. R. 681, 1 R. R. 791 (assignment of half-pay of an officer); *Garforth v. Fearon* (1787), 1 H. Bl. 237, 2 R. R. 778 (office in the customs); *Parsons v. Thompson* (1790), 1 H. Bl. 322, 2 R. R. 773 (dockyards); *Hanington v. Du Chatel* (1781), 1 Bro. C. C. 124 (King's household); *Hopkins v. Prescott* (1847), 4 C. B. 578, 16 L. J. C. P. 259 (collector of taxes); *Corporation of Liverpool v. Wright* (1859), 4 Johnson, 359, 28 L. J. Ch. 868 (arrangement between corporation and clerk of the peace holding office during good behaviour, for commuting fees).

In the following cases, where an office, such as that of a clerk or private secretary, was held at the pleasure of a superior, an arrangement for the assignment of the office, made with the sanction of the superior, has been upheld: *Aston v. Guinnell* (1829), 3 Young & Jervis, 136; *Harrison v. Kloprogge*, cited in *Palmer v. Bate* (1821), 2 Brod. & Bing. 678, n., 6 Moore, 38, n., 2 Chit. 475, 4 Dougl. 5.

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The strict rule has been relaxed in the case of bargains made between professional men in order to realize the good-will of a practice; which have been supported, although the result of the transaction is that a recommendation (of a duly qualified person) is partially influenced by a pecuniary consideration. See *Candler v. Candler* (1821), Jacob, 225, 231, 6 Madd. 141; *Bunn v. Guy* (1803), 4 East, 190, 7 R. R. 560; *Sterry v. Clifton* (1850), 9 C. B. 110, 19 L. J. C. P. 237.

Here may also be noted the important case of *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1, 23 L. J. Ch. 348. There conditional limitations in a will by way of shifting uses, the effect of which was that, if the possessor *pro tem.* of the estates did not acquire the title of the Marquis or Duke of Bridgwater or if he accepted any inferior title, the estates were to go over, were held to be void as against public policy.

AMERICAN NOTES.

Mr. Throop (Public Officers, §§ 50, 51) quotes extensively from the principal case, and declares that "the American authorities closely follow the rule laid down in the English cases." It seems however that in some of the New England States certain town offices may be sold at auction. *Howard v. Proctor*, 7 Gray (Mass.), 128.

In a leading case, *Gray v. Hook*, 4 New York, 449, it was held that an agreement between two applicants for office, in consideration of one dollar, to divide the fees, upon the withdrawal of one and his aiding the other, is void. "Nor did the addition of one honest dollar cure the illegality of the remainder of the consideration," observed the Court. See also *Gaston v. Drake*, 14 Nevada, 175; 33 Am. Rep. 548; *Hunter v. Nolf*, 71 Pennsylvania State, 282; *Martin v. Wade*, 37 California, 168; *Haas v. Fenlon*, 8 Kansas, 601; *Meguire v. Corwine*, 101 United States, 108.

A contract to pay canvassers to procure nomination is void. *Foley v. Sprin.* 100 New York, 552.

All contracts to vote for or support a person on election, appointment, or nomination to public office are void. *Liness v. Hessing*, 44 Illinois, 113; 92 Am. Dec. 153; *Stout v. Ennis*, 28 Kansas, 706; *Swayze v. Hull*, 8 New Jersey Law, 54; 14 Am. Dec. 399; *Ham v. Smith*, 87 Pennsylvania State, 63; *Nicholls v. Mudgett*, 32 Vermont, 546.

This line of authorities is cited and approved by Mr. Lawson (Contracts, § 311), who says: "The public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices." Citing *Outon v. Rodes*, 3 A. K. Marshall (Kentucky), 432; 13 Am. Dec. 193; *Engle v. Chipman*, 51 Michigan, 524; *Groton v. Waldoborough*, 11 Maine, 306; 26 Am. Dec. 530; *Filson v. Himes*, 5 Pennsylvania State, 152; 47 Am. Dec. 422.

So an agreement between plaintiff and a candidate for the office of tax assessor, that if the latter was elected he would appoint the latter his chief deputy, at a salary of \$2500, to be paid from the fees and perquisites of the office, and that the latter should become his official bondsman, and perform

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all the duties of the office except those relating to the poll-tax, was held void. *Robertson v. Robinson*, 65 Alabama, 610; 39 Am. Rep. 17. The Court said: "No judicial tribunal, so far as we can discover, has ever given countenance to any such agreement." See also *Cobbs v. Hixson*, 75 Michigan, 260; 4 Lawyers' Rep. Annotated, 682.

Mr. Mechem (Public Officers, § 351), discusses this principle, and cites the line of cases above given, and says: "These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments, to the great detriment of the public good. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law therefore from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy." Citing *Tool Co. v. Norris*, 2 Wallace (U. S. Supr. Ct.), 45, &c. (Disapproved, as to the point decided, *Lyon v. Mitchell*, 36 New York, 242.)

In *Groton v. Walldoborough*, *supra*, it was held that the sale by a town of the office of constable at auction was illegal. The Court said: "It is to be presumed that the citizens will promote such men to office as are best qualified to discharge the duties. If they are allowed to be the subjects of sale, there would be great danger that purchasers would reimburse themselves by oppression and extortion; and that fidelity and integrity would be less regarded than gain. Indeed men of elevated minds and correct principles could never be reconciled to this mode of obtaining office." The same was held in *Meredith v. Ladd*, 2 New Hampshire, 517. In *Alvord v. Collin*, 20 Pickering (Mass.), 418, however, it was held that this principle did not apply to the collector of taxes, because his is not a "public office." A strong opinion to the contrary was expressed, although not necessarily involved, in *Tucker v. Aiken*, 7 New Hampshire, 113. On the general principle, however, the Massachusetts Court in *Alvord v. Collin* used the strongest language of approbation, observing of a contract for the sale of an office: "It is inconsistent with sound policy. It tends to corruption. It diverts the attention of the collectors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practices to procure a remuneration for the price paid." Citing the principal case.

In *Filson v. Himes*, *supra*, it was held that a promise to secure the removal of a post-office, and the appointment of one as postmaster is illegal. The Court cited the English doctrine, and added: "But were the English common law otherwise, such contracts could not be tolerated by the courts of a country whose government is founded theoretically on the most pure and exalted public virtue."

In *Gaston v. Drake*, *supra*, this doctrine was applied in respect to the office of district attorney, or public prosecuting officer. The Court said: "The tendency of a contract for a contingent reward, to use one's influence to procure another's election to a public office, is as certainly detrimental to the

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public interest as is a contract to use personal influence to procure the passage of a law or to obtain a pardon." The same was held in respect to a county clerk in *Outon v. Rodes*, *supra*.

In *Swayze v. Hull*, *supra*, the Court held that a note executed in consideration that the maker should be elected sheriff, was void. They contented themselves with saying: "There is no doubt it is a corrupt and void agreement."

In *Cobbs v. Hixson*, *supra*, a candidate to succeed a defaulting city treasurer agreed with him that he should retain the custody of the funds and generally perform the duties, and the successor should merely sign reports and be treasurer in name. The Court very severely reprobated this agreement, and pronounced void a bond executed by the defaulting and outgoing officer to the incoming officer for the faithful discharge of the duties of the office. The Court said in conclusion: "It is not pleasant to think that people of any city can have elective offices filled by such methods. To hold that such intrigues can be legally carried out would be monstrous. A community that would knowingly tolerate it would not be fit for self-government. Persons who have taken part in such dealings cannot ask courts to enforce their bargains."

No. 34. — *LOWE v. PEERS*.

(1768 EX. CH. 1770.)

RULE.

AN agreement in general restraint of marriage is illegal and void as against public policy.

Lowe v. Peers,

4 Burr. 2225-2234 & Wilmot, 364-385.

Contract. — Illegality. — General Restraint of Marriage.

A contract under seal made with a lady not to marry another, and in case of doing so to pay the former lady a sum of money: *Held* illegal and void.

This was an action of covenant upon a marriage con- [2225] tract, being a promise under the defendant's hand and seal, and in his own handwriting, to the effect following: "I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself. If I do, I agree to pay to the said Catherine Lowe £1000 within three months next after I shall marry anybody else. Witness my hand Newsham Peers and seal, &c." This deed was executed in 1757. And in 1767 Peers married another woman. Whereupon this action was brought.

* The plaintiff avers in her declaration "that she had [* 2226] remained single, and was always willing and ready to

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marry him whilst he continued single; but he married Elizabeth Gardiner. The breach was assigned in non-payment of the £1000, though demanded. The defendant pleaded *non est factum*.

The question turned upon the second count only: for, it was admitted, that no sufficient evidence was given to support the first count.

The cause was tried before Lord MANSFIELD. It appeared in evidence, by letters that were read, that there had been a long courtship, and that this obligation was fairly and voluntarily given by the defendant to the plaintiff; the defendant pulled the stamped paper out of his own pocket, and wrote, signed, sealed, and executed it in the presence of one witness. And a witness who saw it executed, attested it after the defendant was gone. There was no intercourse between the plaintiff and defendant afterwards. The witness to prove this deed swore that the defendant sealed it before he wrote his name "Newsham Peers." Evidence was called on the other side to prove the contrary.

His Lordship directed the jury to find for the plaintiff, with damages £1000 if they thought the deed to be a good deed. If this direction was wrong, he gave the defendant leave to move for a new trial, without costs.

Accordingly, on Thursday, 21st April last, Mr. Dunning, Solicitor-General, moved for a new trial, with liberty also to move afterwards in arrest of judgment.

Upon showing cause on Monday last (the 9th instant), a question was proposed to be debated, "Whether the jury could give any more or less damages than the £1000, the specific sum mentioned in the deed;" as well as "Whether this instrument is good enough in law to support any action whatsoever."

It was then agreed that both motions (*viz.* for a new trial and in arrest of judgment) should come on to be argued together.

Pursuant to which agreement, the case was argued by [*2227] Sir Fletcher Norton, Mr. Cust, and Mr. *Wallace for the plaintiff; and by Mr. Dunning, Solicitor-General, and Mr. Mansfield for the defendant; but the Court, in giving their opinions upon the two motions, entered so fully into the grounds and reasons upon which they founded their determination, and discussed the objections and cases cited so particularly, as may render the arguments of the counsel unnecessary to be given here at all, or at least more than a slight sketch of them. The general tendency of them was shortly this:—

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The motion for a new trial was founded upon an objection to the direction given to the jury, "to find the whole sum of £1000 in damages, in case they should find for the plaintiff," the counsel for the defendant insisting that the jury ought to have been left at liberty to give a less sum if they had thought proper, the jury being judges of the damages, as well in covenant as in assumpsit. They cited *James v. Morgan*, 1 Lev. 111, where the jury were directed to give only the value of the horse in damages, upon an assumpsit "to pay a barley-corn a nail, doubling it every nail." They also cited and much relied upon *Sir Baptist Hilt's case* in 1 Ro. Abr. p. 703, title "Trial," pl. 9, where a finding of less was holden to be good; and the jury are said to be chancellors, and may give such damages as the case requires in equity.

It was answered that where a particular sum is liquidated and fixed by the agreement of the parties, and the breach of covenant assigned in non-payment of that money, that fixed sum alone is the measure of the damages.

The motion in arrest of judgment was founded upon the following reasons: That all engagements in restraint of marriage are void; that this engagement is of that sort; that there is no consideration for this contract. It is not reciprocal: here is no mutuality, which is essential to the validity of a contract.

It was answered that this whole transaction amounts to a mutual promise "to marry each other." The plaintiff's acceptance of this deed is sufficient evidence of her making such a promise. So that there were mutual promises; and both were bound to perform them. Therefore there was a consideration for the defendant's promise. However, this promise is by a deed; and a deed carries its own consideration.

And this is not an engagement in restraint of marriage generally; it is only a restraint from marrying anybody else but each other. Therefore it is not like the case of *Baker v. White*, in 2 Vern. 215, or that of *Woodhouse v. Shepley*, in 2 Atkyns, 535.

* Lord MANSFIELD stated the deed particularly and the [* 2228] declaration upon it. The words are, "I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself; if I do, I agree to pay the said Catherine Lowe £1000 within three months, &c." The defendant was single at the time, and so was the plaintiff.

The second count avers that the plaintiff was ready to marry him; and that after the making the deed, he did marry another woman; namely, one Elizabeth Gardiner: yet he, the defendant, did not, when requested by the plaintiff, pay the £1000 which he had agreed to pay; and so (though often requested) hath not kept the covenant made between them as aforesaid. So that the breach is assigned in the not paying the £1000.

To this declaration *non est factum* was pleaded by the defendant; but the jury found "that it was his deed," and have given £1000 damages. And by law and in justice he ought to pay the £1000. Money is the measure of value. Therefore what else could the jury find but this £1000 (unless they had also given interest after the three months) ?

This is not an action brought against him for not marrying her, or for his marrying any one else. The non-payment of the £1000 is the ground of this action, — "that he did not, when requested, pay the £1000."

The money was payable upon a contingency, and the contingency has happened. Therefore it ought to be paid.

There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty and recover the penalty, (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*.

And upon this distinction they proceed in Courts of Equity. They will relieve against a penalty upon a compensation; but where the covenant is "to pay a particular liquidated sum," a Court of Equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up a meadow, if the covenant be "not [*2229] to plow," and there be a penalty, a Court of Equity * will relieve against the penalty, or will even go further than that (to preserve the substance of the agreement), but if it is worded "to pay £5 an acre for every acre plowed up," there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement. Here the specified sum of £1000 is found in damages; it is the particular liquidated sum fixed and

agreed upon between the parties, and is therefore the proper *quantum* of the damages.

The same reason answers to the motion for a new trial in the present case.

As to the case (*Sir Baptist Hist v. Goates*) mentioned by Mr. Mansfield from 2 Ro. Abr. 703 (S. C. Cro. Jac. 390), it is impossible to support it, for it cannot be that a man should be obliged to take less than the liquidated sum. And the writ of error in that case was plainly brought by the defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the *quantum* of damages found by the jury be the subject of a writ of error?

It is therefore clear that where the precise sum is not the essence of the agreement, the *quantum* of the damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it.

This brings the matter to the validity of the deed.

Whatever grounds existed at that time that could avail the defendant to avoid the deed, should have come on his part by a proper plea if it would in reality have been a good defence for him. And therefore if any such ground had existed in this case, as did exist in *Shepley's* case (*Woodhouse v. Shepley*, 2 Atk. 535), or any other ground not appearing upon the face of the deed, it ought to have been avoided by a proper plea. Here we are upon the face of the deed; the plea is *non est factum*.

It is objected that this is an engagement in restraint of marriage.

It is answered that this construction is directly contrary to the words and intention of the deed, which amounts to a mutual agreement between these two persons "to marry each other," and that the plaintiff's acceptance of the deed proves that, and that what the jury have found is a sufficient reason to have it supposed that there was such a mutual agreement "to marry each other;" that, however, this is at *the utmost only a contract "that [* 2230] he would not marry any other woman, and that if he should marry any other woman he would pay the plaintiff £1000 within three months after he should so marry any other woman;" but it is very far from restraining his marrying at all.

This is a point of very considerable importance.

All these contracts ought to be looked upon (as Lord HARDWICKE said in the case of *Woodhouse v. Shepley*) with a jealous eye, even

supposing them clear of any direct fraud. In that case, Lord HARDWICKE did not proceed on any circumstances of particular actual fraud, but on public and general considerations, and therefore he gave no costs.

These engagements are liable to many mischiefs, to many dangerous consequences.

When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it, as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free; otherwise, such contracts may be greatly abused, as by putting woman's virtue in danger, by too much confidence in men, or by young men living with women without being married. Therefore these contracts are not to be extended by implication.

But here is not the least ground to say "that this man has engaged to marry this woman." Much less does anything appear of her engaging to marry him.

There is a great difference between promising to marry a particular person and promising not to marry any one else. There is no colour for either of these constructions that have been offered by the plaintiff's counsel.

This is only a restraint upon him against marrying any one else besides the plaintiff; not a reciprocal engagement "to marry each other," or anything like it.

This penalty is set up against the defendant after ten years have passed without any intercourse between the plaintiff and him.

Another reason why we should not strain in favour of this contract is because if there was really any mutual con-
[* 2231] tract * under fair and equal circumstances, the plaintiff will still be at liberty to bring her action, for a void bond can never stand in her way.

Therefore I think that what passed at the trial was perfectly right; that the measure of damages was the £1000, and that this was such a contract as ought not to be carried into execution.

The case of *Baker v. White*, 2 Vern. 215, was not near so strong as the present case. That was in restraint of Elizabeth Baker's marrying again. There is a difference between a restraint of a first marriage and a restraint of a second marriage. The plaintiff there was a widow when she gave the bond. And the transaction

was, in effect, a mere wager, and nothing at all unfair in it ; and yet in that case the bond was decreed to be delivered up to be cancelled.

Mr. Justice YATES was of the same opinion on both points.

Mr. Justice WILLES also concurred.

Lord MANSFIELD. Let the rule for a new trial be discharged, but the judgment must be arrested.

This judgment arresting the original judgment was [Wilm. 364] brought up by writ of error into the Exchequer Chamber, and, after argument there, —

Lord Chief Justice WILMOT delivered the unanimous judgment of the Court.

After stating the proceedings, he said : —

There are two questions :

The 1st question is, whether a covenant not to marry any person but the covenantee, under the penalty of £1000, without any consideration whatever to support it, is valid in point of law, and whether an action will lie to recover the penalty ?

The counsel at the bar, who argued this case for the plaintiff with great ability, admitted that the civil law had a violent aversion to all restraints upon marriage ; and that the Court of Chancery followed the rule of the civil law, in cases where they exercised a concurrent jurisdiction with civil law Courts ; but contended that the common law had not adopted that aversion, and reprobated all restraints upon matrimony, as the civil law did ; and they mentioned the case of Ecclesiastics, and Masters in Chancery formerly, and Fellows of Colleges ; and that by particular modes and provisions * marriage may be checked ; [* 370] as by limiting estates while grantees remain sole and unmarried ; or agreeing to pay a sum of money upon marriage, which will have the same effect as agreeing not to marry under a penalty ; and this kind of reasoning was very skilfully introduced, in order to divide this covenant ; and, supposing the first part of the deed, not to marry, to be illegal, yet that the second part of it might operate as a promise to pay £1000 upon marriage, which is legal ; and many cases were cited to show the difference between bonds void by statute and at the common law ; and that one part of a condition may be good and an action maintainable for a breach of it, though another part is bad. It is not necessary to state or consider those cases, for the fact does not warrant the application of

 No. 34. — *Lowe v. Peers*, Wilm. 370, 371.

them, because this deed contains an entire agreement which must be taken altogether; and there is not the least pretence to divide and separate it into distinct and different parts. The penalty waits upon the contract, and is to secure the performance of it. The covenant is the law, and the penalty the sanction of it; and therefore the question first put is the true question, viz.: "Whether a covenant not to marry anybody except the covenantee under a penalty" induces such a valid legal obligation that the Courts of common law will sustain an action for the breach of it; and as there are no cases directly in point, it may not be improper to mention the reasons particularly which determine us to think that this covenant is void, and that no Court of justice ought to entertain an action for the violation of it.

Upon the first view of this question, the maxim, cited at the bar of *volenti non fit injuria*, seems to favour such a covenant;

that every man has a right, *disponere de suo jure*; and [* 371] as the law * does not oblige anybody to marry, but leaves

a free agency in that respect to every member of this community, it is not an agreement to omit what the law commands; but an agreement to omit, what the law leaves to every one's own choice to omit if he pleases. And as so far as respects obedience to the positive law of this kingdom, the argument is unanswerable; but, besides legal obligations, every member of civil society is under a variety of moral obligations, which municipal laws do not enforce, but which the law of nature, which is the law of God, calls upon him to perform. It would be endless to enumerate the duties which are the objects of moral obligations, both in a state of society and out of it; gratitude, charity, and all parental and filial duties, beyond mere maintenance, friendship, beneficence in all its various branches, and many more, which might be named, are duties of perpetual obligation; and I cannot name a greater than matrimony, being one of the first commands given by God to mankind after the Creation, repeated again after the Deluge, and ever since echoed, by the voice of nature, to all mankind. For the precept of multiplication has been always expounded, by the civilized part of the world, to mean multiplication by the medium of matrimony, and not by promiscuous copulation; and there cannot be a duty of greater importance to society, because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society depends upon protecting and encouraging it.

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The point therefore to be considered is, whether a covenant to omit such a duty, ought to be enforced *in foro civili*.

The writers upon the law of nature consider contracts to omit such duties as void; nay, they consider an oath to perform them as not obligatory. Grotius, 2 Lib. cap. 13, sect. 67. “*Ut valeat *Juramentum, oportet obligatio sit licita; quare [*372] nullas vires habebit jurata promissio de re illicita, aut naturalitur aut divina interdictione aut etiam humana; . . . imo etiam si res quae promittitur, non sit illicita sed majus bonum morale impediens: sic quoque non valebit Jus-jurandum; quia, scilicet profectum in bono, deo debemus, ita ut ejus libertatem eripere nobis ipsis non valeamus.*”

A covenant of this kind does not only hinder a greater moral and social good, it does not only interfere and check that “profectum in bono,” which we owe to God and our country, but it tends to evil and to the promoting of licentiousness; it tends to depopulation, the greatest of all political sins; it is a contract “*vergens ad publicam perniciem*,” and therefore has a moral turpitude in it.

Will the law of this country, the perfection of human reason, enforce such a contract? Is a covenant to omit moral duties, which for the exercise of our virtues are left to our free choice, the proper subject-matter of an action?

Laws are the will of the whole community, and one great part of their function is to enforce the performance of contracts; but could it even be the will of any community to give an effect to agreements subversive of any moral or social duty; and, instead of meliorating and perfecting human nature, countenance and sanctify a contract founded in the corruption and depravation of it?

And it is much worse than a covenant of perpetual chastity, which extends to all unlawful as well as lawful intercourse; for this covenant only interdicts the innocent gratification of a natural appetite, and leaves the party at liberty to a criminal indulgence of it. To entertain an action for the breach of such contracts, would be setting the laws of God and man at variance with one another; it would be *making the common law [*373] counteract its own favourite dominant principle, *Salus populi suprema lex*.

The increase of the people in such a commercial state as ours, where our foreign dominions would take, oftentimes, more than

we have to send them, conduces most materially to the strength and prosperity, and consequently to the safety of the people; and reason, history, and observation tell us, that such an increase is best secured by the medium of matrimony, which is therefore very truly called the seminary of mankind.

Courts of justice must execute the laws as they find them; but if there is no positive written law, nor any adjudged cases, compelling them to apply their power and authority in support of such a contract, as the law stands neuter in respect of matrimony, and many other moral duties, and leaves it optional to mankind whether they will perform them or not, we are for leaving the performance of contracts to omit them equally optional.

It is sufficient that the law leaves matrimony to every man's free choice, and does not punish celibacy; but to effectuate a contract for the continuing in such a state is totally inconsistent with the ideas we have of the proper functions of a Court of justice. Activity in such a case seems to be a profanation of justice, and neutrality the purest and most refined exertion of it.

I have dwelt a little upon this argument, because reasons drawn from States where marriage was a positive duty by the law of the State, do not apply to this case, where it is not so; with the Jews, Greeks, and Romans it was; and therefore contracts of this kind, with them, must be so far from being executed by them, that they

must have been objects of punishment; but we disclaim [* 374] all arguments from those *laws, and therefore we mean to

bottom this judgment upon the law of God, the principles of reason, morality, and the common law, independent of any other municipal law whatever.

I will consider how the law of this country treats restraints upon marriage; and though no case can be found *in specie* upon this question, yet a principle is to be found which directly applies to and governs it.

The case of Ecclesiastics, whether secular or religious, was a weed of the canon law, erroneously tolerated by the common law, and totally extirpated at the Reformation.

The case of the six Clerks in Chancery is recited by the act to have been a custom, not grounded upon any law at all.

The case of the Fellows of Colleges depends upon the will of the founder; there is a succession in colleges; it is only a temporary restraint on a few in seminaries of learning, which are not

proper places for the reception of wives and children; and the loss which the public receives from the celibacy of a few is most amply compensated to them by the better accommodating those seminaries to the purposes of education.

The case of Customs of Manors, and Limitations of Estates during celibacy, are modifications of property; and though they do invite the proprietors of such estates to abstain from matrimony, yet they do not profess and avow that intention; as an estate given upon condition or an express agreement not to marry under a forfeiture, does; where it figures in the shape of a penalty, and discloses a premeditated design to check it.

But whatsoever weight there may be in the distinction between a limitation and a condition, it has been long settled and so often *judicially recognized, that it ought not now [*375] to be disturbed; and it is observable, that it is not a subtlety of our law only, for the civil law, in the passage mentioned at the bar by Mr. Cuft, out of Swinburn, makes the same distinction, and mentions the reason for it, which I have given. 4th part, Ch. 12, Sect. 6, 19.

“Moreover, if the testator do bequeath any legacy to a woman conditionally, if she do not marry, willing her to restore the same to another, if she do marry; albeit, in this case, the woman do marry, she may obtain the legacy, neither is she bound to restore the same; unless it were the meaning of the testator, not to forbid marriage, but to grant the use of the thing bequeathed until the legatary did marry.”

“The ninth limitation is, when the prohibition of marriage is not made conditionally by this word ‘if;’ as ‘I make thee my executor,’ if ‘thou dost not marry,’ but by other words, or adverbs of time; as when the testator willeth that his daughter or wife shall be executrix, or shall have the use of his goods,” so long “as she shall remain unmarried; agreeable hereunto are the laws of this Realm of England, wherein there is a case that one of the Kings of this Realm did grant to his sister the manor of D. so long as she should continue unmarried; and this was admitted to be a good limitation in the law, but not a condition.” Edw. VI. to his sister Mary, according to Hen. VIIIth’s Will (Dyer, 141).

The common law, therefore, in allowing such limitations, does not discover any more favour to restraints upon matrimony than

the civil law did; both allowed a Modus as qualifying and limiting the duration of property, but rejected a condition.

[* 376] * And it is called a "Modus" by the writers upon that law, in contradistinction to a condition; and it was certainly considered, by both laws, like any collateral determination of the estate, or qualification of the donation; but a covenant not to marry under a penalty stands totally unconnected with any gift or estate at all; and it is not *lucrum cessans*, as in the case of a limitation of an estate, but *damnum datum* and punishment. It is laying a mulct upon himself for doing what ancient policy mulcted him for not doing; the case put of a note to pay a sum of money upon marriage is, upon the face of the note, only a contingent time of payment. Some consideration must be proved, and if, under the pretence and mask of a fictitious consideration, it should appear to be given as a penalty to restrict the giver of the note from marrying, without any reasonable ground, foundation, or consideration for giving it; I should be apt to say, as Papinian did, D xxxv. de Condit. & Demons. s. 79, "quod in fraudem legis, ad impediendas nuptias adscriptum est, nullam vim habet."

A case was cited out of 1 Rolles Abridg. 418, that if a man leases for life, upon condition that if the lessee shall marry without licence he shall re-enter, it is a good condition. The case is taken out of the Year Book of 43 Edward III. 6 *a*. The case itself is upon a custom to pay a fine by the tenants of a manor, holding in villenage, on the marriage of their daughters, and an issue was taken on the custom. But the passage cited, and turned into Rolles, is only, in the Year Book, a *dictum* of KIRTON, a Judge; and he adds, "yet it is a condition against the common law;" so that, as far as it goes, it is an authority in point condemning such restraints. *Baker v. White*, 2 Vern. 215.

[* 377] A bond from a widow not to marry again, was * decreed to be delivered up, thought there was a counter-bond to pay a sum of money to her executors, if she did not.

All the cases cited out of the books, where devises of either real or personal estate, made "upon condition of not marrying without consent, with a devise over on non-performance of the condition," are held to be good, are so far from being prohibitions of marriage, that they contemplate and have a marriage in their view, under a proper direction; and though the liberty of marriage is to be

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favoured, yet the liberty of disposing of property as the owner pleases, is likewise to be supported; and by considering these provisions in deed or wills, not as prohibitions, but as wise regulations of marriage, parental authority, and a free exertion of the rights which property gives, are duly maintained, 1 Mod. 308; and the reason given by HALE for supporting such conditional limitations, is "because the party is not thereby bound from marriage." In the case of *Harvey v. Aston*, COMYNS, Chief Baron, 729, lays it down, "if a portion be given on consideration that a daughter should never marry, it should be rejected as repugnant to the original institution of the creation of mankind;" and a covenant, not to marry anybody except a person who is not obliged to marry, is to every purpose the same as a general restraint; and then the principle of public utility interposes, and forbids the sustaining an action for the infraction of it; and what is said in 2 Shower, 351, *The Company of Taylors v. Clarke*, seems to be the substance of everything which can be said on this subject, viz. :

"Whatsoever a man may lawfully forbear, that he may oblige himself against; except where a third person is wronged, or the public is prejudiced by it."

*But the principle of the judgments upon bonds to [*378] restrain trade generally, or in a particular place, without consideration, directly applies to the case and rules it; for every man is at liberty to follow his trade or let it alone. He cannot be compelled to follow it; he may be obliged to maintain himself, if able, but quite at liberty as to the trade or employment, or kind of labour.

Mitchell v. Reynolds, 1 Peere Will. 181, where the restraint is confined to a particular place, for a particular time, and upon consideration, the bond was held good, because the interest of the public is not at all concerned. The indignation of a Judge in Hen. Vth's time (*vide* Mr. Cox's note, 1 Peere Will. p. 193) at such a bond, showed it was criminal in his apprehension. And surely the interest of the country is more materially concerned, and more fatally affected by this covenant than by the other.

I see great temptations to contracts of this kind, and the danger of an abusive application of them. Many virtuous young ladies, from filial duty, from a regard to their parents, from their dependency upon them, and expectations of fortunes from them, may not choose to enter into contracts of marriage. Young gentlemen,

in the hands of cunning artful women, may have firmness enough to resist promises of marriage; but both ladies and gentlemen, when pressed to marry, and apprehensions are expressed of their marrying some other, may, and frequently are, induced to promise not to marry any other person but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life, at the will of most inexorable jailers, — disappointed lovers.

It is the duty of all Courts of justice to keep their eye steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is [* 379] founded upon a * claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance *in foro civili*. Upon this principle, turning prosecutions for felony into civil actions for the things stolen, bonds and agreements not to prosecute felonies, and many other cases might be cited, which are all governed by that supereminent and noble principle, the care and protection of the whole community. And upon that principle, we think this covenant, not to marry, unsupported by any consideration, is void.

The 2nd question is, Whether there is any consideration appearing upon the face of the deed, or any foundation for presuming such a consideration as will substantiate this covenant, and give a binding property to it?

It was contended, that a covenant to marry no other person but the plaintiff was a covenant to marry the plaintiff, and that it was no more than what was implied in every marriage contract; and it is certain that a covenant to marry the covenantee doth carry along with it a covenant not to marry any one else, *expressio unius est exclusio alterius*; but the converse of the proposition is not true; for a promise to marry no person but the covenantee is not a promise to marry the covenantee. It is not a negative pregnant of an affirmative promise, but it is a mere exception out of a restraint, which would otherwise have been general; and if the person excepted had been a stranger, and not the covenantee, there could not have been a shadow of doubt upon the construction, and yet the exception must have the same effect in both; and though it was very properly argued, that deeds are to be construed according to the intention of the parties, yet that intention must not be the child of fancy and conjecture, but be collected from the deed itself.

* We are to construe contracts, which have been made, [* 380] liberally, to reach the intention of the contracting parties; but we are not to twist and turn exceptions out of contracts into contracts, and make agreements for parties which they have not made for themselves.

It has been said that if it is not a promise to marry her, it is a delusive promise, and the plaintiff is cheated because she must have considered it as a promise to marry her. I see no delusion at all in it; the words are plain and clear, and it is a decisive evidence to me that the plaintiff did not mean to take, nor the defendant to give, a promise of marriage; because if they had had any such meaning, they would explicitly have said so. Why take such a circuit to express what five words would have expressed? Why substitute the effect and consequence of a promise of marriage, in the place of the express promise itself?

Reciprocal promises of marriage were not their intention; but a most unequal agreement, by which the man is to be bound, and the woman to be left in a state of perfect liberty as she was before. I am now speaking of the agreement as meant and understood by the parties; for however the law may, for very wise purposes, control such an agreement, yet, taking it as they understood it, the imposition is upon the defendant and not upon the plaintiff; for she is left quite a free agent, and may marry whom she pleases with impunity; and at the same time the defendant can marry nobody but her, without paying her £1000. She walks through life with him as a captive in her hand.

He could maintain no action against her on this deed, for not marrying him. In "assumpsit," mutual promises must be proved; if by deed, they must be contained in the deed.

* It was argued, that if the defendant Peers had tendered himself in marriage to the plaintiff, and she had refused, that it would have been a discharge or at least sufficient to excuse the non-performance of the covenant; and two cases were cited, *Holcroft v. Dickenson*, Carter, 233 and *Cross v. Hunt*, Carthew, 99. In these cases there were mutual promises of marriage; but in this case there are no mutual promises of marriage, and therefore a tender and refusal in this case, where she was not obliged to marry him, and he was not obliged to marry her, could not operate in avoidance of his covenant, nor as an excuse for the non-performance of it; but if there were any

doubt, the plaintiff herself hath resolved it; for in the count upon which she has recovered, she only says, she was ready and willing to have married the defendant, of which he had notice; but does not declare upon the deed as containing any intrinsic promise of that kind, or as founded upon any extrinsic promise of marriage from her. She considers, and declares upon the deed according to its natural, obvious signification, that is, a covenant not to marry any other person but her, without an intimation of any other covenant whatsoever in the deed.

If there was no covenant to be found in the deed from the defendant to marry her, nor any covenant from the plaintiff to marry the defendant, or even not to marry any other person; the question then is, whether a consideration to support a void deed is to be presumed, or, if it is not to be averred and proved? It was argued, and Plowden, 308, cited, that the law, from the deliberation and solemnity which accompanies the execution of a deed, presumes the consideration and delivers the obligee from the necessity of proving it, which must be done in actions [* 382] upon simple contracts; that doctrine *is right, but it applies only to cases where the deed is good upon the face of it. There the will of the party who makes the deed is a sufficient consideration; as Plowden says, "because promises by words, and parole contracts, escape often from men lightly, easily, and without much attention and deliberation, the law has provided that they shall not bind, unless there is a consideration." The will of the maker of the deed shall be a decisive evidence of the will of the party who executes it; but if that will encounters the interest of the public the deed is condemned, not because the deed doth not evidence the will of the maker, but because it evidences a will which the law controls and condemns; and I know of no principle or case, where a consideration has been presumed to support a deed which is void upon the face of it. The apparent consideration must be taken to be the only consideration till the contrary is proved. If a presumption of consideration, without proof, was admissible, no deed could be condemned for its apparent illegality.

But it was argued that the defendant to oust the presumption of a promise from the plaintiff to marry the defendant, should have pleaded there was no promise of marriage from the plaintiff and tendered an issue upon it.

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If the deed had been good upon the face of it, it would have been incumbent upon the defendant to have pleaded the fact which had avoided it; but it is contrary to all rules of pleading and common-sense, for the defendant to introduce a fact to support the plaintiff's defective declaration.

If such a deed is to be propped and bolstered up by averments, it is incumbent upon the party who would support the deed, to make them, and not upon the defendant who contends to avoid it; and *a plea offering an issue, that there was no [* 383] such promise, would be bad, because it would be traversing a fact which is not alleged.

But it is objected there is a fact alleged in the declaration which might have been traversed, and not being traversed must be taken to be true, and that the deed is legitimated by it; viz.: "That she was always ready and willing to marry and take the defendant to husband, whilst he continued unmarried;" but the plaintiff being ready and willing to marry the defendant (supposing it to be a traversable matter), will not have a retrospective influence, and vary the nature of the covenant in its original creation.

If it were void when executed, no subsequent consideration can animate it, and give it a legal existence; for the plaintiff being ready and willing to marry the defendant, does not prove a promise to marry him anterior to the deed, or concomitant with it, which is the point and gist of this question; and therefore admitting that fact to be true, nay, admitting it was a subsequent promise to marry him, it cannot give a being to the original deed.

But it is said the plaintiff's acceptance of the deed is an evidence of a counter-promise; and that, in practice, out of regard to the modesty of the sex, a very little, perhaps silence alone, is sufficient to prove the woman's assent; but in those cases, a promise of marriage on the man's side is fully proved; and so is the case of *Cross v. Hunt* in Carthew; there was an acknowledgment under his hand, whereas here is no promise of marriage on the man's side at all, and therefore it would be most absurd to presume a counter-promise, where there is no promise on the other side; and the acceptance is really nothing more than evidence of assent to the terms expressed in that deed, and if there had been any similar deed *containing a cove- [* 384] nant from the plaintiff, *ejusdem generis* with the cove-

nant upon which this action is founded, it ought to have been averred and proved; and without such a mutual obligation, as Lord HARDWICKE said in *Woodhouse v. Shepley*, 2 Atk. 535, there is colour to support it; and we are no more at liberty to presume a good consideration to support a deed void upon the face of it, than to presume a bad consideration to show the nullity of the deed that is good upon the face of it; they must be equally introduced by averment, and proved in both. In the case of *Cheesman v. Nainby*, 2 Lord Raymond, 1456; 2 Strange, 739, the bond was held to be good, because being only to restrain trade in a particular place, and for a valuable consideration appearing upon the face of the bond; but if that had not appeared, and it had not been averred, it had been void; for a bond to restrain in a particular place, without consideration, is equally bad with a bond of general restraint; and if this were a case of presumption, which it is not, the record in this case absolutely forbids any presumption of a promise of marriage by the plaintiff; for upon the first count, which states the plaintiff's promise of marriage to the defendant as the consideration of a deed, *in totidem verbis*, the jury have found for the defendant, so that it appears judicially to us that there was no such promise as we are now desired to presume, and therefore the verdict is so far from furnishing any presumption of such a proof, that it is decisive against such a presumption. But if the count on which the verdict is taken had been the only count in the declaration there would have been no foundation from the verdict to presume that such a consideration was proved; for the extrinsic collateral consideration, not being alleged, could not have been given in evidence in this count, and [* 385] *therefore the verdict confining it to this count only can furnish no such intendment.

The plaintiff was apprised of the defect, and therefore laid the promise of marriage in the first count, but was not able to prove it. But as the two counts are to be considered distinctly, and as if there had been two distinct deeds, we lay no great stress on the verdict upon the first count.

As the deed is void on the face of it, and there is no intrinsic consideration, nor any alleged in the second count, we are all unanimously of opinion, that the judgment is right, and must be affirmed, and therefore

Let it be affirmed.

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ENGLISH NOTES.

In *Hartley v. Rice* (1808), 10 East, 22, 10 R. R. 228, a contract not to marry within a particular time was declared to be void.

The question of restraint of marriage generally arises in connection with gifts in wills, either vesting on marriage under a condition or being defeated on marriage. Not only are conditions in general restraint of marriage void, but those are also void which lead to probable prohibition. *Keilly v. Monck* (1795), 3 Ridg. P. C. 205. There a condition of a gift was that the donee should not marry any one whose income derived from freeholds was less than £500 per annum. This condition was held to be void.

The following conditions have been held to be valid as being in particular restraint: To marry or not to marry a particular person, *Jarvis v. Duke* (1681), 1 Vern. 19; *Randal v. Payne* (1779), 1 Bro. C. C. 55. Not to marry native of a particular country, *Perrin v. Lyon* (1808), 9 East, 170, 9 R. R. 520. Not to marry member of a particular religion, *Duggin v. Kelly* (1847), 10 Ir. Eq. Rep. 295. To marry persons of a particular religion only, *Hodgson v. Halford* (1879), 11 Ch. D. 959, 48 L. J. Ch. 548. Not to marry persons of a particular class, such as domestic servants, *Jenner v. Turner* (1881), 16 Ch. D. 188, 50 L. J. Ch. 161, 43 L. T. 468, 29 W. R. 99. Not to marry under a reasonable age, or unless with consent of parent or guardians, *Stackpole v. Beaumont* (1796), 3 Ves. 89, 3 R. R. 52; *Clifford v. Beaumont* (1828), 4 Russ. 325; *Younge v. Furse* (1859), 8 De G. M. & G. 756.

The efficiency of a condition in general restraint of marriage depends (1) on the nature of the property to the gift of which the condition is attached; (2) on its being precedent or subsequent.

A condition precedent as to marriage with consent, or above a certain age, or with or except with particular persons, attached to a gift of real or personal property, is valid, and the gift fails to take effect if the condition is not fulfilled. *Scott v. Tyler* (1788), 2 Bro. C. C. 431 (legacy to be settled in case of marriage under twenty-one, with consent); *Fry v. Porter* (1795), 1 Mod. 300; *Bertie v. Faulkland* (1688), 3 Ch. Ca. 129; *Harvey v. Aston* (1737), 1 Atk. 361; *Reynish v. Martin* (1746), 3 Atk. 330; *Stackpole v. Beaumont* (1796), 3 Ves. 89, 3 R. R. 52, which came up again as *Clifford v. Beaumont* (1828), 4 Russ. 325 (gift on marriage with consent); *Knight v. Cameron* (1807), 14 Ves. 389 (legacy on attaining majority, or marriage under that age with consent of executors); *Smith v. Cowdery* (1825), 2 Sim. & St. 358 (bequest on day of marriage with any other person than A.); *Davis v. Angel* (1862), 4 De G. F. & J. 524, 31 L. J. Ch. 613 (gift on marriage with A.); *In re Brown's Will* (1881), 18 Ch. D. 61 (gift on mar-

 No. 34. — *Lowe v. Peers.* — Notes.

riage with consent); *In re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685, 53 L. J. Ch. 475, 50 L. T. 761, 32 W. R. 448 (annuity to testator's widow whose marriage declared null and void before the testator's death, but after the date of the will).

A condition subsequent in general restraint of marriage is good if attached to gift of real estate, at all events, if the disposition can be taken to show an intention of providing until marriage, but not of discouraging marriage. *Jones v. Jones* (1876), 1 Q. B. D. 279, 45 L. J. Q. B. 166. Such a condition in general restraint attached to gift of personalty is bad, *Morley v. Reynoldson* (1843), 2 Hare, 570. There the testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support until she attained twenty-one, or married with the consent of his trustees under that age; and upon her attaining such age or her marriage, for her separate use with remainder to her children; and in case of her death without issue, remainders over to certain legatees. By a codicil, he prohibited his daughter from marrying, and in case of her marriage or death the gift was to go over to the same legatees in remainder. It was held that the condition being in restraint of marriage was void as to the life interest of the daughter. The daughter died in 1894, leaving children. The question arose whether her children were entitled in remainder as directed in the will, or whether the codicil destroyed their right. It was held that the will and codicil must be read together, and that the true construction was that the property was to go over on death or marriage, whichever should happen first, and that as it could not go over on marriage, the children were entitled to the fund. *Morley v. Reynoldson* (1895), 1 Ch. 449. Proceeds of the sale of realty are personalty for the above purpose. So is a mixed fund of personalty and proceeds of sale of realty. *Lloyd v. Lloyd* (1852), 2 Sim. N. S. 255; *Bellairs v. Bellairs* (1874), L. R., 18 Eq. 510, 43 L. J. Ch. 669, 22 W. R. 942.

A condition subsequent in particular restraint of marriage is good as to gifts of real estate, *Jenner v. Turner* (1881), 16 Ch. D. 188, 50 L. J. Ch. 161, 43 L. T. 468, 29 W. R. 99; but ineffectual as to gifts of personalty, unless there is a gift over. *Murples v. Bainbridge* (1816), 1 Madd. 590, 16 R. R. 271; *Poole v. Bolt* (1853), 11 Hare, 53; *W. v. B.*, 11 Beav. 621. If there is a gift over, the condition is effective. *Dickson's Trust* (1850), 1 Sim. N. S. 37, 20 L. J. Ch. 33; *Craven v. Brady* (1867, 1869), L. R., 4 Eq. 209, 4 Ch. 296.

A condition in restraint of second marriage is good. *Allen v. Jackson* (1876), 1 Ch. D. 399, 45 L. J. Ch. 310, 33 L. T. 713, 24 W. R. 306.

A conditional limitation until marriage and then over is valid. *Heath v. Lewis* (1855), 3 De G. M. & G. 954; *Potter v. Lewis* (1855), 24 L. J. Ch. 488.

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AMERICAN NOTES.

The principal case is in harmony with the American cases. See *Conrad v. Williams*, 6 Hill (New York), 444; *Mandlebaum v. McDonell*, 29 Michigan, 78; *Sterling v. Sinnickson*, 2 Southard (New Jersey), 756; *Maddox v. Maddox*, 11 Grattan (Virginia), 804. A contract to pay money on condition that the payee shall not marry within two years, and if he does, then to pay a certain sum per day during the time he remains unmarried, is void. *Chalfant v. Payton*, 91 Indiana, 202; 46 Am. Rep. 586 (case of a so-called "marriage benefit certificate"); *White v. Equitable Nuptial Benefit Union*, 76 Alabama, 251; 52 Am. Rep. 325.

The principal case is cited by Pomeroy (Equity Jurisprudence, p. 1326); and in Lawson on Contracts, § 320; and in 2 Parsons on Contracts, p. *73, where it is said: "These contracts are wholly void," and in Story on Contracts, § 687.

The general rule, with its limitations, is well stated in the case last cited above as follows: "The rule rests upon the proposition that the institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue; and that to secure well assorted marriages there must exist the utmost freedom of choice. Neither is it necessary there should be positive prohibition. If the condition is of such nature and rigidity in its requirement as to operate as a probable prohibition, it is void. On the other hand, conditions in conveyances or annexed to legacies and devises, in partial restraint of marriage, in respect to time, or place, or person, if reasonable in themselves, and not materially and practically creating an undue restraint upon the freedom of choice, are not void. Under the operation of this rule, conditions restraining marriage, without consent of parents, guardians, or executors, or under twenty-one, or other reasonable age, or with particular persons, are held to be valid; and conditions not to marry a man of a particular profession, or that lives in a named town or country, or who is not seised of an estate in fee, are held to be general and void."

In *Conrad v. Williams*, *supra*, it was said, *obiter*, that a promise by A. to marry B. "if he ever married, was in effect a promise in restraint of marriage."

In *Sterling v. Sinnickson*, *supra*, it was held that an obligation to pay \$1000 provided the obligee is not lawfully married in six months, is void. Citing the principal case.

The principal case is also cited in *Maddox v. Maddox's Adm'rs*, *supra*, which holds that a legacy "during her single life, and forever, if her conduct should be orderly," &c., is void. A devise to testator's wife "during her natural life or widowhood, with remainder after her death or marriage to her children," is void. *Silwell v. Knapper*, 69 Indiana, 558; 35 Am. Rep. 240, a learned review. See *Parsons v. Winslow*, 6 Massachusetts, 178; 4 Am. Dec. 107. But to the contrary, *Little v. Birdwell*, 21 Texas, 597; 73 Am. Dec. 242; *Hotz's Estate*, 38 Pennsylvania State, 422; 80 Am. Dec. 490; *Bostick v. Blades*, 59 Maryland, 231; 43 Am. Rep. 548; *Dumey v. Schoeffler*, 24 Missouri, 170; 69 Am. Dec. 422; *Pringle v. Dunkley*, 14 Smedes & Marshall (Mississippi), 16; 53 Am. Dec. 110; *Plympton v. Plympton*, 6 Allen (Mass.), 178; *Hibbits v. Jack*, 97 Indiana, 570; 49 Am. Rep. 478.

No. 35. — *Cartwright v. Cartwright*, 3 De G. M. & G. 982. — Rule.

No. 35. — *CARTWRIGHT v. CARTWRIGHT*.

(Ch. 1853.)

RULE.

AN agreement for future separation between husband and wife is illegal and void as against public policy.

Cartwright v. Cartwright.

3 De G. M. & G. 982-992 (s. c. 22 L. J. Ch. 841, 10 Hare, 630).

Contract. — Illegality. — Husband and Wife. — Agreement for Future Separation.

[982] By an antenuptial settlement, the father of the husband conveyed freehold hereditaments to the use of trustees during the life of the wife, in trust for her separate use, subject to a proviso, whereby it was declared that, if a separation should take place by reason of any disagreement between the husband and wife, or otherwise, the rents and profits should, from the time of such separation, during the joint lives of the husband and wife, be paid to the husband:—

Held, that the proviso was in the nature of a condition, and not of a limitation; and that it was void, as being contrary to public policy.

This was an appeal from the decision of Vice-Chancellor Wood, dismissing a claim.

By an antenuptial settlement, which was dated the 10th of July, 1839, Thomas Cartwright, the father of Henry Cartwright the intended husband, assured certain freehold hereditaments to the use of himself, his heirs and assigns, until the marriage, and immediately after the marriage to the use of a trustee, his executors, administrators, and assigns, for the term of 100 years, upon the trusts thereafter mentioned, with remainder to the use of Thomas Cartwright and his assigns for his life, with remainder to the use of George Keen, his executors, administrators, and assigns, for a term of 600 years, to commence from the death of Thomas Cartwright, upon the trusts thereafter declared, and subject thereto to the use of Moses Cartwright and Robert William Hand, during the life of Ellen Grimes the intended wife; in trust (subject to the provision for the determination of such trust thereafter contained, and to the payment of interest upon two sums therein mentioned), to pay the rents and profits to Ellen Grimes the intended wife for her life, for her separate use, with-

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out power of anticipation. And it was thereby agreed that such rents and profits should be applied by her for the benefit of herself, and also for the support, maintenance, and education of the children (if any) of the marriage, with remainder to the use of Henry Cartwright and his *assigns for his life [* 983] without impeachment of waste, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and other sons and of the first and other daughters of the marriage successively in tail male, with remainder to the use of Thomas Cartwright in fee.

The deed contained the following proviso upon which the question turned: "Provided always, and it is hereby further declared and agreed, by and between the parties to these presents, that in case a separation shall take place, by reason of any disagreement or otherwise, between the said Henry Cartwright and Ellen Grimes, after the solemnization of their said intended marriage, then and in such case the rents, issues, and profits of the said hereditaments and premises so limited in use to the said Moses Cartwright and Robert W. Hand and their heirs, during the natural life of the said Ellen Grimes in remainder expectant upon the decease of the said Thomas Cartwright, and subject to the aforesaid two several terms of years as aforesaid, shall from the time of such separation and thenceforth during the joint mutual lives of the said Henry Cartwright and Ellen Grimes, (but subject and without prejudice to the said two terms or such one of them and the trusts thereof as shall be capable of being exercised in the events which may happen) be paid to or shall be permitted to be received and taken by the said Henry Cartwright and his assigns, to and for his and their own use and benefit, instead of being paid to the said Ellen Grimes for her sole and separate use as hereinbefore directed, but without prejudice to the right of the said Ellen Grimes to receive such rents and profits for the remainder of her natural life, in case she shall happen to survive the said Henry Cartwright, subject nevertheless to the aforesaid terms of 100 years and 600 years, and the trusts thereof. *Provided also, and it is hereby [* 984] further declared and agreed, that if the said Ellen Grimes shall at any time hereafter incur any debt or debts for clothes or paraphernalia, or shall against the will or injunction or without the permission of the said Henry Cartwright, incur any other

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debt or debts on any account whatsoever, or be the means of entailing any loss or damage upon the said Henry Cartwright; and the said Henry Cartwright shall give to the said Moses Cartwright and Robert William Hand, their heirs or assigns, or other the trustee or trustees for the time being, notice in writing, and shall also advance to such trustee or trustees reasonable proof of a demand, or of a loss made upon or incurred by him, for the payment of any such debt or debts, losses or damages, so incurred or entailed by her the said Ellen Grimes as aforesaid; then and in such case the said trustees or trustee shall stand and be possessed of and interested in all and singular the benefits intended for the said Ellen Grimes by this settlement, or such part thereof respectively as may be rendered available for the purposes of the indemnity hereinafter mentioned, in trust, as an indemnity and for the protection of the said Henry Cartwright, his heirs, executors, and administrators, against the payment of such particular debt or debts, losses or damages, out of his own individual estate and effects, and all costs and charges incurred or sustained by him by reason or in consequence thereof; and that until satisfaction of every such debt or debts, losses or damages, whereof notice and proof shall have been so given by the said Henry Cartwright, and such costs and charges as aforesaid, the said trustees or trustee for the time being, acting in the trusts hereinbefore declared, shall withhold or retain out of the said benefits intended for the said Ellen Grimes, and so available as aforesaid, such sum or sums as

shall be requisite to satisfy such debt or debts, losses [*985] or damages, costs, and *charges. And in case the said

Henry Cartwright, his heirs, executors, or administrators, shall pay the same, then shall and do reimburse the said Henry Cartwright his heirs, executors, or administrators, the amount which he or they shall have so paid, together with all costs and charges which he or they may have incurred in relation thereto."

There was no issue of the marriage. Up to the year 1846 the plaintiff and his wife resided together; but in the beginning of 1846 the wife went to reside with her mother at Derby, and she and the plaintiff had from that period up to the present time lived in a state of separation. In June, 1850, the plaintiff commenced proceedings in the Ecclesiastical Court against his wife for restitution of conjugal rights. The wife replied to those pro-

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ceedings by allegations of cruelty and adultery, and prayed a divorce *a mensâ et thoro*; but subsequently the allegations of cruelty were by the Ecclesiastical Court ordered to be expunged. On the 26th of June, 1851, a divorce *a mensâ et thoro* was pronounced by the Ecclesiastical Court. The plaintiff and his wife, during all the proceedings in the Ecclesiastical Court, lived, and they still continued to live, separate and apart from each other.

Thomas Cartwright, the father of the plaintiff, died on the 26th of April, 1851. On his decease the plaintiff applied to the trustees to pay to him the rents, issues, and profits of the settled hereditaments, and on their refusal he filed the present claim.

On the 7th of March, 1853, the claim came on to be heard, and was dismissed with costs, on the ground that, independently of the question whether the provision in the event of a separation was valid or not, the separation *was of such a [*986] kind, and had taken place under such circumstances, that the husband could not avail himself of it for the purpose of claiming the benefit of the provision. From this dismissal the plaintiff appealed.

Their Lordships desired that in the first instance the argument might be addressed exclusively to the question of the legality of the proviso.

Mr. Russell and Mr. T. H. Terrell, for the appellant, referred to the following cases:—

Wilson v. Wilson, 1 H. L. Cas. 538; *Newis v. Lark*, [987] Plowd. 403; *Mary Portington's Case*, 10 Co. Rep. 41 b; *Bateman v. Ross*, 1 Dew. 235; 14 R. R. 55; *Cocksedge v. Cocksedge*, 14 Sim. 244; 5 Hare, 397; 13 L. J. Ch. 384; *Vanderghucht v. de Blaquiére*, 5 Myl. & Cr. 229; *Jacobs v. Amyatt*, 1 Madd. 376 n.; *Wilson v. Mushett*, 3 B. & Ad. 743; 1 L. J. (N. S.) K. B. 250; *Egerton v. Lord Brownlow*, 1 Sim. (N. S.) 464, since reversed by the House of Lords; see 4 H. L. Cas. 1.

Mr. Daniel and Mr. Amphlett, for Mrs. Cartwright, referred to *Durant v. Titley*, 7 Price, 577; *Rodney v.* [988] *Chambers*, 2 East, 283; *St. John v. St. John*, 11 Ves. 526; *Egerton v. Lord Brownlow*, 1 Sim. (N. S.) 464; but see S. C. on appeal, 4 H. L. Cas. 1.

Mr. C. M. Roupell and Mr. Bowring for the trustees.

Mr. Russell in reply.

The Lord Justice KNIGHT BRUCE: —

The first question is, whether the limitation in favour of the husband is in the nature of a remainder, or of a condition destructive of the particular estate. It appears to me plainly in the nature of a condition destructive of the particular estate, and not a limitation to await its natural termination; and if, therefore, the limitation by way of condition destructive of the particular estate, is one of an illegal nature, or contravening the policy of the law (the same idea in other terms), I apprehend that it is void — that it is as if it had never been — and that the invalidity of it does not affect the validity of the other provisions in the same instrument, to which there is no such objection.

Now, I apprehend the theory of the law to be, that a [* 989] * man and his wife cannot live in a state of separation from each other (in the only sense, or in either of the only senses, in which that term can possibly be understood here) without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest. Here certain rights in property have been conferred by an antenuptial settlement on the intended husband and the intended wife, in the event of the marriage taking place, subject to a proviso for materially varying those rights in a manner favourable to the husband, if a separation, by reason of any disagreement or otherwise, should take place. Understanding that term as I have already stated, I am of opinion that such a proviso is against public policy, and therefore void. This renders it unnecessary to go into the particular facts of the case.

The Lord Justice TURNER: —

There are two questions in this case: First, the question on the construction of this deed, whether this is a limitation, or whether it is by way of condition determining the estate; and, secondly, if it be a condition, what is the effect of that condition?

By the deed, the estate is vested in the trustees during the life of the wife, in trust, subject to the provision for the determination of the trusts thereafter contained, to pay the rents and profits to the wife for and during her life; and the provision thereafter contained is, that in case a separation shall take place, by reason of any disagreement or otherwise between the husband and wife after the solemnization of the marriage, then and in such case the rents, issues, and profits shall be paid to the

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husband during the remainder of the joint natural lives of the husband and the wife. Now, if this be construed to be *a limitation, the effect of that construction of the deed [* 990] would be, to leave undisposed of by the deed the interest after the determination of the estate limited to the wife until the separation, — to leave undisposed of the interest in remainder during the joint lives. Of course, that is a construction one would not be inclined ordinarily to put upon a marriage settlement, purporting to dispose of all the interests in the property comprised in that deed. The language of the deed does not import that any such construction could probably be contemplated by the parties, for the limitation is distinct to the trustees, subject to the proviso for determining the estate, and there is a distinct proviso for determining it. I feel, therefore, no doubt that this is a life estate, with a condition for determining that estate.

Then we come to the second question, What is the effect of that condition? It was very fairly admitted in argument that the condition would be bad if contained in a deed entered into between the husband and wife after the marriage; but it was said that it was, nevertheless, good in a deed entered into between the husband and wife and the father of the husband antecedent to and upon the occasion of the marriage, in contemplation of the marriage between the parties. In order to see whether that is so, it is necessary to consider why it is that the condition would be bad if entered into between the husband and wife after the marriage. If it is clear that the reason why the condition would be bad if entered into between the husband and wife after the marriage is, the policy of the law, founded upon the relation which exists between the husband and wife, and the importance to society of maintaining that relation between them, — if that be the principle upon which the condition would be invalid if entered into in a deed after marriage, what distinction can there *be where the provision is contained in a deed [* 991] entered into with reference to marriage and when the marriage state is the condition of the parties contemplated by them at the time of the execution of the deed? Now, that a condition of this description is against the policy of the law is tolerably clear. In the case of *Brown v. Peck*, 1 Eden, 140, there was a gift to a woman of an annuity of a certain amount, if she lived with her husband; but if she lived separate from

him and with her mother, she was to have a larger annuity. It was held that the condition was bad, as being *contra bonos mores*; and the woman was held entitled to the larger annuity. And in the case of *Westmeath v. Westmeath*, Jac. 126, I find Lord ELDON expressing himself in these words: "I apprehend that any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect." These cases, I think, show that it is the policy of the law which renders these conditions bad. The appellant, however, relied upon another case in the House of Lords, *Bateman v. Ross*; but that was a case in which there had been a separation between the parties at the time when the arrangement was made; and in a suit between them there was a reference to arbitration, and the award was, that a certain annuity should be paid to the wife, provided they should so long continue separate and apart from each other; that is to say, that the annuity to the wife should continue as long as the separation continued, there being a separation at the time the deed was entered into. That case, therefore, does not in the least degree militate against [*992] what is to be found in *Westmeath v. Westmeath*, and the other cases which Lord ELDON dealt with when he held that provisions which have reference to future separations are against the policy of the law.

An argument was, however, attempted to be founded on this distinction: it was said this was not a settlement by the husband on the wife, but by the father of the husband. I take it that, in general, no person can derive any interest under the fraudulent act of another, and that this rule equally applies to an act in fraud of the law as to an act in fraud of another party. It does not seem to me, therefore, that any valid distinction can be founded on the circumstance of this being a settlement made by the father.

Upon all these grounds, I am clearly of opinion that this condition is altogether void. The appeal must be dismissed with costs.

ENGLISH NOTES.

An agreement for immediate separation is valid. Covenants in a separation deed will be specifically enforced, *Wilson v. Wilson* (1854),

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5 H. L. Cas. 40; but if the separation does not take place, the agreement is void, *Hindley v. Westmeath* (1827), 6 B. & C. 200, confirmed by *Westmeath v. Salisbury* (1831), 5 Bli. N. S. 339, 395. So is an agreement on reconciliation to revive the provisions of a former separation deed. *Westmeath v. Salisbury*, *supra*.

In re Moore, Trafford v. Maconochie (1888), 39 Ch. D. 116, 57 L. J. Ch. 936, 59 L. T. 681, 37 W. R. 83, a gift to a woman of a weekly allowance while she lived apart from her husband was held to be void *in toto*.

AMERICAN NOTES.

The principal case is well supported in America. *Helms v. Franciscus*, 2 Bland Chancery (Maryland), 544; 20 Am. Dec. 402; *Rogers v. Rogers*, 4 Paige Chancery (New York), 516; 27 Am. Dec. 84; *Mercein v. People*, 25 Wendell (New York), 64; 35 Am. Dec. 653 (by Walworth, Chancellor, and Paige, Senator); *Gaines' Adm'r v. Poor*, 3 Metcalfe (Kentucky), 503; 79 Am. Dec. 559; *McKenna v. Phillips*, 6 Wharton (Pennsylvania), 571; 37 Am. Dec. 438.

A deed of separation is only binding when made through the medium of a trustee, and is then binding only on the husband and trustee. *Stephenson v. Osborne*, 41 Mississippi, 119; 90 Am. Dec. 358. In a note on this case, 90 Am. Dec. 369, it is said to be sustained by *Cropsey v. McKinney*, 30 Barbour (New York Supr. Ct.), 47; *Morgan v. Potter*, 17 Hun (New York Supr. Ct.), 403; *Simpson v. Simpson*, 4 Dana (Kentucky), 140; *Buchner v. Ruth*, 13 Richardson (So. Car.), 157; *Phillips v. Meyers*, 82 Illinois, 67; but that such agreements have been sustained without trustees. *Randall v. Randall*, 37 Michigan, 563.

But it has been held that an agreement by a husband to pay a trustee money for the support of his wife, in contemplation of an immediate separation, which takes place, is valid. *Albee v. Wyman*, 10 Gray (Mass.), 222; *Fox v. Davis*, 113 Massachusetts, 255; 18 Am. Rep. 476; *Griffin v. Banks*, 37 New York, 621; *Emery v. Neighbour*, 2 Halsted (New Jersey Chancery), 112; 11 Am. Dec. 541.

An agreement for separation and maintenance pending an action for absolute divorce is valid. *Pettit v. Pettit*, 107 New York, 677.

The distinction between agreements for future separation and those for immediate separation is the very unsatisfactory one of the inevitability of the separation. In *Albee v. Wyman*, the Court regarded it as obnoxious to grave objections. On this subject Mr. Schouler says: "Such a state of things no public policy can safely favour; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or prevent the evil; and hence it may be thought more expedient for the Courts to enforce such mutual contracts of the unhappy pair as mitigate their troubles, than to dabble in a domestic quarrel and try to compel unwilling companionships. This we conceive to be the frightful position of the English and American Equity Courts whenever they see fit to enforce separation agreements" (Domestic Relations, Ch. XVII.) "And a recent North Car-

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olina case distinctly maintains what ought to be and may yet become the American doctrine: that separation deeds are void as against law and public policy." *Ibid.*, citing *Collins v. Collins*, 1 Phillip's Equity (No. Car.), 153; 93 Am. Dec. 606. Bishop cites the principal case (1 Marriage, &c., § 1277), and also cites the last case, and *Tourney v. Sinclair*, 3 Howard (Mississippi), 324; *McCrocklin v. McCrocklin*, 2 B. Monroe (Kentucky), 370.

No. 36. — *STANLEY v. JONES*.

(1831.)

No. 37. — *KEIR v. LEEMAN*.

(Ex. Ch. from Q. B. 1846.)

RULE.

THE maintenance of an action by a stranger, particularly on an agreement for sharing the profits of success, is illegal, as being contrary to public policy.

So is an agreement to stifle a criminal prosecution.

Stanley v. Jones.

7 Bing. 369-379.

Contract. — Illegality. — Champerty.

[369] An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal.

Debt. The declaration stated, that, by certain articles of agreement made between the defendant John Jones, administrator of the goods and chattels, rights and credits of Thomas Jones, late of Bankside, in the county of Surrey, gentleman, deceased, of the one part, and Thomas Stanley of the other part [after reciting that Thomas Jones in his lifetime carried on, in partnership with Robert Monro of Nelson Square in the county of Surrey, and William Seale Evans of Twyning, in the county of Gloucester, gentleman, the establishment of a gas-light concern at Bankside, in the county of Surrey; that after the decease of the said Thomas Jones, the defendant John Jones, as his administrator, succeeded in the place of Thomas Jones in the partnership concern; that some time after, John Jones, through the representations of Robert

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Monro and William Seale Evans that the concern was not so productive and profitable as it really and truly was, was induced to relinquish his interest in the copartnership establishment for a sum very far from equivalent to the value of such interest; and after reciting that Thomas Stanley had given the defendant reason to believe that the representations so made to him by Robert Monro and William Seale Evans, by which he was induced to relinquish his interest in the aforesaid copartnership concern, were false; and that Thomas Stanley, being in possession of evidence to manifest the same, and to prove that the defendant was entitled to recover considerable sums of money from the said Robert Monro and William Seale Evans on account of the copartnership concern, had *agreed to communicate such evidence to [*370] the defendant upon receiving from him the sum of £23 expended by him Thomas Stanley in obtaining the same, and upon having an agreement by the defendant to pay unto him Thomas Stanley, his executors or administrators, one-eighth part of the clear amount of such sum or sums of money as the defendant should or might thereafter recover from the said Robert Monro and William Seale Evans, or either of them, through the means of him, Thomas Stanley, after payment of the expenses of recovering such monies; that the defendant had assented to such proposal, and had agreed to pay to Thomas Stanley the said sum of £23, and to enter into such covenant with Thomas Stanley as in the articles of agreement was contained and thereafter mentioned]; it was witnessed, that for carrying the said recited agreement into effect, and in consideration of the sum of £23 by the defendant to Thomas Stanley paid as therein mentioned, and in consideration, also, of the covenant therein contained on the part of the defendant, Thomas Stanley did thereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the defendant, that he Thomas Stanley should and would, immediately after the execution of the said articles of agreement, communicate unto the defendant all such knowledge and information as he Thomas Stanley possessed touching the falsehoods and misrepresentations made by the said Robert Monro and William Seale Evans, by which the defendant was so induced to quit the partnership concern, as in the articles of agreement was mentioned; and should and would give and communicate unto the defendant all such information as he Thomas Stanley possessed, or could or might procure or get at,

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with a view to the recovery by the defendant of all such sum or sums of money as the defendant, as such administrator of [* 371] the said Thomas * Jones, had been deprived of, or had lost through the misrepresentations of the said Robert Monro and William Seale Evans; and should and would use and exert his utmost influence and means for procuring such evidence as should or might be requisite to substantiate the claims of the defendant against the said Robert Monro and William Seale Evans:

And it was further witnessed, that in consideration of the covenant therein-before contained on the part of Thomas Stanley, the defendant did thereby covenant, promise, and agree with, and to the said Thomas Stanley, his executors and administrators, that the defendant should and would well and truly pay or cause to be paid unto Thomas Stanley, his executors and administrators, one clear and equal eighth part or share of all such sum or sums of money as should at any time or times thereafter be recovered or obtained, after payment of the costs and expenses to be incurred in the recovery thereof, either by suit at law or in equity, or by voluntary payment of and from the said Robert Monro and William Seale Evans, or either of them, or their or either of their executors or administrators, by reason of such information to be communicated and given by Thomas Stanley to the defendant by virtue of the covenant in the said articles of agreement, within one week next after such money or monies should be received by the defendant:

And the plaintiff in fact said, that Thomas Stanley, immediately after the execution of the articles of agreement, to wit, on, &c., at, &c., did communicate unto the defendant all such knowledge and information as he Thomas Stanley possessed, touching the falsehoods and misrepresentations made by the said Robert Monro and William Seale Evans, by which the defendant was so induced to quit the partnership concern as in the articles of agree- [* 372] ment was mentioned; and did also then, and *at all other times, after the making of the said articles of agreement, until the receiving of the money by the defendant of and from the said Robert Monro and William Seale Evans as thereafter mentioned, communicate unto the defendant all such information as he Thomas Stanley possessed, or could and might procure, or get at, with a view to the recovery by the defendant of all such sum and sums of money as the defendant, as such administrator of the said Thomas Jones, had been deprived of, or had lost through the

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misrepresentations of the said Robert Monro and William Seale Evans; and did during all that time use and execute his utmost influence and means for procuring such evidence as was requisite to substantiate the claims of the defendant against the said Robert Monro and William Seale Evans, to wit, at, &c.: of all which several premises the defendant there had due notice.

And the plaintiff in fact further said, that the defendant did, after the making of the said articles of agreement, and by reason of such information so communicated and given by Thomas Stanley to the defendant as aforesaid, and after the death of the said Thomas Stanley, to wit, on, &c., at, &c., and as and by way of a compromise of a certain suit in equity, before then instituted by the defendant against the said Robert Monro and William Seale Evans, recover, obtain, and receive by voluntary payment of and from the said Robert Monro and William Seale Evans a large sum of money, to wit, the sum of £14,000 of lawful money of Great Britain, after payment of the costs and expenses which had been incurred in and about the recovery thereof, to wit, at, &c.: whereby and according to the tenor and effect of the said covenant so made by the defendant as aforesaid, the defendant then and there became liable to pay, and ought to have paid, to the plaintiff, as administratrix *as aforesaid, within one week next after [* 373] he had so received the same as aforesaid, one clear and equal eighth part or share thereof, amounting in the whole to a large sum, to wit, the sum of £1750 of like lawful money, to wit, at, &c. Nevertheless the defendant, not regarding the said articles of agreement, did not, nor would, within one week next after he had so received the said sum of £14,000 as aforesaid, or at any time afterwards, although often requested, &c., pay to the plaintiff, as administratrix as aforesaid, the said sum of £1750, being one clear and equal eighth part or share of the said sum of £14,000 so received as aforesaid, after payment of the costs and expenses as aforesaid, but wholly refused and neglected so to do, whereby *actio accrevit*, &c. *Profert*, &c.

Demurrer thereon, and joinder.

After argument, the Court took time for consideration.

TINDAL, C. J. The question upon the present record is [376] this: Whether the contract stated in the deed upon which the action is brought is a legal contract capable of being enforced by a court of law? The deed recites that Stanley had given the

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defendant reason to believe that certain representations made to him were false; and that Stanley being in possession of evidence to manifest the same, had agreed to communicate such evidence to the defendant upon receiving from him a certain sum [* 377] * expended in obtaining the same, and upon having an agreement by the defendant to pay him one-eighth part of the clear amount of such sums as the defendant should recover through the means of Stanley. The deed, then, contains a covenant by the defendant to Stanley, to the effect of the agreement above recited.

The agreement, therefore, is in effect a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties, at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of the production of that very evidence. And we all agree in thinking such an agreement cannot be enforced in a court of law.

The offence of champerty is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our own law in the statutes Westminster first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the Continent.¹ The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action, as is evident from Lord COKE's reading on stat. Westm. 2, c. 49, 2 Inst. 484, where he remarks, "True it is, that if any other person (*i. e.* than the Chancellor, treasurer, and [* 378] other persons * mentioned in the Act), purchase *bonâ fide* depending the suit, he is not in danger of champerty; but these persons here prohibited cannot purchase at all, neither for champerty or otherwise depending the plea;" evidently pointing to the distinction that the offence of champerty consisted in purchasing an interest in the thing in dispute, with the object of

¹ See Dig. 48, 7, 6

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maintaining and taking part in the litigation : and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore. Courts of equity have, in various modern cases brought before them, held the offence still to exist. In *Stevens v. Bagwell*, 15 Ves. 139 ; 10 R. R. 46, where a bill was filed for the purpose, amongst other things, of declaring an agreement void which had been made by a seaman for the sale of his chance of prize-money to his prize-agents, who were to carry on the suit, the MASTER OF THE ROLLS (Sir W. GRANT), says, " I expressed at the hearing my opinion that the agreement was void from the beginning, as amounting to that species of maintenance which is called champerty, viz. the unlawful maintenance of a suit in consideration of a bargain for a part of the thing, or some profit out of it." ¹

Now, in the present case, Stanley does purchase an interest in the subject-matter of dispute, not in terms indeed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not indeed stipulate that he is to furnish money for the carrying on the suit, or that he is to carry it on himself ; but he stipulates that " he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant." And if there is any difference * between [* 379] this contract and direct champerty, it appears to us to be strongly against the legality of this contract ; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice.

We therefore think, in this case, there ought to be judgment for the defendant.

Judgment for defendant.

¹ See also 18 Ves. 126, 11 R. R. 165, and the opinion of the MASTER OF THE ROLLS in 2 Jacob & Walker, 135.

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15 L. J. Q. B. 360–364 (s. c. 9 Q. B. 371, 10 Jur. 742).

Contract. — Illegality. — Compromise of Indictable Offence.

[360] An agreement, by which, in consideration that the prosecutor of an indictment preferred against certain persons for an assault and riot would not proceed further on the indictment, the defendants promised to pay him a sum of money, is illegal, although the prosecutor forbore to give evidence on the indictment with the knowledge and assent of the Court before which the indictment was pending.

In all offences which involve damages to an injured party, and for which he may maintain an action, he may, notwithstanding they are also of a public nature, settle his private damage in any way he may think fit; but a compromise of an assault, coupled with riot, is not legal.

[* 361] * Error from the Court of Queen's Bench.

This was an action of assumpsit, upon an agreement, the consideration for which was (*inter alia*) the compromise of an indictment for an assault upon a sheriff's officer, in the execution of his duty, accompanied with riot and disturbance. The defendant pleaded that the consideration was illegal.¹ The Court of Queen's Bench gave judgment for the defendant: upon which the plaintiff brought a writ of error, which was argued² by —

Bliss, for the plaintiff in error. No instance can be found in the books of an indictment for compromising a misdemeanour. Informations for penalties might be lawfully compromised before the statute of 18 Eliz. c. 5, which does not extend to informations cognizable before a magistrate, — *The King v. Crisp*, 1 B. & Ald. 282, — and cannot be said to be in affirmance of the common law; it appears by *Williams v. Hedley*, 8 East, 378; 9 R. R. 473, that it applies only to informers, and not to the party informed against. There is no such thing as misprision or concealment of a misdemeanour. There is a current of decisions from the year 1734, in which compromises for misdemeanours are shown by the books to have taken place, and convenience and frequency of practice are in favour of it. He cited *Johnson v. Ogilby*, 3 P. Wms. 277; *Druge v. Ibberson*, 2 Esp. 643; *The King v. Grant*, *The King v. Coombs*, and *The King v. Lord Falkland*, cited in Kyd on Awards,

¹ The pleadings are set out in full in 13 CRESSWELL, J., COLTMAN, J., PARKE, B., L. J. (N. S.) Q. B. 359.

² *Coram* TINDAL, C. J., MACLE, J.,

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p. 64, and Watson on Awards, p. 47, where a distinction is made between cases where a compromise is made by the authority of the Judge, and where without that authority. *Collins v. Bluntern*, 2 Wils. 34, and 1 Smith's Lead. Cas. 154, is expressly pleaded to have been a corrupt, unlawful, and wicked contract. *Fallowes v. Taylor*, 7 T. R. 475, was an action on a bond conditioned to remove a public nuisance in consideration of not being indicted. That was a case in which no action would lie, for the party was public prosecutor, proceeding under the order of magistrates. The judgment of LAWRENCE, J., declares the consideration to be a legal one. *Edgecombe v. Rodd*, 5 East, 294; 7 R. R. 700, which will be relied on by the other side, was decided on another ground; and though the Court do take notice of the point here in question, it was beside the real point in dispute. The plaintiff had been brought before the magistrate, under 1 Will. & M. c. 18, s. 18, for disturbing a dissenting congregation, and was committed for the next session for want of sureties; before the sessions the magistrates consented that the prosecutor should let him out of prison, and compromise the matter. He then brought an action against the magistrate for false imprisonment, who pleaded the discharge from prison and the compromise in satisfaction, and the judgment is, that the pleas are bad; for either the agreement was illegal, or the satisfaction, at any rate, was moving from the prosecutor, not from the defendant, whose consent was unnecessary. The distinction attempted to be drawn by LE BLANC, J., between public crimes and private injuries, for which either an indictment or action will lie, is not borne out by the cases. There was also in that case a forfeiture of £20 to the Crown, which would make a compromise illegal. In *Beeley v. Wingfield*, 11 East, 46; 10 R. R. 431, and *Baker v. Townsend*, 7 Taunt. 422; 1 Moore, 120; 18 R. R. 521, a misdemeanour was compromised by leave of the Court, after conviction, but that can make no difference, for it is as much an interference with the law after as before conviction. He cited *Elworthy v. Bird*, 2 Sim. & Stu. 372; 3 L. J. Ch. 190; *Kirk v. Stickwood*, 4 B. & Ad. 421; 2 L. J. (N. S.) M. C. 43. In all these cases misdemeanours of very public natures have been compromised, some of them infringing upon the case of *Collins v. Bluntern*. And the conclusion is, that it is the law of the land that misdemeanours may be compromised. But it is not necessary to go this length, for it would be enough to say that the arrangement was here made with the knowledge of the

Court; and that, at least, is legal, — Chitty on Contracts, [* 362] ch. 2, * p. 73. However general the terms of a contract are, it will only include those things which the parties contemplated. Here, therefore, it must be construed that the parties only contracted to forbear to proceed further, as in a legal manner they might; therefore there is nothing illegal on the face of this contract, *Jones v. Waite*, 5 Bing. N. C. 341; 8 L. J. (N. S.) Ex. 305; and if it can be shown how it might be legally performed, it is a good consideration. The Attorney-General, at all events, would enter a *nolle prosequi*. *The King v. Fielding*, 2 Burr. 720, *The Mayor and Corporation of York v. Pilkington*, 2 Atk. 302. Here there is no averment of any injury but what is strictly private; therefore the Attorney-General would probably have entered a *nolle prosequi*.

[TINDAL, C. J. Was this point made before the Court below?]

No. He cited *Holland v. Hall*, 1 B. & Ald. 53; 18 R. R. 428; *Sewell v. The Royal Exchange Assurance*, 4 Taunt. 856. *Haines v. Busk*, 5 Taunt. 521, goes to show that a contract is not illegal, if there is a means of making it legal. *Harrington v. Klopprogge*, 2 Brod. & Bing. 678, n. A Court of justice is so far counsel for the Crown as to be able, with the consent of a prosecutor, to make such arrangements as the Crown might have made.

Martin, *contrò*. The question is, was this contract originally legal? If not, it is difficult to see how the subsequent assent of the Judge could make it so; nor is it at all clear that a contract to obtain a *nolle prosequi* from the Attorney-General in consideration of a certain sum of money, would be legal. If the argument attempted to be drawn from *Holland v. Hall* and that class of cases were a good one, it would apply equally to felony, for the Attorney-General may enter a *nolle prosequi* in felony as well as misdemeanour. *Harrington v. Klopprogge* only shows that a contract to assign offices was obligatory on the party to the extent to which he could legally assign; and *The King v. Fielding*, that the Court will not grant a criminal information when it appears that the party was bringing a civil action at the same time. *The Mayor of York v. Pilkington* has no bearing on the subject; and *Jones v. Waite* only shows that a defendant must plead to the whole of a declaration, unless a part is illegal upon the face of it. Therefore the argument on the other side must come to this, that it is legal to compromise a misdemeanour, but not a felony. But whether that be so or not, at

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least it is clear that any agreement, the consideration for which is contrary to the policy of the law, is void, as is laid down in *Collins v. Blantern*, in Smith's Leading Cases, following Com. Dig. F, 7, "Action on the Case." It may be true that the line is very difficult to draw, and if the whole matter were now to be considered *de novo*, it would probably be laid down that contracts for compromising all misdemeanours were illegal; as held by ALDERSON, B., in equity, in *Garth v. Earnshaw*, 3 You. & Coll. 584. And if this were a case of common assault, perhaps the Court would be induced to review the matter; but as all the cases show that there is a recognized difference between public crimes and offences for which private compensation may be given, it becomes unnecessary in this case. He then went through the cases cited on the other side, and cited Clitty on Contracts, p. 674.

Bliss was heard in reply.

Curr. adv. vult.

TINDAL, C. J., delivered the judgment of the Court. — This was an action on an agreement, by which the defendants, in consideration (*inter alia*) that the plaintiff, being the prosecutor of an indictment preferred against certain persons for an assault and riot, would not proceed further on such indictment, undertook and promised the plaintiff to pay him a certain amount of money. The declaration averred that in pursuance of such agreement the plaintiff did not proceed further with the indictment, and did, with the assent of the defendants, inform the Court before which the indictment was pending, of the premises, and by leave of the Court forbore to give evidence upon the indictment, and that thereupon the said defendants in such indictment were *acquitted. The de- [* 363] fendants pleaded several pleas to this action, but the most material plea is that which raised the question whether the consideration for the said supposed promise was illegal, and the promise therefore void. Upon demurrer, the Court of Queen's Bench held this to be so, and the same question has been argued before us on the writ of error; and we think the judgment of the Queen's Bench was right. It seems clear from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and the consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of *Collins v. Blantern*, which was the case of a prosecution for

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perjury. It is strange that such a doubt as the present should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of *Johnson v. Ogilby* as stated in 3 P. Wms. 277. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanour seems to have been the foundation of the decision, if it was made, by Lord TALBOT, — a distinction overruled in *Collins v. Bluntern*, which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised as a part of the agreement, or that the fraud was an indictable one; and perhaps the case may be so explained. If not, it cannot, we conceive, be sustained as law. In *Drage v. Ibberson*, however, Lord KENYON adverted to, and stated that he should adhere to the class of cases which held that the consideration for an agreement being the settling of a misdemeanour might be good in law. Thus a settlement of an indictment for a nuisance preferred by public authority was held a lawful consideration for a bond binding the defendant to remove the nuisance, — we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the Court seems to have overlooked the consideration, that a defendant who had infringed upon the right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd*, LE BLANC, J., assigns this as a reason for the consideration being illegal, — “that there the prosecution was for a public misdemeanour, and not for a private injury to the prosecutor.” It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallows v. Taylor*. Nor can *Pool v. Bousfield*, 1 Camp. 55; 10 R. R. 633, be reconciled with it. There an agreement to stifle a motion against the defendant that he should answer the matters of an affidavit, was held illegal. But there is a class of cases, such as *Beeley v. Wingfield* and *Baker v. Townsend*, which do not at all break in upon sound principles. Those are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As GIBBS, C. J., in the latter case, well observes, “the parties have referred nothing but what they had a

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right to refer, — they have referred the several assaults ” (by which we understand him to mean their several rights to damages for those assaults), — “ these may be referred ; they have referred the right of possession, — that may be referred. The reference of all other matters in dispute refers all other their civil rights,” which words show our previous interpretation to be correct. The case of *Beeley v. Wingfield* was after conviction, and the promissory note seems merely to have been given for the expenses of the prosecution, and was obviously a part of the punishment inflicted by the Court after conviction for the offence. Indeed, it is very remarkable what very little authority there is to be found — rather consisting of *dicta* than decisions — for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that in all the offences which involve damages to an injured party for which he may maintain an action, it is competent for him, * notwithstanding they are also of a public nature, to [* 364] compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault, he may also undertake not to prosecute on behalf of the public: it may be so; but we are not disposed to extend this any further. In the case before us, the offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence. Nor do we think that the assent of the Judge was material. We entirely agree in the observations of the Court of Queen’s Bench as to this part of the case, and we think that the judgment of the Queen’s Bench must be

Affirmed.

ENGLISH NOTES.

There are various old statutes against maintenance, champerty, &c., which were confirmed and extended by 32 H. VIII. c. 9.

In *Strange v. Brennan* (1846), 15 Sim. 346, a lady resident in Ireland agreed with an Irish solicitor that if he would employ a solicitor in London to take out for her certain letters of administration in England, which were necessary to complete her title to a fund in the Court of Chancery in England, and afterwards procure the fund for her, he should receive a commission of ten per cent. on the amount of the

fund, and also be reimbursed what he should pay to the London solicitor. The agreement was held contrary to public policy and void. In *Sprye v. Porter* (1856), 7 El. & Bl. 58, 26 L. J. Q. B. 64, the question arose out of an agreement by which the plaintiff, in consideration of a promise by the defendant to give him one-fifth of the property if recovered, delivered to the defendant certain documents and information which established the latter's right to certain property of his title to which the defendant was unaware. The defendant was not, under the agreement, obliged to institute any action or proceedings. It was held that the agreement was not in itself invalid; but, it appearing from the pleas that the real object of the agreement was to promote litigation and to share the gains, the agreement was declared to be void. In *Grell v. Lerey* (1865), 16 C. B. (N. S.) 73, 9 L. T. 721, 12 W. R. 378, an agreement entered into in France between an attorney and a Frenchman to sue for a debt due to the latter from a person residing here, whereby the latter was to receive by way of recompense a moiety of the amount recovered, was held void. In *Earl v. Hopwood* (1861), 9 C. B. (N. S.) 566, 30 L. J. C. P. 217, 3 L. T. 670, 9 W. R. 272, a contract between an attorney and his client that the attorney should advance money for carrying on a lawsuit to recover possession of an estate, and that the client shall, if the suit be successful, pay the attorney over and above his legal costs and charges a sum according to the benefit to the client from possession of the estate, was declared to be void on the ground of maintenance. So in *Prince v. Beattie* (1863), 32 L. J. Ch. 734 (an agreement with a solicitor to pay £5 per cent. above costs on recovery of the property); *Hiltén v. Woods* (1867), L. R., 4 Eq. 432, 36 L. J. Ch. 941, 16 L. T. 736, 15 W. R. 1105 (an agreement to give solicitor a share in the benefit to accrue from a suit upon being indemnified by him against the costs); *Hutley v. Hutley* (1873), L. R., 8 Q. B. 112, 42 L. J. Q. B. 52, 28 L. T. 63, 21 W. R. 479 (an agreement for advancement of money, supplying evidence, and engagement of attorney by the plaintiff to prosecute a suit on condition of equal division of property if recovered).

It seems that the directors of a company may authorize their secretary to sue, at the company's expense, a shareholder who had prosecuted him maliciously. *Elborough v. Ayres* (1870), L. R., 10 Eq. 367.

Akin to maintenance is the purchase of a *res litigiosa*. The solicitor cannot purchase it from his client. *Wood v. Downes* (1811), 18 Ves. 120; 11 R. R. 160; *Simpson v. Lamb* (1857), 20 L. J. Q. B. 121. But he may take a conveyance by way of security for costs incurred. *Anderson v. Radcliffe* (1858), El. Bl. & El. 806, 29 L. J. Q. B. 128, 8 W. R. 283. This does not apply to a solicitor not engaged in the cause; nor is there any objection generally to the purchase of a *res liti-*

giosa, unless the real object of the transaction is to speculate in litigation. *Knight v. Bowyer* (1858), 2 De G. & J. 421, 27 L. J. Ch. 521. Sale of an interest to which a right to sue is incident is good. *Tyson v. Jackson* (1861), 30 Beav. 384; *Dickinson v. Burrell* (1866), L. R., 1 Eq. 337; *Guy v. Churchill* (1888), 40 Ch. D. 481, 58 L. J. Ch. 345. The sale of a mere right to sue (such as arises on a pure tort) is bad. *Prosser v. Edmunds* (1835), 1 Young & Coll. Ex. 481; *De Houghton v. Money* (1867), L. R., 2 Ch. 164; *In re Paris Skating Rink Co.* (1877), 5 Ch. D. 959, 37 L. T. 298, 25 W. R. 701.

Maintenance is bad if tending to promote unnecessary litigation, otherwise not. For instance, a solicitor can lawfully agree to charge nothing for costs in an action. *Jennings v. Johnson* (1877), L. R., 8 C. P. 425. An agreement to indemnify against costs a common informer suing for a statutory penalty, is maintenance; and the promisor is liable to be sued by the person from whom the penalty has been claimed. *Bradlaugh v. Newdigate* (1883), 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 W. R. 792. If A. & B. have a common interest in prosecuting a suit against C., A. may help B. in maintaining the action; but if there is no community of interest between A. & B., A. by maintaining renders himself liable to a suit for damages by C. *Bradlaugh v. Newdigate*, *supra*; *Alabaster v. Harness*, 1895, 1 Q. B. 339. There B., at the instigation of A., whose solicitor acted for B., at A.'s expense, instituted an action for slander against C. Judgment with costs went for C., and B. was unable to pay. It was held that C. could recover damages from A., as the latter was not justified in maintaining a suit, for he had no common interest with B.

A bankrupt cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no common interest. The action, if any, passes to the trustee in bankruptcy. *Metropolitan Bank v. Pooley* (1885), 10 App. Cas. 210, 54 L. J. Q. B. 449, 53 L. T. 163, 33 W. R. 709.

The principal case of *Keir v. Leeman* was followed in *Williams v. Bayley* (1866), L. R., 1 H. L. 200, 35 L. J. Ch. 717, No. 41, p. 455, *post*. In *Flower v. Sadler* (1882), 10 Q. B. D. 572, it was held that where a debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, and the creditor has obtained from the debtor a security for the debt, it is not enough in order to make the security illegal to show that the creditor was thereby induced to abstain from prosecuting. In *Lownd v. Grimwade* (1888), 39 Ch. D. 605, a bond, the consideration of which was partly illegal, as containing stipulations with reference to pending criminal proceedings by which the course of such proceedings might have been affected, was declared void. In *Windhill Local Board v. Vint* (1890), 45 Ch. D. 351,

59 L. J. Ch. 608, 63 L. T. 366, 38 W. R. 738, the compromise of any public misdemeanour was declared to be illegal. The fact that the defence is discreditable to the party setting it up is immaterial. *Jones v. Merionethshire Permanent Benefit Building Society*, 1892, 1 Ch. 173, 61 L. J. Ch. 138, 65 L. T. 685, 40 W. R. 273.

An instance of an agreement for stifling a criminal prosecution which came before the House of Lords is furnished by the case of *Williams v. Bayley*, No. 41, p. 455, *post* (L. R., 1 H. L. 200, 35 L. J. Ch. 717). This appears to have been considered a sufficient ground for holding the agreement void; and in the opinion of Lord WESTBURY it is explicitly so stated. But the judgments are mainly rested on the ground of undue pressure.

AMERICAN NOTES.

The doctrines of champerty and maintenance prevailed generally at an early day in this country, but in recent times have been considerably modified or disregarded, particularly in the so-called "Code States." Mr. Parsons cites the principal cases, and supports it by *Lathrop v. Andherst Bank*, 9 Metcalf (Mass.), 489; *Byrd v. Odem*, 9 Alabama, 755; *Key v. Vattier*, 1 Hammond (Illinois), 58; *Rust v. Larne*, 4 Littell (Kentucky), 417; 14 Am. Dec. 172; *Martin v. Foeder*, 20 Wisconsin, 466; *Alexander v. Polk*, 39 Mississippi, 737; *Orr v. Tanner*, 12 Rhode Island, 94; *Quigley v. Thompson*, 53 Indiana, 317.

Mr. Lawson (Contracts, § 317) cites as preserving the old law *Backus v. Byron*, 4 Michigan, 535; *Sedgewick v. Stanton*, 14 New York, 289; *Boardman v. Thompson*, 25 Iowa, 487; *Coleman v. Billings*, 89 Illinois, 183; *Van Seven v. Stickney*, 75 Alabama, 225; *Weakley v. Hall*, 42 Am. Dec. 194; *Stearns v. Felker*, 28 Wisconsin, 594; *Hovey v. Hobson*, 51 Maine, 62; *Christie v. Sawyer*, 44 New Hampshire, 298.

In other States the doctrine is practically rejected as obsolete. *Danforth v. Streeter*, 28 Vermont, 490; *Sherley v. Riggs*, 11 Humphrey (Tennessee), 53; *Bentinck v. Franklin*, 38 Texas, 458; *Cain v. Munroe*, 28 Georgia, 82; *Ballard v. Carr*, 48 California, 74; *Richardson v. Rowland*, 40 Connecticut, 575; *Schaferman v. O'Brien*, 28 Maryland, 565; 92 Am. Dec. 708; *Phillips v. South Park Comm'rs*, 119 Illinois, 629; *Schomp v. Schenck*, 40 New Jersey Law, 195; 29 Am. Rep. 219; *Perry v. Dicken*, 105 Pennsylvania State, 83; 51 Am. Rep. 181; *Brown v. Bigné*, 21 Oregon, 260; 28 Am. St. Rep. 752; *Metropolitan L. Ins. Co. v. Fuller*, 61 Connecticut, 252; 29 Am. St. Rep. 196. The leaning of these cases is to support a bargain by a stranger, not an attorney, to supply funds for the purpose of prosecuting a claim, in consideration of having a share in the recovery, where it is fair, and not for the purpose of stirring up or encouraging litigation. "In this country, where no aristocracy or privileged class elevated above the mass of the people has ever existed, and the administration of justice has been alike impartial to all, without regard to rank or station, the reason for the ancient doctrine of champerty and maintenance does not exist, and hence has not found favour in the United States." *Brown v. Bigné*, *supra*, citing *Roberts v. Cooper*, 20 Howard (U. S. Supr. Ct.), 467;

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Thalhimer v. Brinckerhoff, 3 Cowen (New York), 623 ; 15 Am. Dec. 309, and note, 319 ; *Coondo v. Mookerjee*, L. R., 2 App. Cas. 186 ; and *Stanley v. Jones*.

It is very frequently held that the attorney is not a stranger to the litigation, and it is lawful for him to conduct it on a contingent fee to be paid out of the proceeds, unless he agrees to pay or advance money toward the expenses. Mr. Lawson deems this "certainly the better view." *Duke v. Harper*, 66 Missouri, 51 ; 27 Am. Rep. 314 ; *Allard v. Lamirande*, 29 Wisconsin, 502 ; *Moses v. Bagley*, 55 Georgia, 283 ; *Martin v. Clark*, 8 Rhode Island, 389 ; 5 Am. Rep. 586 ; *Thompson v. Reynolds*, 73 Illinois, 11 ; *Stearns v. Felker*, 28 Wisconsin, 594 ; *Moody v. Harper*, 38 Mississippi, 599 ; *Boardman v. Thompson*, 25 Iowa, 487 ; *Martin v. Amos*, 13 Iredell Law (Nor. Car.), 201 ; *Atchison, &c. R. Co. v. Johnson*, 29 Kansas, 218 ; *Blaisdell v. Ahern*, 144 Massachusetts, 393 ; 59 Am. Rep. 99 ; *Manning v. Sprague*, 148 Massachusetts, 18 ; 12 Am. St. Rep. 508 (prosecution of claims for damages by cruiser "Alabama") ; *Stanton v. Embrey*, 93 United States, 548 ; *Coughlin v. N. Y., &c. R. Co.*, 71 New York, 443 ; 27 Am. Rep. 75 ; *Duke v. Harper*, 66 Missouri, 51 ; 27 Am. Rep. 314 ; *Taylor v. Bemiss*, 110 United States, 42. In the last case Mr. Justice MILLER speaks of "the suspicion which naturally attaches to such contracts."

But though the attorney's contract be void for champerty, he may recover *quantum meruit*. *Rust v. Larne*, *supra* ; *Stearns v. Felker*, *supra* ; *Merritt v. Lambert*, 10 Paige Chancery, 352 ; *Wallis v. Loubat*, 2 Denio (New York), 607 ; *Coldwell's Adm'r v. Shepherd's Heirs*, 6 T. B. Monroe (Kentucky), 389.

There are, however, in some States (New York, for example), statutes prohibiting attorneys from buying claims for prosecution, and these have not been abrogated by the Code provision repealing all laws restricting or controlling the right of a party to agree with his attorney for his compensation. Mr. Weeks (Attorneys, p. 717) says in relation to such agreements with attorneys: "Upon investigating the decisions of the various States of the Union, it will be found that the authorities are about evenly divided."

Mr. Weeks' conclusion upon the whole doctrine is (Attorneys, p. 189): "In short, the whole doctrine of maintenance has been so modified in recent times as to confine it to strangers, who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife."

That an agreement to stifle a criminal prosecution is void is well settled, — as an agreement by an attorney for a contingent fee to procure the quashing of a criminal conviction, *Ormerod v. Dearman*, 100 Pennsylvania State, 561 ; 45 Am. Rep. 391 ; or to pay one for endeavouring to induce prosecutors of a criminal charge to discontinue it. *Rhodes v. Neal*, 64 Georgia, 704 ; 37 Am. Rep. 93 ; or to prevent the finding or procure the dismissal of an indictment. *Barron v. Tucker*, 53 Vermont, 338 ; 38 Am. Rep. 684, citing *Keir v. Leeman*, or to "use every legal and proper endeavour to have the criminal prosecutions dismissed," *Averbeck v. Hall*, 14 Bush (Kentucky), 505 ; or a contract of attorneys to defend liquor dealers for a certain monthly compensation against excise complaints, *Bowman v. Philips*, 41 Kansas, 364 ; or a note given for influence to secure acquittal of a felony, *Ricketts v. Harvey*, 106 Indiana, 561 ; or an agreement in consideration of money paid to become bail of one charged

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with felony, so that he may escape trial, *Dunkin v. Hodge*, 46 Alabama, 523; or notes given for influence in endeavouring to procure mitigation of punishment, *Buck v. First Nat. Bank*, 27 Michigan, 293; 15 Am. Rep. 189; an agreement to give notes and money to a prosecuting witness on condition that he sign a petition for pardon, and the granting thereof on discharge. *Haines v. Lewis*, 54 Iowa, 301; 37 Am. Rep. 202. See *Bartle v. Nutt*, 4 Peters (U. S. Supr. Ct.), 184.

Within this principle come agreements for compounding felonies, which are uniformly held void. *McMahon v. Smith*, 47 Connecticut, 221; 36 Am. Rep. 67; *Morrill v. Nightingale*, 93 California, 453; 27 Am. St. Rep. 207; *Pearce v. Wilson*, 111 Pennsylvania State, 14; 56 Am. Rep. 243; *Lindsay v. Smith*, 78 North Carolina, 328; 24 Am. Rep. 463; *Peed v. McKee*, 42 Iowa, 689; 20 Am. Rep. 631.

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(1843.)

No. 39. — PRICE v. GREEN.

(Ex. Ch. 1847.)

**No. 40. — NORDENFELT v. MAXIM-NORDENFELT GUNS
AND AMMUNITION COMPANY.**

(H. L. 1894.)

RULE.

A CONTRACT in general restraint of trade is illegal and void, as being against public policy: but a particular restraint of trade, within reasonable limits having regard to the protection of the interests of the party contracted with, is valid. And where the promise, so far as relates to a restraint within reasonable limits, is separable from the stipulation for a general restraint, the contract will be valid as to the former, though void as to the latter. A restraint unlimited geographically may be reasonable if the trade is itself of a limited character and such as to require a world-wide protection.

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11 M. & W. 653-669 (s. c. 12 L. J. Ex. 376; 7 Jur. 536).

Contract. — Restraint of Trade. — Reasonableness.

Covenant. — By articles of agreement under seal, it was agreed that the [653] defendant should become assistant to the plaintiffs in their business of surgeon dentists for four years; that the plaintiffs should instruct him in the business of a surgeon dentist, and that after the expiration of the term, the defendant should not carry on that business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The declaration alleged as breaches; first, that after the term, the defendant carried on the said business in London; secondly, that the plaintiffs had, during the said term, carried on business in Great Russell Street, Bloomsbury; yet the defendant, after the term, carried on the said business in the same place. Plea to the first breach, that London was a large and populous district, containing 1,500,000 inhabitants, and that the stipulation in the agreement was an undue, unreasonable, and unlawful restriction of trade. Plea to the second breach, that, before the expiration of the service, the plaintiffs had practised in very many towns in England, and amongst others, London, Preston, Oswestry, &c., and that divers of the said towns were distant from each other 150 miles; wherefore the said stipulation was an unreasonable restriction of trade, and the said agreement, as to so much, was wholly void.

Held, that the first plea was bad, as the covenant not to practise in London was valid, the limit of London not being too large for the profession in question; and that the latter part of it was also bad, for attempting to put in issue matter of law, viz., the reasonableness of the restriction.

Semle, that in considering the question of restriction, the populousness of particular districts ought not to be taken into consideration.

Held, secondly, that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service, was an unreasonable restriction, and therefore illegal and void: but that the stipulation as to not practising in London was not affected by the illegality of the other part.

Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as injurious to the interests of the public, on the ground of public policy.

Covenant. — The declaration stated, that, on &c., by certain articles of agreement then made and entered into by and between the plaintiffs of the one part, and the defendant of the other part, [profert], it was mutually agreed * and declared [* 654] by and between the said parties thereto, firstly, that the defendant should thenceforth be and become assistant to the plaintiffs in their business of surgeon dentists, for and during the

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term of four years, computed from the date of the said articles, if both the parties should so long live, provided the defendant should conduct himself properly and to the satisfaction of the plaintiffs in transacting the said business; secondly, that the defendant should and would, during the said term of four years, aid and assist in the said business in a proper manner, and to the best of his skill and ability; thirdly, that the plaintiffs should and would, during the said term, instruct the defendant in the said business of a surgeon dentist, to the best of their ability; and that they would, during the said term of four years, at their own expense, find and provide for the defendant good and sufficient meat, drink, and lodging; fourthly, that, after the expiration of the said term of four years, the defendant should not nor would either directly or indirectly, without the consent in writing of the plaintiffs, carry on, or be concerned as principal or assistant or agent, or in any other capacity, in the profession of a surgeon dentist or any branch thereof, in London or any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the said service, and should not in any manner at any time make any use whatever of the names of the plaintiffs, or either of them, on his cards, plates, or advertisements, or otherwise howsoever, having reference to or containing any statement of his former connection with the plaintiffs, or otherwise howsoever; and for the due performance of the stipulations contained therein, in the said fourth article thereof, on the part of the defendant, he the defendant did thereby bind himself, his heirs, executors, and administrators, to the plaintiffs, their executors and administrators, in the sum of £500, to be paid to the plaintiffs, their executors and administrators, by the defendant, [* 655] his executors or administrators, * on any breach or default in performance of the said stipulations, and the same to be recovered as and for liquidated or assessed damages; provided always, and it was expressly understood and agreed, that the defendant should not be liable for any breach of the said stipulation thereinbefore contained, for carrying on such business in any such places as aforesaid, not therein expressly named, before he should know that the place where he should be so doing business was prohibited by the said articles, or he should have received notice from the plaintiffs or one of them, that the same was a

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prohibited place: And the plaintiffs say, that the said period of four years elapsed before the commencement of this suit; and that the plaintiffs did, to wit, during the said term, carry on the said profession in London, and did, after the expiration of the said term, to wit, thence to the commencement of this suit, carry on the said profession; and the plaintiffs say, that the defendant did, in pursuance of the said articles, to wit, on the 25th day of December, 1835, become and be an assistant to the plaintiffs in their said business of surgeon dentists, and so continued, to wit, during the said term of four years; and the plaintiffs did, during the said term, instruct the defendant in the said business of a surgeon dentist, according to the said articles, and did, during the said term, perform the said articles in all things on the part of the plaintiffs to be performed; and the plaintiffs say, that at the expiration of the said term, and thence at all times to the commencement of this suit, London was, and the defendant had notice and knew that London was, a place wherein he was prohibited by the said articles from carrying on (unless with the consent in writing in the said articles mentioned) the business of a surgeon dentist, after the expiration of the said term; and although the plaintiffs did not at any time consent in writing to the carrying on by the defendant of the said business as hereinafter is mentioned; yet the defendant did, before the commencement of the suit, and after *the expiration of [* 656] the term, to wit, on &c., and thence continually until the commencement of the suit (without the consent in writing of the plaintiffs), carry on the profession of a surgeon dentist in London, to wit, as principal, contrary to the said articles.

Second breach. — And for a further breach of the said articles the plaintiffs say, that they did practise as and carry on the profession of surgeon dentists before the expiration of the said service, to wit, during the said term of four years, in a certain place in England, and in the county of Middlesex, called Great Russell Street, Bloomsbury; and the plaintiffs say that, after the expiration of the said service, to wit, thence to the commencement of this suit, the plaintiffs have practised and carried on as the said profession of surgeon dentists, and the said last-mentioned place was, during the carrying on by the defendant as hereinafter mentioned of the said profession, and the defendant, at all times during the said time of carrying on the same as

hereinafter mentioned, well knew that the said place was prohibited to him the defendant by the said articles, and a place wherein, according to the said articles, he was not, after the expiration of the said term of four years, to carry on the profession of a surgeon dentist without the consent in writing of the plaintiffs; and the plaintiffs say, that they did not at any time consent in writing to the carrying on by the defendant, as hereinafter mentioned, in the said place hereinafter mentioned, of the profession of a surgeon dentist; yet the defendant, not regarding the said articles, did, after the expiration of the said term of four years, to wit, on &c., and thence for a long time, to wit, continually until &c., carry on, to wit, as principal, the profession of a surgeon dentist, in the said street and place, to wit, Great Russell Street, Bloomsbury, in the county of Middlesex, contrary to the said articles.

There were also other breaches assigned, for making use of the plaintiffs' names in advertisements, and on the defendant's *doors, &c. To this declaration the defendant [* 657] pleaded, seventhly, to the first breach, that London, in the said agreement and declaration mentioned, at the time of making the agreement, was and from thence hitherto hath been and still is a certain large and populous district and place, containing more than one million of inhabitants, to wit, one million and a half of inhabitants; and that the said fourth article and stipulation, in the said agreement mentioned and contained, touching the defendant carrying on or being concerned in the profession of a surgeon dentist, or any branch thereof, in London, was and is an undue, unreasonable, and unlawful restriction of trade, and by reason thereof the said agreement, as to so much thereof, was and is wholly void. — Verification.

The eighth plea, which was to the first and second breaches, alleged that, after the making of the agreement, and before the expiration of the service of the defendant, to wit, on &c., and on divers other days and times, the plaintiffs by themselves, and by and through the defendant on their account, practised as such surgeon dentists as in the said agreement is mentioned, in and at divers and very many towns and places within England, to wit, among others, in and at London, Preston, in the county of Lancaster, Peterborough, in the county of Northampton, Oswestry, in the county of Salop [enumerating a great many towns], of

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which premises the defendant afterwards, and before the committing of the said alleged breaches, to wit, on &c., had notice; and the defendant further says, that divers of the said towns and places, at which the plaintiffs so practised as aforesaid before the expiration of the said service, are and were distant from each other many miles, and exceeding 100 miles, that is to say, 150 miles; and that the plaintiffs, at the time of making the said agreement, intended to practise as aforesaid at divers towns and places within England, so distant from each other as aforesaid, *that is to say, more than 100 miles distant [* 658] from each other; wherefore the defendant says, that the said fourth article and stipulation in the said agreement contained, touching the defendant's carrying on or being concerned in the profession of a surgeon dentist, or any branch thereof, in any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the said service, was and is an unreasonable restriction of trade, and the said agreement, as to so much thereof, was and is wholly void and of none effect.

Special demurrer to the seventh plea, assigning for causes, that the said plea is improperly confined to the first breach of the declaration; whereas, if the said plea be valid, it is an answer to the whole action and to every breach in the declaration assigned, and ought to have been pleaded to the whole declaration, and not to a part thereof only; for that the said plea states no facts or circumstances from which the Court can infer, or it can be seen, that the said fourth article and stipulation was an undue, unreasonable, or unlawful restriction of trade, or from which it can be inferred or seen that the said agreement, or any part thereof, was or is void; that the said plea states only matter of evidence and matter of law, namely, that London was and is a place containing more than one million of inhabitants, and that the said article was and is an undue, unreasonable, and unlawful restriction of trade; whereas the said plea should have shown that the said place was or is too large or populous for the plaintiffs to have carried on, throughout the same, their said profession; or should have shown that the carrying on of their profession by the plaintiffs would not, and did not, suffice for the wants of the inhabitants of the said place; or should have stated and shown other facts, from which it might have appeared, that the said

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article and stipulation was void for the reason supposed, [* 659] or some other reason to be alleged; and for that *the said plea is so framed as to endeavour to submit to a jury questions of law, and so that the plaintiffs cannot safely take issue thereon.

Special demurrer also to the eighth plea, assigning for causes, that it contains no answer to the breaches to which it is pleaded, or either of them, or any part thereof; that the said plea, if an answer to any part of the declaration, is an answer to the whole thereof, and ought to have been so applied and pleaded; that the said plea does not state any fact or facts from which it can be seen or inferred, that the said agreement, or any part thereof, was or is void; but merely states certain matters of evidence, namely, that the plaintiffs practised and intended to practise at certain towns, some of which were distant from each other more than 100 miles, of which the defendant had notice before committing the said breaches; and then proceeds to state certain matters of law, namely, that the fourth article and stipulation was an unreasonable restriction of trade, and that the said agreement, as to part thereof, was void; whereas the defendant should have stated and shown facts from which it might have been inferred and seen by the Court, whether the said article and stipulation was in such restriction of trade, and whether the said agreement was, for the cause alleged by the defendant, or any other cause, void; that the said eighth plea does not show that the towns and places at which the plaintiffs practised, as in the said plea alleged, were so distant as that the plaintiffs could not, during the time in question, have properly or sufficiently practised throughout the same, and so as to meet and suffice the wants of the respective inhabitants thereof; that the said plea is uncertain, in not stating or showing which in particular of the towns and places in the plea mentioned or referred to are distant from each other more than 100 miles, or how many miles; for that the said plea does not state or show that it was part of the said agreement that the plaintiffs should practise in the [* 660] said places, or any other places distant from *each other, but only that the plaintiffs practised at such places, and did, at the time of making the said agreement, intend so to practise; that the said plea is so framed as to endeavour to submit to a jury questions of law, and so that the plaintiffs cannot safely

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take issue thereon, or reply thereto; and for that the same amounts to, and is no more than, an informal demurrer.

Joinder in demurrer.

Whateley argued in support of the demurrer in Easter Term [May 1]. — The eighth plea, which is pleaded to both the breaches, is clearly bad. The general-rule is, that all restraints of trade, if nothing more appear, are bad. That is laid down in the leading case of *Mitchell v. Reynolds*, 1 P. Wms. 181, where all the cases are thoroughly weighed and considered, and which was confirmed by the case of *The Master, &c. of Gunmakers v. Fell*, Willes, 388. But to that general rule there are some exceptions; as first, if the restraint be only partial in respect to the time or place, and there be good consideration given to the person restrained, a contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law.

That was so held in the very case of *Mitchell v. Reynolds*. Now here it cannot be denied that the restraint is partial, nor that the consideration is sufficient. It is said, however, that it is unreasonable; but it is not so. In *Davis v. Mason*, 5 T. R. 118; 2 R. R. 562, where a bond was given by a surgeon's assistant, that he would not practise on his own account for ten years, within fourteen miles of where the surgeon lived, it was held to be valid. Lord KENYON, C. J., there says, "It was objected that the limits within which the defendant engaged not to practise are unreasonable, but I do not see that they are necessarily unreasonable, nor do I know how *to draw the line. [*661] Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town." And in *Bunn v. Guy*, 4 East, 190; 7 R. R. 560, where a contract was entered into by an attorney to relinquish his business for a valuable consideration, and not to practise in London or 150 miles from it, it was held to be good. So a bond by an apothecary not to set up in business within twenty miles. *Hayward v. Young*, 2 Chit. Rep. 407. But an agreement that the defendant, a dentist, would abstain from practising over a district 200 miles in diameter, was held to be unreasonable and void. *Horner v. Graves*, 7 Bing. 743; 5 Mo. & P. 738. That case partly turned upon the adequacy of the consideration; and since the cases of *Hitchcock v. Coker*, 6 Ad. & Ell. 440; 1 Nev. & P. 796, and *Archer v. Marsh*, 6 Ad. & Ell.

964; 2 Nev. & P. 562, must so far be considered to be overruled. But with respect to what is reasonable, TINDAL, C. J., there lays down the rule thus: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive." In the present case, the protection given to the plaintiffs is by no means unfair or unreasonable. And after noticing *Davis v. Mason*, his Lordship adds, "Unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering." Now this is not a greater restraint than is necessary for the protection of the plaintiffs, as the facts alleged in the plea show. It is to prevent the defendant from availing himself of the knowledge he has [*662] acquired in the plaintiffs' service, to *interfere with the plaintiffs' customers, and to practise in his name in those places where the defendant has notice that the plaintiffs carry on their business; and it appears that he has had such notice of their having practised in the places enumerated. These limits are very insignificant, compared with the kingdom at large, and are nothing like so extensive as those in *Horner v. Graves*. In *Hitchcock v. Coker*, the ground upon which a restraint may be unreasonable is thus stated by the Court: "Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Now, that cannot be applied to the present case, for here it was clearly necessary for the plaintiffs' protection. In *Ward v. Byrne*, 5 M. & W. 548, the agreement was held void because it was unlimited in point of space. In *Proctor v. Sargent*, 2 Man. & Gr. 20; 2 Scott, N. R. 289, the agreement was held valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade.

The seventh plea is also bad. — It calls upon the Court to say that the fourth article of the agreement is void, and that it is an undue restriction of trade, because London contains a million and

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a half of inhabitants; but that is not a sufficient reason for restraining the defendant from carrying on the same trade there. The quantity of the population is not a test of the reasonableness of the restraint; and there is no averment that London is too large or too populous for the plaintiffs to have carried on their business throughout the whole of it, or that their carrying it on did not suffice for the wants of the inhabitants. Besides, as the reasonableness of the restraint is a question for the Court, and *not for the jury, the plea is bad, as leaving a matter [*663] of law to be decided by the jury. On such a plea the plaintiffs could not safely take issue.

Martin, *contrà*. — This agreement, being in unreasonable restraint of trade, is bad. There is no dispute as to the law, but the difficulty consists in applying it to the present case. It has been admitted that all restraints of trade are *prima facie* bad, and it is therefore the duty of the plaintiffs to show that the restraint here insisted upon is valid. The fourth clause prohibits the defendant from practising in London, or any of the towns or places in England or Scotland, where the plaintiffs might have been practising before the expiration of the service. Now, that is clearly bad, since it may amount to an absolute prohibition to the defendant's carrying on business in this country; for it is at the option of the plaintiffs to go to every place or town of consideration, for a day, and so it would become a general restriction; and if it be, then it is clearly bad, and the contract being entire, if it is bad in part, it is void altogether. *Shuekell v. Rosier*, 2 Bing. N. C. 646; 3 Scott, 59, *Waite v. Jones*, 1 Bing. N. C. 656, 662; 1 Scott, 730; Chitty on Contracts, 693, 694. Secondly, the pleas are not bad for alleging that the fourth article in the agreement was "an undue, unreasonable, and unlawful restriction of trade," thus leaving the matter for the consideration of the jury; for they, and not the Court, are to determine whether the restraint is an unreasonable one or not; and the plaintiff might well have taken issue upon it. In *Hitchcock v. Coker*, 6 Ad. & Ell. 447, Lord ABINGER, C. B., appears to have thought that this was a question of fact for the jury. And the judgment of the CHIEF JUSTICE in that case shows it to be so, as it is a question depending upon the facts and the nature of the trade. Again, in *Proctor v. Sargent*, MAULE, J., [*664] says, 2 Man. & Gr. 24, "Is there any case, except *Horner*

v. Graves, in which the Court have decided this question solely upon the record?" There are a variety of considerations which could not be stated with particularity in a plea, that enter into and are involved in the question whether it is a reasonable or an unreasonable restriction.

Whateley, in reply. — It is said that this agreement is unlawful, as being in restraint of trade, and that if bad in part, it is bad for the whole. But *Wood v. Benson*, 2 Cr. & J. 94; 2 Tyrw. 93, shows that the covenant is divisible, and that an agreement may be void as to one part, and not as to the other. So, in the notes to *Butler v. Wigge*, 1 Saund. 66 a, it is said, "Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest." Secondly, the reasonableness of the restraint is a question of law for the consideration of the Court, and not one of fact for the jury to decide upon. — He cited Viner's Abr., "Journeys Accounts" (A.), p. 558.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The demurrer to the seventh plea, which is pleaded to the first breach, raises two questions: —

First, whether the latter part of the plea be good, which avers the fourth article and stipulation in the agreement to be an undue, unreasonable, and unlawful restriction of trade; and if not, whether the residue of the plea is an answer to the first breach, or whether the covenant, of which it is a breach, is void in law.

The rule, as laid down by Lord MACCLESFIELD and Lord [* 665] *Chief Justice WILLES, in *Master, &c. of Gunmakers v. Fell*,

Willes, 388, is that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad; but if the circumstances are set forth, that presumption may be excluded, and the Court are to judge of those circumstances, and determine whether the contract be valid or not. *Mitchell v. Reynolds*, 1 P. Wms. 196. "Contracts in restraint of trade are, in themselves, if nothing shows them to be reasonable, bad in the eye of the law." Per TINDAL, C. J., in *Horner v. Graves*, 7 Bing 744.

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Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in *Prugnell v. Close*, Aleyn, 67, and the case of *The Ten Tailors of Exeter v. Clarke*, 2 Show. 350, and *Claygall v. Bachelor*, Owen, 143; Year Book, 2 Hen. V. fo. 5.

But if there are circumstances recited in the instrument (or probably if they appear by averment), it is for the Court to determine whether the contract be a fair and reasonable one or not; and the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the *case of the [* 666] disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry. *Prugnell v. Close*, Aleyn, 67; *Broad v. Jolliffe*, Cro. Jac. 596; *Jelliot v. Broad*, Noy, 98. And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man, taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. *Cheesman v. Nainby*, 2 Lord Raym. 1456; 2 Stra. 739. In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.

It is justly observed by Lord WYNFORD, in giving the judgment

of the Court in *Homer v. Ashford*, 3 Bing. 326, that "it may often happen that individual interest and general convenience render engagements not to carry on trade, or act in a profession, in a particular place, proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry."

In the present case, the statements in the deed declared upon show that the defendant was to be instructed in a business requiring skill and intelligence, and upon the principles above [*667] laid down, the contract not to exercise the *same business, within certain reasonable limits, was not invalid.

The question then comes to this, whether the limits assigned by this covenant are unreasonable. It may be safely laid down, in the language of Chief Justice TINDAL, in *Horner v. Graves*, that "whatever restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy."

Applying this rule, and referring to the analogous authorities, it appears to us that, for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason*, Thetford and ten miles round, in *Hayward v. Young*, twenty miles round a place, was held a reasonable limit in the case of a surgeon; in that of an attorney, London, and 150 miles round, in *Bunn v. Guy*; and in *Proctor v. Sargent*, five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question. We conceive that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection

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to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid.

We are of opinion, therefore, that the covenant, the [668] breach of which is that first assigned, is valid.

We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz. the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law, and was decided as such in *Davis v. Mason*, *Horner v. Graves*, *Proctor v. Sargent*, and *Cheesman v. Nainby*. The plaintiff, therefore, is entitled to our judgment on the first breach.

The question raised by the demurrer to the last plea renders it necessary to consider, whether the covenant on which the second breach is assigned is good in law, upon the principle before laid down.

That covenant is, “that the defendant should not, without the plaintiffs’ consent, carry on the profession of a surgeon-dentist, &c., in London, or any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the said service.” According to the terms of this covenant, the defendant is prohibited from carrying on his business, not merely at such place or places as the plaintiffs might be practising in at the time of the expiration of the service, but at any place where they might have been practising before, though for ever so short a time. This covenant goes much beyond what the protection of any interests of the plaintiffs could reasonably require, and it puts into their hands the power of preventing the defendant from practising anywhere. We are therefore of opinion, that it is an unreasonable restriction, and that the defendant is entitled to our judgment on the *demurrer to the second [* 669] breach, for the insufficiency of the declaration in that respect.

It was contended, that, if the covenant was illegal and void as to this part, it was so altogether. But we think that the stipulation as to not practising in London is valid and is not affected by the illegality of the other part. That point was decided in *Cheesman v. Nainby*, above cited. *Judgment accordingly.*

Price v. Green, Executor of John Gosnell, deceased.

16 M. & W. 346-354 (s. c. 16 L. J. Ex. 108; 9 Jur. 880).

Contract. — Restraint of Trade. — Reasonableness. — Divisible Covenant.

[346] By deed, reciting that A. & B. carried on business as perfumers in partnership, and that it had been agreed between them that B., in consideration of £2100, should assign to A. his moiety of the good-will, stock in trade, &c., of the copartnership, B., in consideration thereof, covenanted that he would not, during his life, carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same respectively; and for the observance of this covenant, he bound himself to A., his executors, &c., in the sum of £5000, by way of liquidated damages, and not of penalty: —

Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that this covenant was divisible, and was good so far as it related to the cities of London and Westminster, though void as to the 600 miles; that a breach, that B. carried on the trade in the city of London, was good; and that A. was entitled to recover, in respect of such breach, the whole sum of £5000.

Quære, whether a bill of exceptions lies for misdirection of a judge on the execution of a writ of inquiry.

This was an action of covenant, for the breach of a covenant by the plaintiff in error (the defendant below), contained in an indenture made between him and John Gosnell, deceased, whereby he covenanted not to carry on the trade of a perfumer, toyman, and hair-merchant, within the cities of London or Westminster, or within the distance of 600 miles from the same respectively; and for the observance of which covenant the defendant bound himself, his executors, &c., in the sum of £5000, as and by way of liquidated damages, and not by way of penalty. The defendant set out the deed on oyer, and then pleaded, that the cities of London and Westminster, and the distance of 600 miles from the same respectively, comprised the whole of England and Wales, and 19-20ths of Scotland, and that the covenant was therefore void in law. To this plea there was a demurrer, on which the Court of Exchequer gave judgment for the plaintiff below. 13 M. & W. 695.

On the execution of the writ of inquiry, before POLLOCK, C. B., the jury, under the direction of the learned Judge,
 [* 347] *assessed the damages for the breach of covenant at the full sum of £5000. To this direction the defendant's counsel tendered a bill of exceptions.

A writ of error having been brought, the case was argued in this Court, in Michaelmas Vacation, 1845 (Dec. 1),¹ by

Cowling for the plaintiff in error. — First, this covenant is not enforceable at law, for it amounts to an illegal restraint of trade. And it is an entire, and not a divisible, covenant; and even if, according to the judgment of the Court below, the covenant not to carry on the trade in London and Westminster would of itself be good, that part is not separable from the rest of the covenant. It is one entire engagement, not to carry on the trade within a certain district, which is defined to be the cities of London and Westminster, and a circuit of 600 miles from them. To confine it to London and Westminster only, is to frame a new bargain for the parties, which they have not made for themselves. It is clear that part of a covenant which is illegal cannot be rejected, if the covenant be entire. *Lowe v. Peers*, Wilmot's Notes, 364, p. 347, *ante*. There the covenant was not to marry any one but the plaintiff, and to pay a sum of money to the plaintiff on marrying another. That was just as divisible as the present covenant, yet it was held to be entire and void. In *Bunn v. Guy*, 4 East, 190; 7 R. R. 560, where the covenant was not to practise as an attorney in London, or within 150 miles of it, the divisibility of the covenant was only suggested in argument, but not noticed by the Court. In *Horner v. Graves*, 7 Bing. 735; 5 M. & P. 738, a covenant not to practise as a dentist within 100 miles of York was held void, and no *suggestion was [*348] made as to the divisibility of it. [PATTESON, J. There the breach was assigned on the illegal part of the covenant.] In *Hinde v. Gray*, 1 Man. & G. 195; 1 Scott, N. R. 123, the breach was not so limited. There the covenant was not to carry on the trade of a brewer "in Sheffield or elsewhere;" the breach was for carrying on the trade "in Sheffield and elsewhere," and the covenant was held void; whereas it is clear that, if it could have been divided, it might have been held good as far as regarded the town of Sheffield. In *Davis v. Mason*, 5 T. R. 120; 2 R. R. 562, which may be relied upon on the other side, the covenant was held good on the ground that the limits of the restraint were not unreasonable. The same observation applies to *Cheesman v. Vainby*, 2 Stra. 739; 2 Ld. Raym. 1456. Here the covenant,

¹ Before TINDAL, C. J., PATTESON, J., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., MAULE, J., WIGHTMAN, J., and ERLE, J.

taken altogether, is clearly an unreasonable restraint of trade, for it extends throughout England, and almost the whole of Scotland. The Court below decided this case entirely on the authority of *Mallan v. May*, 11 M. & W. 653, p. 393, *ante*; but it is submitted that that is a decision which ought to be reviewed.

Secondly, even if the judgment on the demurrer was right, the LORD CHIEF BARON was wrong in holding that the plaintiff below was entitled to recover the whole sum of £5000 or liquidated damages. By the judgment on the demurrer, the contract is altered and limited; why then should the defendant still pay the whole sum for the breach of it? Surely the penalty for trading in London and Westminster ought to be much less than for trading throughout so large a space as that mentioned in the covenant. Supposing the covenant were not to practise in three or four specified counties, and that were considered an illegal restraint of trade, which of the counties would the Court [*349] reject as making it unreasonable? It is clear *that the £5000 was to be the price paid for a practising in any or every part of the whole district mentioned in the deed.

Martin, *contra*. — First, the judgment of the Court below on the demurrer was right. There is no stipulation in this deed for a monopoly. It is merely the sale of the good-will of a business, and, incidental to that sale, an agreement by the seller not to do that which would defeat the object of the purchaser. It is said that the covenant cannot be enforced as to the cities of London and Westminster, because in its terms it extends also 600 miles beyond those places; but *Cheesman v. Nainby*, which was a judgment of the House of Lords, is directly in point to the contrary; and although that was an action on a bond, it does not in this respect differ from the case of a covenant. [PATTESON, J. It was argued the other day, in a case of *Nicholls v. Stretton*, 10 Q. B. 346, that a bond and a covenant differ in this respect, the bond being one-sided, whereas, in the case of a covenant, if the consideration was illegal, the whole fell to the ground.] A deed is equally obligatory whether it contain a consideration or not. Besides, it is to be remembered that the other part of the covenant is not illegal, but only void as being unreasonable. There is a great difference between a contract which the law will not enforce, and one which is absolutely illegal. The whole of the law on this subject was fully gone into in the case of *Mallan*

v. May, which was decided after great consideration. The cases referred to on the other side do not bear upon the question. *Low v. Peers* was clearly an entire contract not to marry with any other person than the plaintiff. In *Dacis v. Mason* this point did not arise; nor was it raised in *Horner v. Graves*, *Bunn v. Guy*, or *Hinde v. Gray*.

*Secondly, no bill of exceptions or writ of error lies [*350] for misdirection on the execution of a writ of inquiry, which is said, in *Bruce v. Rawlins*, 3 Wils. 61, to be a mere "inquest of office." In *Gould v. Hammersley*, 4 Taunt. 148, it was assigned as error that there was no execution of the writ of inquiry entered upon the record, and this was held not to be error, on the ground that the execution of the writ of inquiry might be dispensed with, and final judgment given for a certain sum with the plaintiff's assent. The cases on this subject are collected in *Holdipp v. Otway*, 2 Saund. 105 *a*, and they show that the Statute of Westminster 2nd applies only to writs of *Visi Prius*. A Judge, sitting on the execution of a writ of inquiry, is merely in the character of an assessor to the sheriff; per HOLT, C. J., *Anon.*, 12 Mod. 610. — He cited also, on this point, *Hewit v. Mantell*, 2 Wils. 372, and *Waite v. Smoles*, Barnes, 135.

But, thirdly, the ruling of the LORD CHIEF BARON was correct. The covenant was incidental only to the sale of the good-will; and the very object of fixing the damages was to render that certain which would otherwise be uncertain. The only question really is, whether the contract has been broken; if it has, the parties have assessed the damages for themselves. It is not a penalty for the breach of a number of stipulations of various degrees of value, as in *Kemble v. Farren*, 6 Bing. 141; 3 M. & P. 425. — He referred also to *Gainsford v. Griffith*, 1 Saund. 58, and the cases there collected.

Cowling, in reply. — If, as is said on the other side, the £5000 was to be paid in case the trade should be carried on anywhere in London and Westminster or within the 600 miles, then the covenant is void, as being too large. Secondly, the bill of exceptions will lie in this case. The *language of the [*351] Statute of Westminster 2nd is very large — "before any of the justices;" and being a remedial law, it ought to be construed liberally. It has been held, accordingly, to extend to a

trial at bar; *Thurstan v. Slatford*, Lutw. 905 *a*: and to a sheriff in the County Court; *Strother v. Hutchinson*, 4 Bing. N. C. 83. [MAULE, J. Would it lie to a sheriff executing a writ of inquiry, or to the master computing principal and interest?] The reason given by Lord COKE, in the 2nd Inst. 427, applies strongly to such cases. He says that the statute extends not only to all Courts of record, but to the County Court, the Hundred Court, and Court Baron, "for therein the Judges are more likely to err." *Cur. adv. vult.*

The judgment of the Court was now delivered by

PATTESON, J. — This was an action of covenant, by the executor of John Gosnell, against the defendant, for the sum of £5000 as liquidated damages, for the breach of a covenant contained in an indenture, which is set out on over upon the record.

It appears by the indenture, that Gosnell and the defendant had been partners as hair-dressers and perfumers in London. The partnership was agreed to be dissolved; and Gosnell purchased the defendant's share of the business at £1500, and also his share of certain leasehold premises at £600, and his share of their stock in trade at £4149 18s. 6*d.*, secured by bond. The £1500 is recited to have been paid; and the covenant of the defendant is in these words: "And in pursuance and performance of the agreement in this behalf, and in consideration of the said sum of £1500 to the said Rees Price by the said John Gosnell paid as hereinbefore mentioned, he the said John Rees [* 352] doth hereby covenant, promise, and agree with and *to the said John Gosnell, his executors, administrators, and assigns, that he the said Rees Price shall not nor will, at any time during his life, either by or for himself, or for or with any person or persons whomsoever in trust for him, or to or for his benefit or advantage, use, exercise, or carry on, within the cities of London or Westminster, or within the distance of 600 miles from the same respectively, the trade or business, or trades or businesses, of perfumer, toyman, and hair-merchant, or any other trade or business lately carried on by them the said Rees Price and John Gosnell in copartnership together, under the hereinbefore mentioned articles of copartnership of the 1st of January, 1829. And for the due observance and performance of this covenant by and on the part of him the said Rees Price, he the said

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Rees Price doth hereby bind himself, his heirs, executors, and administrators, to the said John Gosnell, his executors, administrators, and assigns, in the sum of £5000, as and by way of liquidated damages, and not of penalty." The declaration then states a breach of this covenant, by the defendant carrying on the business of a perfumer in the city of London. The defendant pleads, that the cities of London and Westminster, and 600 miles from the same, include all England, whereby the indenture is void. To the plea the plaintiff demurs, and judgment has been given for him in the Court below.

Upon the argument in this Court, it is conceded that the covenant is void, so far as regards the distance of 600 miles from London and Westminster; but it is contended for the defendant in error, that the covenant is divisible, and stands good so far as regards the cities of London and Westminster, upon which part of it the breach is assigned. The case of *Mallan v. May*, in the Court of Exchequer, 11 M. & W. 653, p. 393, *ante*, is an express decision upon the point, in favour of the defendant in error; but having been decided very recently, *the [* 353] present writ of error is in truth brought to question that decision, as much as the judgment in the principal case.

Had the words of this covenant formed part of the condition of a bond, it cannot be denied that they might be taken separately; for that point has been expressly decided in *Cheesman v. Nainby*, on a writ of error from the Common Pleas, and again in the same case, on a writ of error to the House of Lords, 1 Bro. P. C. 234. Again, it cannot be denied, that if this indenture had contained two covenants in point of form, the one relating to London and Westminster, and the other to a distance of 600 miles from them, the invalidity of the latter would in no way have affected the former. The question, therefore, seems to be one of construction: whether, from the language used, the covenant be capable of division. Now, if such language admits of its being construed divisibly in the condition of a bond, it is difficult to see why it is not equally capable of such construction, where it occurs in a covenant. No doubt the covenant formed the consideration for the payment of £1500, and possibly Gosnell would not have given so large a sum, unless the prohibition to trade had been as extensive as by the whole of the covenant it is made to be; but this is conjecture only, and independent of the point that for a covenant

under seal no consideration is necessary, it should be observed, that the restriction as to 600 miles from London and Westminster is only void, not illegal; and therefore, the rest of the restriction would have formed a sufficient consideration for the agreement to pay £1500.

Upon the whole, we are of opinion that this covenant is divisible, and that the judgment of the Court of Exchequer must be affirmed as to that point.

[* 354] *The other question arises upon the writ of inquiry executed before the LORD CHIEF BARON, to whose direction to the jury a bill of exceptions was tendered. The first objection is, that on a writ of inquiry the Judge is but assessor to the sheriff, and that a bill of exceptions will not lie. The second is, that the jury should have been directed to find the actual damage sustained, and not the whole £5000. As we are of opinion that the direction of the LORD CHIEF BARON was right, we are not called upon to give any opinion on the first objection. The £5000 is expressly declared by the covenant to be "as and by way of liquidated damages, and not of penalty." It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The Courts have indeed held, that, in some cases, the words "liquidated damages" are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument that the real intention was different. Here, however, there is but one thing to which the £5000 relates, viz. the restriction of trade, though extended to two different districts; and it is plain that the parties intended, that if the restriction was violated in either district, the sum should be paid, and not that inquiry should be made as to the actual damage and loss sustained. Upon this point, therefore, as well as the other, we are of opinion that the judgment must be affirmed.

Judgment affirmed.

No. 40. — Nordenfelt v. Maxim-Nordenfelt Guns, &c. Co., 1894 App. Cas. 535, 536.

Nordenfelt (Pauper), Appellant, v. The Maxim-Nordenfelt Guns and Ammunition Company, Respondents.

1894 App. Cas. 535-575 (s. c. 63 L. J. Ch. 908; 71 L. T. 489).

Contract. — Restraint of Trade. — World-wide Restraint in Trade of Special Character and limited as to Number of Customers.

A patentee and manufacturer of guns and ammunition for purposes of [535] war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage, except on behalf of the company, either directly or indirectly in the business of a manufacturer of guns or ammunition: —

Held, affirming the decision of the Court of Appeal ([1893] 1 Ch. 630), that the covenant though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers (namely, the Governments of this and other countries), wider than was necessary for the protection of the company, nor injurious to the public interests of this country; that it was therefore valid and might be enforced by injunction.

Appeal from an order of the Court of Appeal, [1893] 1 Ch. 630; 62 L. J. Ch. 273. The question turned upon a covenant in restraint of trade, unrestricted as to space, made on the 12th of September, 1888, * between the appellant and the [*536] respondent company, under the circumstances related in the judgment of Lord HERSCHELL, L. C. The covenant was in these words: —

“The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of re-constitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same.”

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The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

ROMER, J., made an order declaring that the covenant was void as being unreasonable and beyond what was required for the protection of the company.

The Court of Appeal (LINDLEY, BOWEN, and A. L. SMITH, L. J.J.) were of opinion that the covenant was too wide in its application to any business which the company might carry on during twenty-five years, but was valid as regarded the gun and ammunition business, and varied the order of ROMER, J., by declaring "that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder or subaqueous or submarine boats or [* 537] torpedoes or castings or forgings of steel or iron or *alloys of iron or of copper)." And the Court granted an injunction and ordered an inquiry accordingly. [1893], 1 Ch. 630; 62 L. J. Ch. 273.

April 13, 16, 17. The appellant in person: —

The judgment of BOWEN, L. J., is inconsistent with the decision of the Court of Appeal in *Davies v. Davies*, 36 Ch. D. 359; 56 L. J. Ch. 962, and with *Tallis v. Tallis*, 1 E. & B. 391; 22 L. J. Q. B. 185, in which Lord CAMPBELL, C. J., expressly stated that though the restriction may be unlimited in respect of time, there must be some limit of space. The Court of Appeal has altered the law. It cannot be the law that a man should be prevented from earning his living in any part of the wide world. The true principle is that the restraint must not be wider than is necessary for the protection of the covenantee. *Rousillon v. Rousillon*, 14 Ch. D. 351; 49 L. J. Ch. 338; *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L. J. Ch. 362. The present case does not come within any of the exceptions to the general principle against restraints of trade. The business was sold without reserve, and the covenant was not made in connection with the sale of the business and is thus doubly void, as there was no consideration, and the restraint is in effect a universal one both as to time and space. Further, it would be against public policy to enforce the covenant; as the special knowledge acquired is no longer avail-

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able for the service of the British Government. Besides, the respondents are sufficiently protected by their patents; and to enforce the covenant would be an indirect and illegitimate method of prolonging or extending those patents.

Sir R. E. Webster, Q. C., and W. F. Hamilton for the respondents:—

The restraint is not greater than is required for the protection of the respondents, who were in a position to impose more stringent terms. It cannot be against public policy to prohibit the appellant from giving his advice or assistance to foreign governments, and BOWEN, L. J., seemed to intimate that a stipulation that he should not advise the British Government might be illegal. The limits of such covenants must vary with the *progress of trade and international intercourse, and [*538] also according to the character of the business. The case is practically one of a trade secret to which the law forbidding restraint of trade does not apply. The appellant is not prevented from earning his living. He may, for instance, make and sell sporting guns. The alleged absence or inadequacy of consideration is a matter which the Court cannot consider. *Gravelly v. Barnard*, L. R., 18 Eq. 518, 522; 43 L. J. Ch. 659.

[They also cited *Rousillon v. Rousillon*, 14 Ch. D. 351, 363; 49 L. J. Ch. 338, *Mitchel v. Reynolds*, 1 P. Wms. 181, and *Tallis v. Tallis*, 1 E. & B. 391; 22 L. J. Q. B. 185, and the cases referred to in the Courts below.]

The appellant in reply:—

There is nothing in the nature of a trade secret, as any one could make one of the guns from a pattern. Many of the patents expire in a year or two, and the respondents are thus practically getting a large extension of these patents. The terms imposed are oppressive, especially as the company has sold its business at 100 per cent. profit.

The House took time for consideration.

July 31. Lord HERSCHELL,*L. C.:—

My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms: “(2) The said Thorsten Nordenfelt shall not, during the term of 25 years from

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the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not [*539] apply to explosives other than gunpowder or *to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the good-will of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

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The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the *transfer of their business and assets to a new company, [*540] to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3rd of July, 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3rd of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of the 3rd of July, but also “to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the good-will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively.”

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good-will of the appellant's business, and was designed for the protection of the good-will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good-will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the good-will was conveyed to them, and was protected by a covenant in

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some respects larger than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased [* 541] when *the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shown, stated to the world to be the acquisition of the good-will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good-will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognised and given effect to by Lord MACCLESFIELD in his celebrated judgment in *Mitchel v. Reynolds*. That was a case of particular restraint, and the covenant was held good, the CHIEF JUSTICE saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained: but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." And at a later part of the judgment, after

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dividing voluntary restraints by agreement into those which *are, first, general, or secondly, particular as to [* 542] places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of *Master, &c. of Gunmakers v. Fell*, Willes, at p. 388, WILLES, C. J., said the general rule was "that all restraints of trade (which the law so much favours), if nothing more appear, are bad. . . . But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of *Horner v. Graves*, 7 Bing. 735; 9 L. J. (O. S.) C. P. 191, TINDAL, C. J., said: "The law upon this subject [*i. e.*, restraint of trade] has been laid down with so much authority and precision by PARKER, C. J., in giving the judgment of the Court of B. R. in the case of *Mitchel v. Reynolds*, which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'"

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, PARKER, C. J. * says, 'a restraint to carry on a trade throughout the [* 543] kingdom must be void; a restraint to carry it on within a

particular place is good;’ which are rather instances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case.” But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of TINDAL, C. J. that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by PARKER, C. J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of TINDAL, C. J.’s opinion by his judgment in the subsequent case of *Hinde v. Gray*, 1 Man. & G. 195; 9 L. J. C. P. 253. In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, TINDAL, C. J., saying that it was “assigned on a covenant which according to the case of *Ward v. Byrnes*, 5 M. & W. 548; 9 L. J. Ex. 14, was void in law.” This is, to my mind, only intelligible if *Ward v. Byrnes*, which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void: unless it were so, [*544] I do not see how it could be regarded *as determining that the covenant in question in *Hinde v. Gray* was void: or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are

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material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by *Ward v. Byrne*; but TINDAL, C. J., did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde v. Gray*, the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward v. Byrne*, except to say, that although the learned Judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer, Mr. John William Smith, as shown by his notes in *Mitchel v. Reynolds*, 1 P. Wms. 181. He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of WILLES and KEATING, JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

* In the year after the decision of *Hinde v. Gray*, the [*545] case of *Whittaker v. Howe*, 3 Beav. 383, 394, came before Lord LANGDALE. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The MASTER OF

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THE ROLLS refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel v. Reynolds* was cited in argument, but neither *Ward v. Byrne* nor *Hinde v. Gray* appear to have been brought to the notice of the Court. Lord LANGDALE expressed himself thus (*Whittaker v. Howe*), "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord KENYON said in *Davis v. Mason*, 5 T. R. 118; 2 R. R. 562, 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned Judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by WILLES

and KEATING, JJ., as questionable, and it is certainly [* 546] difficult to see why, *if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde v. Gray* should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity Judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather*

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Cloth Company v. Lonsont, L. R., 9 Eq. 345; 39 L. J. Ch. 86, JAMES, V. C. said: "I do not read the cases as having laid down that un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in *Rousillon v. Rousillon*, 14 Ch. D. 351; 49 L. J. Ch. 338, FRY, J., thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be *admitted, somewhat academic. For, in con- [*547] sidering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the cove-

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nantor may now be essential if there is to be reasonable protection to the covenantee.

When Lord MACCLESFIELD emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action. (See Puffendorf, lib. 5, c. 2, s. 3; 21 H. VII. 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the [* 548] *covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord MACCLESFIELD's judgment will show that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I

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think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good-will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations, where a sale of the good-will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy *which countervail the disadvantage which would arise [*549] if the good-will were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner v. Graves*, 7 Bing. 735, 743, in considering whether the agreement was reasonable. TINDAL, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay

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down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord BOWEN, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the governments of this and other countries; and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation [*550] to the *United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON : —

My Lords, the order appealed from directs that, for five-and-twenty years from and after the 17th of June, 1888, the appellant

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shall, if and so long as the respondent company or any company taking a transfer of its business shall continue to carry on business during that period, be restrained from engaging, "either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder, or sub-aqueous boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper)." The prohibition is not confined to English, or even to British soil; it extends to every part of the surface of the globe available for the purpose of carrying on the process of manufacture.

The order does nothing more than enforce, according to its terms, an undertaking given to the respondent company by the *appellant upon the occasion of their taking over, [*551] in the year 1888, from the Nordenfelt Company, the extensive business which had been established by the appellant, and had been transferred by him to the latter company in March, 1886. At the bar of the House the appellant, for the first time, pleaded that the undertaking given by him to the respondent company was without adequate consideration, and could not warrant the injunction of which he complains. I have all along been satisfied, for the reasons explained by the LORD CHANCELLOR, which I shall not repeat, that the plea is groundless, and that, for the purposes of this appeal, the appellant stands in the same position as if his undertaking had been given to the Nordenfelt Company in consideration of the full price which was paid to him by that company for the stock and good-will of his business.

The main question discussed in the Courts below, and the only question which, in my opinion, it is necessary for your Lordships to decide, is raised by the appellant's contention that the personal restraint to which he has agreed to submit, being unlimited in space, is contrary to the recognised policy of English law, and is therefore incapable of being enforced by an English Court. The decisions, at common law and in equity, which bear more or less directly upon the question thus arising, are very numerous. They have been reviewed by the learned Judges of the Appeal Court, who all arrived at the same conclusion by independent lines of reasoning, which are occasionally divergent. Some of the more important of those cases have been noticed by the LORD CHANCELLOR, and will be criticised by my noble and learned

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friend, Lord MACNAGHTEN. I have, as in duty bound, read and considered all the cases cited; but I do not propose to refer to them in detail. I shall simply endeavour to indicate the considerations which have led me to concur with your Lordships in affirming the order of the Court of Appeal.

With regard to the facts of this case, I have only to observe, that they are, from a legal point of view, exceptional. Their parallel is not to be found in any of the reported cases; but they are such as may naturally be expected to occur in the altered and daily altering conditions under which trade is conducted in modern times. The manufacturing department of the [*552] business, *which the appellant sold in 1886, was, and still is, carried on at extensive works in England and in Sweden. The business might be said to be local in that sense, but in that sense only. The area which it supplied was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily a limited class, but they are to be found all over the world. They include, or, strictly speaking, consist of, governments and potentates, great and small, civilised and savage, who for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition.

It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community. Nor is it doubtful that Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.

I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day

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after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether — when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the *purchaser [*553] against any attempt by the seller to resume the business which he sold — a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal.

The earlier decisions, which were chiefly, if not exclusively, by the Courts of common law, contain abundant *dicta*, which, if literally followed, would sustain the plea upon which the appellant relies. These *dicta* broadly state the rule to be that a general restraint of trade, or, in other words, a restraint unlimited as to space, is void, because it is contrary to the commercial policy of England. The same proposition is frequently to be found in the later common law cases. To me it seems very natural that the law should have been laid down in these broad terms. The rule of policy, as originally understood and administered, struck at all restraints, whether partial or general. It was relaxed, by these decisions, in the case of partial restrictions, which were held to be reasonable. I feel that, had I occupied the seat of the learned Judges who pronounced them, I should probably have used the same language which they employed with reference to unlimited restraints. They never imagined that any business could attain such wide dimensions that it could not be reasonably protected from the invasion of the seller except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule would have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case.

A series of decisions based upon grounds of public policy, however eminent the Judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with

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and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. [* 554] *Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community.

No one of the noble and learned Lords before whom this appeal was heard has had the least difficulty in holding that the injunction granted was reasonably necessary in order to protect the respondent company's business from the aggressive acts threatened and commenced by the appellant. Nor, so far as I understand, have noble and learned Lords had any hesitation in coming to the conclusion, with the learned Judges of the Appeal Court, that there is no existing rule of public policy which can be effectively pleaded in bar of the injunction. For my own part I am very clearly of opinion that no violence is done to the canon laid down by the common law Courts in affirming that a restraint which is absolutely necessary in order to protect a transaction which the law permits in the interest of the public ought to be regarded as reasonable, and cannot, in deference to political ideas which are now obsolete, be regarded as in contravention of public policy. Were it necessary, I should be prepared to affirm that, in the year 1888, there was not, and that there does not now exist, any imperial rule of policy which requires that a restraint having that effect only shall be treated as a nullity, because it is unlimited in space, in circumstances such as occur in the present case. I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether at any period

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of time an English Court would have allowed a foreigner to break his contract with an English subject in order to foster such competition.

When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the *history of a protracted struggle between the [* 555] principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the Courts. I do not think that, between the Courts of common law and equity, there has been much, if any, real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite *dicta* of the common law Courts. I purposely say some of those *dicta*, because I find in the opinions of many common law Judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your Lordships in the decision of this appeal.

The Lords Justices were agreed, and I understand that your Lordships are also agreed, as to the result of this case. A controversy has arisen as to the principle upon which that result ought to be reached. To my mind, it is not a matter of practical importance whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints. I have no desire to interfere with anybody's freedom of choice between these alternatives. I am content to state that, in my opinion the judgment which your Lordships are about to pronounce goes no farther than to adapt to new circumstances an old and sound exception to the general rule.

LORD ASHBOURNE : —

My Lords, I concur in the judgment moved by the LORD CHANCELLOR.

The sole question is, whether the covenant referred to is void, or whether it is capable of being enforced against the appellant. I think it is quite clear that the covenant must be taken as entered into in connection with the sale of the good-will of the appellant's

business, and that it was entered into with the plain and *bonâ fide* object of protecting that business.

[* 556] *The appellant has argued that he is not bound by the covenant, and that it is void, as being opposed to public policy, and, being general, unrestricted as to area.

The cases that have been referred to are interesting and important as showing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live.

The appellant practically seeks to ignore the altered conditions of to-day, and to rely upon a rigid application of what he conceives to be the meaning of some decisions given in other generations, and this without taking note of the facts of the cases or of the conditions of the time when they occurred.

His argument practically is that his covenant is in general restraint of trade, and that if it be so — regardless of whether it is reasonable, whether it only affords a fair protection to his covenantees — it must be held to be void.

In the early times all agreements in restraint of trade were discountenanced; but by degrees, as the exigencies of an advancing civilization demanded, this was found to be too rigid, and our Judges considered in each case what was reasonable and necessary to afford fair protection. This is apparent in the important judgment of Lord MACCLESFIELD in *Mitchel v. Reynolds*. That was the case of a partial restraint of trade, and the judgment referred to the great distinction between a covenant in general restraint of trade and such a covenant as he was then dealing with.

[* 557] According to the then state of English life, it *would be hard to conceive that a covenant in general restraint of trade could ever be reasonable, and no imagination could then conceive

that it could ever be needed for the fair protection of any one. It is easy to understand how a distinction for convenience came to be thus expressly noted between general and partial restraints of trade. TINDAL, C. J., in *Horner v. Graves*, 7 Bing. 735, points out, in reference to this judgment of Lord MACCLESFIELD: "The LORD CHIEF JUSTICE says 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

Reference to this judgment of Lord MACCLESFIELD and to this distinction between covenants in general and partial restraint of trade is found naturally in numerous cases. It appeared to afford a convenient nomenclature, and to be probably suited for some cases; but I respectfully concur with TINDAL, C. J., in the words already quoted, that these covenants were not "limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

I do not know that there is a single reported case, whose facts are clearly known, where a covenant in general restraint of trade clearly reasonable in itself and only affording a fair protection to the parties, has been held to be void. One can readily see that such covenants might be extravagant and unnecessary, quite unreasonable, and not at all required for fair protection, and then the fact that they were general and not partial would be a distinction entitled to great weight. Thus I can well understand the existence of the distinction being kept alive and noted in so many cases, though this would not at all imply or require that the reasonableness of a covenant and the fact that it only afforded fair protection should ever be put aside or ignored.

In former days the arguments used showed how different were the circumstances of those times. Discussions are to be found as to ten-mile limits, and fifty miles, and as to the distances of *one English town from another, — then considerable [* 558] topics, but now often trivial having regard to present means of locomotion. The cases show a great variety of circumstances, different professions and trades, cases of apprenticeship and sales of good-will. Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade

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requiring distinct treatment and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times and must advance and develop with the growth of our national life and institutions. Whether there ever was an effective and acknowledged rule, requiring all covenants in restraint of trade to be divided into two broad categories of general or partial restraint with the test of reasonableness openly and expressly applied to partial restraints, whilst it was ostensibly denied to general restraints, though in reality applied under the guise of an exception whenever the exigencies of life and business required it; or whether, assuming the rule to have been once known and recognised, it can now be accepted as applicable to the conditions of our present life; or whether all restraints upon trade have been always really governed by the one test, what is a fair protection and what is reasonable; are inquiries of interest on which legal minds may differ. I do not regard the distinctions of any practical importance, because, as in the present case, the inquiry as to the validity of all covenants in restraint of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees. There may be differences of opinion as to the history of covenants in restraint of trade, as to distinctions from time to time taken in nomenclature, but I believe in the result there is no real difference of opinion, and that all your Lordships hold the covenant in the present case to be good and valid for reasons which do not very seriously differ.

I do not pursue the controversy suggested by BOWEN, L. J., as to the judgments of Lord LANGDALE, JAMES, V. C., and Sir EDWARD FRY in the three cases so often referred to; but, as will appear from what I have already said, I would find much difficulty [*559] in *accepting all his criticisms, much as I respect his ability and research.

LINDLEY, L. J., clearly in his judgment recognised the tendency of modern decisions, and said expressly the opinion "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee" was "the doctrine to which the modern authorities have been gradually approximating."

Having regard to the facts of the present case, to the nature of

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the business, to the class and number of customers, I think the covenant reasonable and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the LORD CHANCELLOR in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

I concur in the suggested judgment.

Lord MACNAGHTEN : —

My Lords, the appellant Thorsten Nordenfelt, a Swedish gentleman of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the manufacture of quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company which was formed for the purpose of purchasing it. At the same time and as part of the same transaction he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have *been made [* 560] at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which of course would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement.

In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case.

The stipulation was that Mr. Nordenfelt should not, during the

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term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, "engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition," — so far the covenant has been held good; then come the words, "or in any business competing or liable to compete in any way with that for the time being carried on by the company." A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. The latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant.

Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade unlimited in space.

And the only point which your Lordships have to decide [* 561] is *whether that part of the covenant which the appellant has broken is valid. For it cannot be disputed that the covenant is severable, and that part may be good though part be void.

The learned Judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view.

LINDLEY, L. J., expressed his opinion that the doctrine "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee," was "the doctrine to which the modern authorities have been gradually approximating." But he could not, he said, "regard it as finally settled, nor, indeed, as quite correct." He thought it ignored "the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his

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living in the best way he can." In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was "reasonably necessary for the protection of the interests of the covenantee."

The late Lord BOWEN considered that it was the established common law doctrine, — a rule to be gathered from the books "with perfect ease," though certain equity Judges had ignored the rule or misunderstood the law, — that in the case of contracts in general restraint of trade the Courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as "those by which a person restrains himself from all exercise of his trade in any part of England." "Scores of cases," he added, "have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law Judges." But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions; and treating the present case as an exception, he, too, thought the agreement limited to the *first part of the covenant [* 562] reasonable in itself and not contrary to public policy.

A. L. SMITH, L. J., came to the same conclusion, thinking that there was no hard-and-fast rule "that every covenant in restraint of trade is *ipso facto* void if it is unlimited as to space," and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades, or branches of trade, in which the appellant had been engaged were reserved to him by the proviso attached to the covenant.

No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is, what is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories — partial restraints and general restraints — that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions; and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints.

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There is a distinction certainly. But whether there is a substantial difference it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded.

Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal have arrived, if it had not been for certain passages in the very able and elaborate judgment of the late Lord BOWEN, from which I respectfully dissent.

Having laid down what he considers to be the common law rule, Lord BOWEN proceeds to observe that "the first cloud upon the clear sky of the common law narrative comes in the equity [* 563] *decision of Lord LANGDALE in *Whittaker v. Howe* (1841).

3 Beav. 383, 394,"—a decision to which he applies the word "inexplicable." "Everything," says Lord BOWEN, "appears clear in the case except the judgment of the Court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction; Lord LANGDALE, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of TINDAL, C. J., in *Horner v. Graves*, 7 Bing. 735, 743; 9 L. J. (O. S.) C. P. 191." Then, after pointing out that *Horner v. Graves* was a case of limited restraint, Lord BOWEN adds, "Lord LANGDALE thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category." Dealing with the judgment of JAMES, V. C., in the *Leather Cloth Company v. Lonsout*, Lord BOWEN says that his "language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine." "The VICE CHANCELLOR's expressions," he observes, "are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord LANGDALE in *Whittaker v. Howe*." Observations of a similar kind are made in reference to the judgment of Sir EDWARD FRY in *Rousillon v. Rousillon*.

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My Lords, this appears to me to be a very grave censure — graver, I think, than Lord BOWEN could have supposed or intended — because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the Court was to give effect to common law rights. If the covenant was void at common law, a Court of equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful, it would have been the duty of the Court, at least in the time of Lord LANGDALE, to leave the parties to their common law rights, or to take the opinion of a Court of common law, as was done in the case of *Bunn v. Guy*, 4 East, 190; 7 R. R. 560, *and by Lord LANGDALE himself in the case of [*564] *Nicholls v. Stretton*, 7 Beav. 42; 10 Q. B. 346.

Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step. I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord BOWEN'S opinion, that I cannot help thinking that Lord LANGDALE and JAMES, V. C., and Sir E. FRY have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times.

In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate v. Bachelet*, Cro. Eliz. 872). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. "Where the restraint is general," says Lord MACCLESFIELD, in *Mitchel v. Reynolds*, "not to exercise a trade throughout the kingdom, the

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restraint "must be void, being of no benefit to either party and only oppressive, as shall be shown by-and-by." Later on he gives his reason. "What does it signify," he says, "to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." "Any deed," says BEST, L. C. J., in [* 565] **Homer v. Ashford*, 3 Bing. at p. 326, "by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself."

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much even since *Mitchel v. Reynolds*. It has become simpler and broader too. It was laid down in *Mitchel v. Reynolds* that the Court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the Court, and it was held to be sufficient if there was a legal consideration of value; though of course the *quantum* of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable. It was said, and apparently said with truth, that up to that time restrictions had been confined

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to the limits of a parish, or to some short distance, as half-a-mile. But Lord KENYON, in his judgment, observed that he *did not see that the limits in question were necessarily [* 566] unreasonable. "Nor do I know," he added, "how to draw the line." *Davis v. Mason*, 5 T. R. 118; 2 R. R. 562. The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to show that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed" if the proposed restraint were upheld. *Tallis v. Tallis*, 1 E. & B. 391, 412; 22 L. J. Q. B. 185.

To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.

When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged and that trade should be free; but a fetter is placed on trade and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general "the whole of the public is restrained," — a phrase not, I think, particularly accurate, or perhaps particularly *intelligible. It has been said [* 567]

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that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship and cases of that sort; but it is, I think, rather a fanciful way of looking at the matter in the case of a sale of good-will. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business meaning to trade no more? Is it likely that he will begin the struggle of life again working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Now, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When Lord KENYON was pressed with an argument as to the injury to the public in Thetford that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. "Every other person," he added, "is at liberty to practise as a surgeon in this town." *Davis v. Mason*, 5 T. R. 118; 2 R. R. 562. Then I cannot help thinking that there is a good deal of common sense in the way in which Lord CAMPBELL looked at this question. A retired partner in the canvassing trade of a publishing business, being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. "It is clear," said Lord CAMPBELL, "there would be evil if the law justified such a breach of contract: but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff." *Tallis v. Tallis*, 1 E. & B. 391, 413; 22 L. J. Q. B. 185. That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to [* 568] circumstances. * But Lord CAMPBELL's observation serves to bring into contrast the two principles which have to be adjusted in all these cases, — freedom of trade and freedom of contract.

Sir EDWARD FRY's view was that the cases in which an un-

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limited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. Lord BOWEN cites this passage, and meets it with the following question: "Is it not a truer view that the Courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?" That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel v. Reynolds* how many cases have there been in which a general prohibition has come before a Court of common law for discussion or decision? So far as I can discover there are two, and two only, — *Ward v. Byrne* and *Hinde v. Gray*. In *Hinde v. Gray* the point was disposed of during the argument, on the presiding Judge observing that the particular covenant under consideration had been held invalid in *Ward v. Byrne*. That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though perhaps not quite so absurd, as the covenant in *Ward v. Byrne*. *Hinde v. Gray*, therefore, does not help one much. There remains the case of *Ward v. Byrne*. In that case an unlimited restraint was imposed on a coal merchant's clerk. When once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant, — an absurd and unreasonable stipulation, if ever there was one. The only wonder is, that when the case first came before the Court on an argument as to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the Court abstain from entering on the consideration of the particular circumstances? Why, *the main, if not the only, ground of [*569] objection was the unreasonableness of such a restriction in the particular circumstances of the case. "This restriction," observes the CHIEF BARON, "extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation

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which the defendant undertakes by his bond is that he shall neither be nor serve a coal merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require that it is an unreasonable restriction: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands." Nothing can be plainer than the view of the CHIEF BARON: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of PARKE, B., is, I think, substantially to the same effect; but it is so important that I shall reserve it for separate consideration presently. GURNEY, B., followed the same line of argument. "What is there," he asks, "in the trade of a coal merchant in London whose interests could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York?" All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the Court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints.

There is no higher authority upon this subject in modern times than TINDAL, C. J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the Judges since Lord MACCLESFIELD'S time put together. You will hardly find any judgment in reference to restraint of trade delivered by any Court in England or America [* 570] *during the last sixty years in which some passage is not cited from some judgment of TINDAL, C. J. In *Hornor v. Graves*, TINDAL, C. J., delivered the considered judgment of the Court. In the course of it he had occasion to refer to the passage in *Mitchel v. Reynolds*, which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints. "PARKER, C. J.," he observes, "says a 'restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to

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the particular case." It is quite true that *Horner v. Graves* was a case of partial restraint; but here we have TINDAL, C. J., dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is, what is a reasonable restraint with reference to the particular case. I do not find that this passage has ever been questioned, nor is there in the books, so far as I can discover, any authority conflicting with it, except the judgment of Lord BOWEN in the present case. It may, perhaps, be objected that passages are to be found in the judgments of TINDAL, C. J., as well as in the judgments of other Judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that TINDAL, C. J., thought general restraints bad, not because there was an arbitrary law to that effect,—a hard-and-fast rule which Judges had learned by rote, and the origin of which it was forbidden to explore,—but because he took a general restraint to be an example, a typical example if you will, of an unreasonable contract? It does not seem to me to affect the question in the very least how often the *dictum* may be found repeated, if, on the one hand, it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had become a *rule which was neither to be [*571] questioned nor explained. It is merely a *dictum* after all, because there is no reported case, except, perhaps, *Ward v. Byrnes*, in which it could have had any bearing upon the decision. Certainly it is no wonder that Judges of former times did not foresee that the discoveries of science and the practical results of those discoveries might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate development—it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule.

I would now turn to the judgment of PARKE, B., in the case of *Ward v. Byrnes*, which was decided in 1839, eight years after the decision in *Horner v. Graves*. The learned Judge begins by stating the circumstances of the case, and the leading principle

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laid down in *Mitchel v. Reynolds*, that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of TINDAL, C. J., in a case of limited restraint, the very thing for which Lord LANGDALE is so much blamed. He could not, he said, express the rule more clearly than it had been done by TINDAL, C. J., in *Hitchcock v. Coker*, 6 A. & E. 438, where he says: "We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Oddly enough, that is a reproduction of the very passage which Lord LANGDALE selected as his guide; only he took it from *Horner v. Graves* directly; PARKE, B., took it from the judgment on appeal in *Hitchcock v. Coker*. There it is attributed to Lord DENMAN, who does no more than quote the passage which Lord LANGDALE cites from *Horner v. Graves*. Then PARKE, B., observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general [* 572] restriction limited only as to time. *He might, I think, have said with equal truth, that there was no case since *Mitchel v. Reynolds* in which the question had come before the Court for consideration. In conclusion he says: "This case falls within the rule laid down by TINDAL, C. J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require. On that ground I think the judgment ought to be arrested." What did PARKE, B., mean there by the rule laid down by TINDAL, C. J.? There is no rule to be found laid down by TINDAL, C. J., in those words or to that effect except in the passage I have cited from *Horner v. Graves*. PARKE, B., may have been referring to *Horner v. Graves*, or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible if PARKE, B., thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint.

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With regard to Lord LANGDALE's judgment in *Whittaker v. Howe*, 3 Beav. 383, I have some difficulty in understanding what the objection to it is, even on the view which Lord BOWEN takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited, seems to indicate, that a restraint limited to England is to be considered as a general restraint now-a-days when England is only part of the United Kingdom as much as it was when the three kingdoms were separate.

I cannot think that *Whittaker v. Howe* requires much explanation. There is a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk." That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order *to [* 573] hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price: that he kept in his pocket. Lord LANGDALE thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. Lord LANGDALE held, on the evidence before him, that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate, that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of

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restriction unreasonable. I venture to think that the decision in *Whittaker v. Howe* was right. And, further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of TINDAL, C. J., and PARKE, B. Nor can I, with all deference to PATTESON, J., understand how anybody could suppose that *Whittaker v. Howe*, in which the restraint was held to be reasonable, conflicts with *Ward v. Byrne*, where the restraint was plainly unreasonable and held to be so.

Now, in the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. [* 574] It *enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has "committed industrial suicide," and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. My Lords, this seems to me to be very far-fetched. Mr. Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is. But even so, I would answer the argument in the words of TINDAL, C. J.: "If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable and extravagant contingencies in order to make it void." *Rannie v. Irvine*, 7 Man. & G. at p. 976.

My Lords, for the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by TINDAL, C. J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore I agree that the appeal should be dismissed.

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LORD MORRIS : —

My Lords, I entirely concur in the judgment and the reasons for it given by the LORD CHANCELLOR. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your Lordships, the weight of authority up to the present time is with the proposition that general restraints *of [* 575] trade were necessarily void. It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered *primâ facie* void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness, though not *per se* a decisive test. If the consideration of reasonableness or of public interest is the rule, the appellant in my opinion has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives was one which would almost altogether be with governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents; nor does the substitution of a company for the appellant in the manufacture of guns and ammunition appear to me to injuriously affect the public interest.

Order appealed from affirmed and appeal dismissed.

Lords' Journals, 31st July, 1894.

ENGLISH NOTES.

A covenant or agreement is a restraint on trade when it produces any of the following results:—

First. Where it prevents a party from competing with another. The law on this point is thoroughly discussed in the three principal cases. The tabular statement of cases contained in Pollock's Principles of Contracts, 6th edition, pp. 345-347, showing what restrictions in different kinds of business have been held reasonable or otherwise, may also be referred to.

It may be sufficient here to note the following points not brought out in the principal cases. A covenant or agreement not to carry on any business whatsoever is unreasonable, however limited the time or space may be. *Baker v. Hedgerock* (1888), 39 Ch. D. 520, 57 L. J. Ch. 889, 59 L. T. 361, 36 W. R. 840. So is a restrictive covenant whereby the covenantee is the sole judge of determining whether a new business set up by the covenantor competes with his own or not. *Perls v. Saalfeld* 1892, 2 Ch. 149, 61 L. J. Ch. 409, 66 L. T. 666, 40 W. R. 548. A limit of time has been held not necessary to make a restraint of trade reasonable. *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; *Wallis v. Day* (1837), 2 M. & W. 273; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305, 29 L. J. C. P. 105, 1 L. T. 64, 8 W. R. 187; *Harms v. Parsons* (1863), 33 Beav. 328, 35 L. J. Ch. 247, 7 L. T. 815, 11 W. R. 250; *Catt v. Tourle* (1869), L. R., 4 Ch. 654, 38 L. J. Ch. 665, 21 L. T. 188; *Leather Cloth Company v. Lonsont* (1869), L. R., 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. 661, 18 W. R. 572; *May v. O'Neill* (1875), 44 L. J. Ch. 660; *Darey v. Shannon* (1879), 14 Ex. D. 81, 48 L. J. Ex. 459, 40 L. T. 628, 27 W. R. 599; *Mills v. Danham*, 1891, 1 Ch. 576, 60 L. J. Ch. 362, 64 L. T. 712, 39 W. R. 289. Some limit of space is generally assumed to be necessary; but in every case the criterion is the protection of the covenantee.

Secondly. When the agreement prevents the divulgence of a trade secret. This is not within "the principle or the mischief of restraints of trade." *Leather Cloth Company v. Lonsont*, *supra*.

Thirdly. When the agreement refers to the manner of carrying on the trade. If the agreement deprives each party of the control of his business, it is bad. For instance, an agreement between master manufacturers to regulate the discipline and management of their establishment, the hours of work, wages, &c., by a vote of the majority. *Hilton v. Eckersley* (1855-6), 6 El. & Bl. 47, 66, 25 L. J. Q. B. 199. So an agreement between A., B., C., and D., &c., that if that member of the body to whom a business is assigned is not employed by strangers to the contract, the others will refuse to accept. *Collins v. Locke*

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(1879), 4 App. Cas. 674, 688, 48 L. J. P. C. 68, 41 L. T. 392, 28 W. R. 189. So an agreement between members of a trade society not to employ a person who has been dismissed by one of them, is bad. *Mineral Water Bottle, &c. Society v. Booth* (1887), 36 Ch. D. 465, 57 L. T. 573, 36 W. R. 274.

AMERICAN NOTES.

There has been a marked tendency in the recent American adjudications, as well as in the English, to modify the ancient strictness on this subject, and to decline to lay down any definite and general rule, but to measure each case by the circumstances, and to support such an agreement in restraint of trade as is reasonable and necessary.

Now, as formerly, an agreement unlimited as to both time and space, and in total and general restraint of trade, is void, for it is against public policy to allow a citizen to disable himself from ever again carrying on his trade or occupation in any place in the country where he resides, — as an agreement that he will never carry on, or be concerned in, the business of an iron-founder, *Alger v. Thacher*, 19 Pickering (Mass.), 51; 31 Am. Dec. 119; or that he will never be interested in any part of the United States in manufacturing daguerreotype materials. *Dean v. Emerson*, 102 Massachusetts, 480. See also *Keeler v. Taylor*, 53 Pennsylvania State, 467; 91 Am. Dec. 221; *Lange v. Werk*, 2 Ohio State, 519; *Wright v. Ryder*, 36 California, 312; 95 Am. Dec. 186; *Long v. Towl*, 42 Missouri, 515; 97 Am. Dec. 355; *Berlin Works v. Perry*, 71 Wisconsin, 495; 5 Am. St. Rep. 236; *Peltz v. Echale*, 62 Missouri, 171.

A contract limited as to space, but unlimited in time, is not illegal, and may continue for the life of the party restrained, — as an agreement of a miller not to carry on same business within thirty miles of Marion, Indiana, *Bowser v. Bliss*, 7 Blackford (Indiana), 344; 43 Am. Dec. 93; or of a physician not to practise in a certain town within a certain distance of the other party, *Cook v. Johnson*, 17 Connecticut, 175; 36 Am. Rep. 64; or of a lawyer not to practise in a certain town. *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267. See also *Angier v. Webber*, 14 Allen (Mass.), 211; 92 Am. Dec. 748; *Pike v. Thomas*, 4 Bibb (Kentucky), 486; 7 Am. Dec. 741; *Webster v. Buss*, 61 New Hampshire, 40; 60 Am. Rep. 317, citing the first two principal cases; *Hubbard v. Miller*, 27 Michigan, 15; *Curtis v. Gokeg*, 68 New York, 300. See also other cases cited in Lawson on Contracts, § 326, and *French v. Parker*, 16 Rhode Island, 219; 27 Am. St. Rep. 733. In the earlier American cases it was considered that a contract never to carry on a particular business in a certain State was void, *Chappell v. Brockway*, 21 Wendell, 157; *Taylor v. Blanchard*, 13 Allen (Mass.), 370; but it is now held to the contrary, as in *Oregon St. Nav. Co. v. Winsor*, 20 Wallace (U. S. Supr. Ct.), 61, where an agreement not to run a steamboat on any waters in California was held valid; and so in *Beal v. Chase*, 31 Michigan, 490, of a contract not to carry on a publishing business in Michigan; and so in *Diamond Match Co. v. Rocher*, 106 New York, 473; 60 Am. Rep. 464, where an agreement not to manufacture matches for ninety-nine years in any of the United States or Territories, except Nevada and Montana, was sustained.

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But if the party contracts for restraint in respect to a duty which he owes to the public, although in a limited space, equity will not enforce it, — as where a gas company, incorporated and under contract to supply a city, agreed to abandon its right for one hundred years in a particular part of the city to another company. See *New Orleans G. Co. v. Louisiana Light Co.*, 115 United States, 650; *Commercial U. Tel. Co. v. N. E. Tel. Co.*, 61 Vermont, 241; 15 Am. St. Rep. 893 (restricting use of telephone); *Texas S. Oil Co. v. Adone*, 83 Texas, 650; 29 Am. St. Rep. 690; *Vulcan Powder Co. v. Hercules P. Co.*, 96 California, 510; 31 Am. St. Rep. 242.

A contract by a barber, who had no shop nor good-will to sell, to work for another exclusively in a certain town is invalid. *Carroll v. Giles*, 30 South Carolina, 412; 4 Lawyers' Rep. Annotated, 154. The Court seemed to limit the applicability of restrictive agreements to cases of accompanying sales, and to deny their application to cases of the mere exercise of a trade, especially of an unscientific one.

But a contract limited as to time but unlimited as to territory is void, — as on the sale of a stock of goods and a lease, an engagement not to re-engage in that business for five years. *Wiley v. Baumgardner*, 97 Indiana, 66; 49 Am. Rep. 427; *Mossop v. Mason*, 18 Grant Ch. (Upper Canada), 453; *Saratoga Co. Bank v. King*, 44 New York, 87; *Callahan v. Donnolly*, 45 California, 152; 13 Am. Rep. 172, and note 173; *Bishop v. Palmer*, 146 Massachusetts, 469; 4 Am. St. Rep. 339; *Ganewell F. A. Tel. Co. v. Crane*, 160 Massachusetts, 50; 39 Am. St. Rep. 458.

A reasonable limit both as to time and space will always suffice to uphold the restrictive agreement, — as not to engage in casting iron within sixty miles of Calais for ten years. *Whitney v. Slayton*, 40 Maine, 231; or on the sale of a stock of goods and the good-will, not to re-engage in that business in that village for five years. *Washburn v. Dosch*, 68 Wisconsin, 436; 60 Am. Rep. 873; *Newell v. Meyendorff*, 9 Montana, 254; 18 Am. St. Rep. 738; *Nat. Ben. Co. v. Union Hospital Co.*, 45 Minnesota, 272; 11 Lawyers' Rep. Annotated, 437. But the limits must be reasonable. So in *Western Wooden Ware Ass'n v. Starkey*, 84 Michigan, 76; 11 Lawyers' Rep. Annotated, 503; 22 Am. St. Rep. 686, an agreement between manufacturers in different States, one agreeing to sell to the other and not to re-engage in the same business in eight specified States for five years thereafter, nor to allow the premises formerly occupied by him in the business to be used for that purpose, nor to sell them to be so occupied, was deemed invalid, as against public policy, because it would suppress a great local industry, and throw many people out of employment. Citing *Wright v. Ryder*, 36 California, 342; 95 Am. Dec. 186.

If the agreement is apparently unlimited as to time and space, it has been held that to effectuate the real intention of the parties it will be construed so as to impose only a reasonable restraint as to space, and not such a general and unlimited restraint as to be void. Thus in *Hubbard v. Miller*, 27 Michigan, 15; 15 Am. Rep. 153, where the defendant sold to plaintiff his business of well-driving at G., and in consideration thereof agreed "not to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving after" that date, this was construed to impose a restraint upon the defendant within such limits about G. as the business in question would naturally and

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reasonably embrace. See also *Moore, &c. Co. v. Towers, &c. Co.*, 87 Alabama, 206; 13 Am. St. Rep. 23.

But the contrary was held of a contract by a patentee not to "manufacture, sell, or cause to be sold any sand-papering machines of any description." *Berlin Machine Works v. Perry*, 71 Wisconsin, 495.

An interesting application of the principle in question was made in *Herreshoff v. Boutineau*, 17 Rhode Island, 3; 33 Am. St. Rep. 850; 8 Lawyers' Rep. Annotated, 469, where an agreement by a teacher with his employer that he would not for a year after the end of his service at Providence teach French or German, nor be connected with any teachers thereof, in Rhode Island, was held void, not because the restriction "extends through the State, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent."

The most interesting and authoritative of the recent American decisions on this question is probably *Diamond Match Co. v. Roher*, *supra*; and the following passages from the opinion of RUGER, C. J., may be found valuable: —

"The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to *Mitchel v. Reynolds*, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the Court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the Court was sustained."

"It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have, for the purpose of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labour. The laws no longer favour the granting of exclusive privileges, and to a great extent, business corporations are practically partnerships and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigour of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed it has of late been denied that a hard and fast rule of that kind has ever been the law of England. *Rousillon v. Rousillon*, 14 Ch. Div. 351. The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in

Nos. 38, 39, 40. — *Mallan v. May*; *Price v. Green*; *Nordenfelt, &c.* — Notes.

Horner v. Graves, 7 Bing. 735, Chief Justice TINDAL considered a true test to be 'whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public.' When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a partial corresponding restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than the man who having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions."

"In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

"The covenant in the present case is partial and not general. It is practically unlimited as to time, but this under the authorities is not an objection if the contract is otherwise good. *Ward v. Byrue*, 5 M. & W. 548; *Mumford v. Gething*, 7 C. B. (N. S.) 305, 317. It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York constitutes a general restraint within the authorities. In *Chappell v. Brockway*, *supra*, BRONSON, J., in stating the general doctrine as to contracts in restraint of trade, remarked that 'contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void.' The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the Court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was *obiter*, and in reason cannot be

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a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the State are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which from their nature are located; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colourable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint in trade, when upon its face it is only partial."

In *Hulse v. Bonsack M. Co.*, 65 Federal Reporter, 864, a contract by which an employee agreed that if he should make any improvements in the machines of his employer they should be for the exclusive use of the latter, was held valid. The Court cite *Registering Co. v. Sampson*, L. R., 19 Eq. 466; *Ammunition Co. v. Nordenfelt* (1893), 1 Ch. 630; *Morse, &c. Co. v. Morse*, 103 Massachusetts, 73; and observe: "The true test is that made by TINDAL, C. J., in *Horner v. Graves*, 7 Bing. 735: 'Is the restraint such only as to effect a fair protection to the interest of the party in favour of whom it is given, and not so large as to interfere with the interests of the public?'"

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(1866.)

RULE.

WHERE a contract purports to have been made by the person charged, but that person was influenced thereto by overmastering fear brought upon him by the other party, there is no contract which the Courts will enforce.

Williams and others, appellants, v. Bayley, respondent.

L. R., 1 H. L. 200-222 (s. c. 35 L. J. Ch. 717; 12 Jur. N. S. 875; 14 L. T. 802)

Contract. — Undue Pressure. — Overmastering Fear. — Stifling a Prosecution.

A son carried to bankers of whom he, as well as his father, was a [200] customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it, was lying at the bankers dishonoured. He seemed to

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have communicated the fact to the son, who immediately redeemed it: but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered: the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him: —

Held, that the agreement was invalid.

A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity.

Opinion by Lord WESTBURY that the agreement was also void by reason of its object being to stifle a criminal prosecution.

This was an appeal against a decision of Vice-Chancellor STUART, by which certain agreements given by the respondent to the appellants were declared void, and were ordered to be delivered up.

The appellants were bankers at Wednesbury, in Staffordshire. The respondent carried on the business of a coalmaster near that place, and he also occupied a large farm at Knowle, in Warwickshire. One of his sons, William Bayley, had been for some years in business as a dealer in coal and coke at West Bromwich, and at Birmingham. The respondent had for years kept an account at the bank of the appellants, and often had a considerable balance to his credit. In April, 1862, William Bayley opened an account at the appellants' bank. William Bayley had often been a purchaser of coal from his father, and, in that way, many transactions on promissory notes had occurred between them. Notes, too, [* 201] had *been passed by William Bayley into the appellants'

house, and had of late often borne the indorsement of the respondent. On one or two occasions these notes had been dishonoured, and the appellants had given formal notice to the respondent of the fact. On the 6th of January, 1863, an event of that kind occurred, with respect to a note for £247. The respondent, who seemed to have believed it to relate to a note he had indorsed, mentioned the matter to his son, who promised to provide for it. On the day following the notice, it was provided for by William Bayley depositing with the appellants another note of the same

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amount, without the respondent being farther troubled about the matter. William Bayley, however, had, without his father's knowledge, sent to the bank many notes apparently indorsed by his father, but of which the indorsements were forgeries by himself, and their amount at last reached a considerable sum. Suspicion having been excited, application was urgently made by the appellants to the respondent for a settlement, and this application produced the discovery that William Bayley had, in many instances, forged the indorsements of his father, whose liabilities, so created, had become very large. On the 18th of April, 1862, in consequence of communications made to him, the respondent called, in company with his son, Thomas Abishai Bayley, at the appellant's bank, and had an interview with Mr. Deakin, their manager, when the manager stated that William Bayley's liabilities were serious, but if he would act properly, and his friends would back him, all would be right. At this interview the respondent distinctly denied that he had ever given his son authority to make these indorsements, and, on being informed that the amount was £6000 or £7000, said that he was an old man, and could not be expected to beggar himself, but was willing to do anything to assist in reason, and Deakin said that Messrs. Williams did not wish to exercise any pressure upon him.

On Monday, the 20th of April, there was a meeting of all the parties at the bank of the appellants, when some statements were made as to William Bayley's means of meeting the notes which were out. At that meeting the respondent, addressing his son, said, "Now, William, don't deceive the gentlemen, you say you can pay them £1000 a-year?" To which William Bayley * answered, "Yes, father, I can." Philip Williams (one [* 202] of the appellants) thereupon said, "We shall have nothing to do with any £1000 a-year. If the bills are yours" (addressing the respondent) "we are all right; if they are not, we have only one course to pursue; we cannot be parties to compounding a felony." There was afterwards a conversation, in the course of which the solicitor for the bankers said it was "a serious matter;" and the respondent's solicitor added, "a case of transportation for life." Then there was a discussion about the means of meeting the difficulties in which William Bayley was placed, by a partnership between him and his brother Thomas Abishai Bayley; and then again, by some charge upon his wife's property; but through-

out all the conversations which took place, the respondent never admitted any one of the indorsements to be his, or to have been authorized by him. Finally, after discussions of this kind, the solicitor for the appellants expressed his belief that William Bayley's wife had no such interest in property as could be made a valid security, and said that they had been brought to the point from which they started, and could only look to the respondent. The respondent's solicitor, Mr. Duignan, refused to be a party to the respondent making himself liable for the whole amount, and prepared to leave the room where the interview took place, when the respondent (as it was alleged) said, "What be I to do? How can I help myself? You see these men will have their money." Mr. Duignan did leave the place, and, after he had gone, the following agreement was drawn up by the solicitor for the appellants:

"Wednesbury Bank, 20th April, 1863. — To Messrs. Philip and Henry Williams, bankers, Wednesbury. In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge all that my colliery, situate at Tipton, in the county of Stafford, and known as the Tipton Meadow Colliery, with the engines, fixtures, and apparatus thereto belonging, and all other the hereditament and premises described in the title deeds hereinafter mentioned, with the payment to you of £7203 14s. 6d. being the amount advanced by you on the said bills and notes. And I hereby agree to pay to you the said sum of £7203 14s. 6d., and I agree to deposit with you the several title [* 203] deeds and writings relating to the said Tipton *Meadow Colliery by way of equitable mortgage, for securing payment to you of the said sum of £7203 14s. 6d."

To this agreement a list of notes, making up this amount, was appended. These notes were delivered up to the respondent. On the following day the respondent deposited with the appellant's solicitor a bundle of deeds. It turned out that all the proper deeds had not been brought. The others were afterwards brought, and a more formal agreement, but exactly to the same effect, was prepared by the solicitors for the appellants, and was signed by the respondent on the 22nd of April, 1863.

On the 25th of April, 1863, the respondent drew a cheque on the appellant's bank for £5000, in order to transfer that sum to the bank of Messrs. Duignan & Co., at Walsall. This cheque was returned by post. On the same day the respondent's solicitor

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wrote a letter complaining of the agreement which had been entered into against his advice, declaring it to have been obtained under influences improperly exercised, and announcing that he had been instructed to apply for the restoration of Mr. Bayley's deeds, and offering to return "the documents" [the notes] which Mr. Bayley had received from the appellants. This was refused.

On the 27th of April, 1863, William Bayley was adjudicated a bankrupt, on the petition of the respondent; he had absconded two days before that time.

On the 1st of May, 1863, the respondent commenced an action in the Court of Exchequer against the appellants, to recover a sum of £6704 13s. 9d., being the balance standing in his name in the books of the appellants' bank, and also for dishonouring his cheque for £5000.

On the 19th of May, 1863, the appellants brought an action in the Court of Queen's Bench to recover the amount claimed by them on the agreement of the 20th of April.

The respondent filed his bill, which was amended and re-amended, in the Court of Chancery, setting forth the above transactions, and praying that the agreements, dated on the 20th and 22nd of April, might be declared invalid, and be ordered to be delivered up to be cancelled. Answers were put in and evidence taken, and the cause came on for hearing before Vice-Chancellor STUART, who, on the 7th March, 1865, made a decree to that effect, *and directed the respondent to deliver up to [*204] the appellant the notes in respect of which the agreements had been made (4 Giff. 638).¹ This appeal was then brought.

Sir H. Cairns, Q. C., and Mr. E. K. Karslake (Mr. Kingdon was with them) for the appellants: —

The mistake of the VICE CHANCELLOR was this, he assumed that all the negotiations were on the footing of the indorsements being forgeries. That was not so. The appellants did not know that they were forgeries, and had reason to believe that the acts of William Bayley had been done with the knowledge and assent of the respondent, although it was possible that in the amounts he might have exceeded his authority. The father's silence after notice encouraged this belief. The dealings between the parties were therefore always on the footing of the settlement of a simple civil liability. Asserting that, as between themselves and the

¹ See a note by the learned reporter, p. 663

respondent, the respondent was liable, the appellants also believed that William was liable to the respondent, and were quite willing to join in any arrangement by which that liability might be satisfied. This was the first object of the negotiations. It was found that William had not the means of giving the proper security, and then it was arranged that the appellants should give up the notes to the respondent, he giving them security for their amount, so that he would then be put in the best position to assert his claims against his son. The only pressure exerted on the respondent was the pressure of a civil liability, which by his own conduct he had incurred. [Lord CHELMSFORD: In their answer the appellants never suggest that the respondent was civilly liable.] One test of the true nature of the transaction is this: suppose it was legal to compromise a felony, and to allege such compromise as a ground of liability, there was nothing done here which could support such an allegation. In fact there was no such compromise. In a case of this kind, which occurred before Lord ELLENBOROUGH, *Wallace v. Hardacre*, 1 Camp. 45; 10 R. R. 629, his Lordship said, that if any act could be shown which was done to stifle a prosecution, the action could not be maintained, but otherwise, the mere [*205] substitution *of good notes for those which had been forged would not invalidate the plaintiff's right to recover upon them. There was no attempt here to stifle a prosecution; all that was done was to enforce an existing civil liability. In *White v. Spettigue*, 13 M. & W. 603; 14 L. J. Ex. 99, trover was held to be maintainable to recover the value of goods which had been stolen from the plaintiff, though he had not then taken any steps to prosecute the thief. In that case there was no antecedent debt, as there was here, and that circumstance made the decision in *Chourne v. Baylis*, 31 Beav. 351; 31 L. J. Ch. 757, that the civil remedies are suspended until after the conviction of the felon, inapplicable, for there the only debt was that which was constituted by the felony of the clerk. In *The Dudley and West Bromwich Banking Company v. Spittle*, 1 J. & H. 14, where the debt likewise arose out of the felonious act of the debtor, the general right to sue in respect of it was not denied, though it was held that the civil remedy was suspended till the prosecution was instituted. *Stone v. Marsh*, 6 B. & C. 551; 5 L. J. K. B. 201, which afterwards came up to this House, *nom. Marsh v. Keating*, 2 Cl. & F. 250, established the doctrine that civil remedies might exist in

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cases where felonious acts had been committed. The authorities on the criminal law, Hale, Book 2, c. x., Hawkins, Book 1, c. vii., and Russell, Vol. ii. 741–42, Greaves' ed., all showed that there must be a knowledge that a felony had been committed before there could be any misprision of felony, for that phrase meant the knowledge that there had been a felony, and the wilful attempt to conceal it. Here the appellants had reason to believe that whether the name of the respondent was written by himself or not, it was written upon sufficient authority from him in the course of the dealings in which both father and son were engaged. The Courts would not presume that an agreement of this kind was corrupt, but would require distinct evidence that it was so. *Ward v. Lloyd*, 6 Man. & G. 785; 13 L. J. C. P. 5. *Reg. v. Hardey*, 14 Q. B. 529; 19 L. J. Q. B. 196, proceeded on the principle that though indictments, even for misdemeanours, could not be the subject of a reference, still where a verdict of acquittal was taken on them, because no evidence to sustain them was produced, there was *nothing illegal in referring at the same [*206] moment all matters in difference between the parties, though such matters were those which had constituted the groundwork of the indictment. In *De Tastet v. Carroll*, 2 Rose, 462; 1 Stark. 88; 18 R. R. 748,¹ it was held that a transfer of property to a creditor, made on the eve of bankruptcy, under fear of criminal proceedings, is valid.

The Attorney-General (Sir R. Palmer), and Mr. F. W. E. S. Everitt, for the respondent: —

It is impossible to doubt that when a father knows that his son has committed forgery the holder of the forged instrument possesses a power, and exercises an influence over him, which the law considers undue pressure, and therefore will not allow securities obtained from him under such pressure to be enforced against him. In *Ex parte Critchley*, 3 Dowl. & L. 527, a charge of embezzling was pending: the magistrate doubted whether there was not a partnership between the prosecutor and the accused. A warrant of attorney was given to secure payment of the money charged to have been embezzled, and the charge was withdrawn. It was held that the warrant of attorney was invalid, because at the time of giving it a charge of a criminal nature was pending which it was calculated to bring to an end. A similar principle was acted on

¹ See Mont. Bky. Rep. 138 and 153, where the whole history of the case is given.

in *Osbaldiston v. Simpson*, 13 Sim. 513, where the alleged offence was cheating at cards, and the punishment would only have been a liability to penalties under the 9 Anne, c. 14. Even in matters not absolutely criminal, but which are prohibited, the law will not allow itself to be thus defeated by private agreements. In *Osborne v. Williams*, 18 Ves. 379; 11 R. R. 218, a father commanded a post-office packet; with the approbation of the Postmaster-General he sold it to his son, but, by a private agreement between the father and the son, the latter was only to hire the vessel at a settled rent, being allowed £200 per annum for the command. This was held to be a fraud on the Ship Registry Acts, and an account was decreed. That shows that the argument of *in pari delicto* would not prevent the application of the general [* 207] rules of law in such a case. Where a transaction is *contrary to public policy it will not be binding. *Nerille v. Wilkinson*, 1 Bro. C. C. 543. *Wallace v. Hardacre* is not in point. All that was done there was merely to substitute good notes for bad ones. Of course, there could be no difficulty in suing on the good notes. And *Ward v. Lloyd* is not applicable to this case, for there the debtor was merely making a provision for his own lawful debt; he himself denied that he had ever been in fear of a prosecution; and the Court did not think there was sufficient evidence of the fact of a corrupt agreement. Here there was no debt by the respondent: his name had been forged, and forgery cannot create a debt. In *Roche v. O'Brien*, 1 Ball & Bea. 330, a reversionary grant obtained by fraud was set aside, though it had been thirty-four years in existence, and had been confirmed by subsequent acts; and a deed confirming a grant impeached by suit, and compromising rights, the subject of the suit, though obtained from a person apprised of his rights, was set aside, he being compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation. There *Martin v. Littlehales*, 1 P. Wms. 75, n., was referred to, where bonds had been executed, against which relief was given, because the party executing them was under difficulties, and was not then *sui juris*. If that was so in a matter where merely civil rights were concerned, how much more strongly would that principle apply where the party executing an agreement like this was under the influence of a fear of a criminal prosecution, a prosecution for forgery, against his own son! The pressure that could be exerted on a father under

such circumstances is enormous. It is against public policy to allow such an agreement, so obtained, to be valid. In all the cases the consideration of public policy was a great ingredient in the decision. On public policy the decision in *Egerton v. Brownlow*, 4 H. L. C. 1; 23 L. J. Ch. 348, wholly proceeded. All these cases were considered in the *Dudley and West Bromwich Banking Company v. Spittle*, where, it is true that the civil remedy was said to be only suspended, but where all that was done to enforce a civil remedy was done after the party had first discharged his duty to the state by instituting * crim- [* 208] inal proceedings. *Chowne v. Baylis* likewise treated the civil remedy as only suspended, but there the offender was prosecuted and convicted before the debt was attempted to be enforced. Here there can be no doubt that the scheme was to suppress or stifle a prosecution, and that all the parties proceeded with a view to accomplish that object. Agreements made with such an object are void.

Sir H. Cairns replied.

THE LORD CHANCELLOR (Lord CRANWORTH):—

My Lords, although the facts of this case are somewhat complicated, and extend over a considerable length of time, I do not think it is necessary, in giving the advice I am about to tender to your Lordships, that I should go into any detail of the facts, because, having occupied the consideration of the House for two or three days, they are, I am quite sure, present to the minds of all persons concerned. It will be sufficient, I think, to start from this point, that on Friday the 17th of April, 1863, the father being at a railway station, and circumstances having arisen which caused these bankers to have doubts about the signatures to certain bills or promissory notes, and the bankers wishing to satisfy themselves whether a signature was, as it purported to be, that of the father, James Bayley, they presented to him a note for £500 made by the son, and purporting to contain the father's signature, and asked him whether that was his signature. The father denied it. The bank manager, who was present, was much surprised to find that the signature was not correct, and it was arranged that the matter should be looked into, that it should stand over then, and that there should be another meeting with the parties on the following day. It appears that, in the course of the evening of that day, the son, William Bayley, was communicated with. He was informed

of what had taken place; and, I suppose, the conclusion was come to in the family that the son had been in the habit of using his father's name without his sanction. I say "using his father's name without his sanction," for I have no doubt at all in coming to the conclusion (there is not a tittle of evidence to the contrary) that all these signatures were forgeries. That they

[* 209] *were not the signatures of the father is clear, and I do not think there is the smallest reason to suppose that he ever gave his son any express or implied authority to sign the bills in his name.

This matter appears to have come to the knowledge of the family on the evening of the same day. One member of the family, Thomas Abishai Bayley (another son of the respondent and brother of William), who is not at all involved in these transactions, went with his father to the bank, and then considerable negotiation took place. It is obvious that at that time the bankers must have seen that they were in great jeopardy as to the notes, and that they would probably lose their money unless the father came in and assisted the son. I cannot, however, but come to the conclusion, from the evidence, that they strongly suspected, indeed they must be said to have known, that these signatures were forgeries. If the signatures were forgeries, then the bankers were in this position, that they had the means of prosecuting the son. That was clear.

Now the question is, what was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these notes? Was it merely, we do not know these to be forgeries, we do not believe them to be so, but your son is responsible for them, and if you do not help him we must sue him for the amount? Or was it, if you do not pay these notes we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery? What is the fair inference from what took place?

I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of Sir Hugh Cairns, that it is not pressure in the sense in which a Court of equity sets aside transactions on account of pressure, if the pressure is merely this: "If you do not do such and such an act I shall reserve all my legal rights, whether against yourself, or against your son." If it had only been, "If you do not take on yourself

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the debt of your son, we must sue you for it," I cannot think that that amounts to pressure, when parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor, not, indeed, on the first occasion, but afterwards, before anything was done.

But if what really takes place is this: If you do not *assist your son, by taking on yourself the payment of [* 210] these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take, meaning to insinuate, if not to say, we shall hold in our hands the means of criminally prosecuting him for forgery. I say, if it amounts to that, that it is a very different thing. When the parties met on Saturday, there was a very significant expression made use of by Mr. Deakin, the manager, in the presence of one of the bankers, Henry Williams, "We do not wish to exercise pressure on you if it can be satisfactorily arranged." Does the "pressure" mean a pressure arising from our exercising the power, or keeping in our hands the means of exercising the power, of instituting a criminal prosecution? Or does it mean the "pressure" of getting you to make yourself responsible for your son's debt? It must have meant the former, because the context shows that the other was alternatively provided for. When it was said, we do not wish to exercise pressure if it can be satisfactorily arranged, that could not mean, if you take on yourself the debt, without pressure we don't mean to press you. That would be nonsensical. But, on the other interpretation of the words, the sense is very plain. "If you can satisfactorily arrange this, and if you choose" (according to another expression that was used) "to treat it as a matter of business," that is, to take upon yourself the debt, we will not exercise "pressure." Of course not. The "pressure" there referred to must be something different from merely obtaining the security of the father. It amounts to this: "Take your choice,—give us security for your son's debt. If you take that on yourself, then it will all go smoothly; if you do not, we shall be bound to exercise pressure;" which could only mean, to exercise those rights which remain to us, by reason of our holding signatures forged by your son.

That is what took place on the 18th. It was then arranged that there should be another meeting on the 20th. It was urged in the argument, that the bankers could not have contemplated a prosecu-

tion, because they allowed two days to elapse, during which the son might have escaped. But all parties supposed that the father could prevent the prosecution by giving what the bank required.

On Monday, the 20th, the parties met; the father, the [*211] *son, and other members of the family, with the father's solicitor, all met at the bank office. On that occasion, farther conversation takes place. There had been some negotiations going on, to see how the debts of the son could be met or satisfied, what assets he had, and so forth. The father said something about the son paying the bankers by instalments of £1000 a-year. To which one of the bankers answered, "We shall have nothing to do with any £1000 a-year. If the bills are yours" (addressing the plaintiff) "we are all right. If they are not, we have only one course to pursue; we cannot be parties to compounding a felony." Now, according to my interpretation of the law, it does not amount to compounding a felony. But one sees clearly what the parties meant. It was this: If you choose to take on yourself the responsibility of these bills, all will be right; but if not, we cannot be parties to what they call "compounding a felony;" but what Lord ELLENBOROUGH more correctly called "stifling a prosecution." I think that is the only interpretation that can possibly be put on what passed. Then, in the course of this same conversation, the solicitor of the bankers said, "Yes, it is a serious matter," and Mr. Duignan remarked, "it is a case of transportation for life." Now that was said in the hearing of the bankers. They must have heard it. They must have known, while all these negotiations were going on, that all the parties to them understood that this was a case, not of life or death, but of transportation for life. The father, then, was acting in this matter under the notion that if he did not interfere to save his son, the latter would be liable to be prosecuted, and, probably, would be prosecuted for forgery, and so be transported for life.

Then that being, as I think, the clear inference from all the evidence, the question arises: What is the law applicable to such a case? These bankers hold a number of acceptances which one can hardly suppose they did not believe to be forged acceptances. I say that because they never suggest any doubt on the subject. Although the bill of the plaintiff was amended and re-amended, and in the last re-amended bill there is a special charge that the bankers never suggested that the notes, which certainly were not

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in the plaintiff's handwriting, were signed with the privity of the plaintiff, the bankers, in answering that bill, never deny that; but, *on the other hand, one of the witnesses, [*212] Thomas Bayley I think, says that during the whole meeting no such suggestion was ever made. I asked Sir Hugh Cairns, in the course of his argument this morning, if he could point out any suggestion of that kind as having been made; but the only approach to such a suggestion that he could refer to was a question addressed to the father, as to one of the notes, to this effect: "Why did you not answer the letter informing you that it was dishonoured?" It is very true that lawyers might fully understand what that might mean, but I cannot think that that could possibly be understood by the parties as amounting to this, that we do not admit that these indorsements, though not in your handwriting, were not signed by your authority. I think that is an inference which, under all the circumstances of this case, never could be dreamt of as deducible from what so passed. That being so, I think the case in point of fact is this: Here are several forged notes. The bankers, in the presence of the father and of the person who forged them, both being persons of apparent respectability in the country, carrying on business as tradesmen, and the father having the presence and the assistance of his solicitor, the bankers say to him what amounts to this: "Give us security to the amount of these notes, and they shall all be delivered up to you; or do not give us security, and then we tell you we do not mean to compound a felony; in other words, we mean to prosecute." That is the fair inference from what passed. Now is that a transaction which a Court of equity will tolerate, or is it not? I agree very much with a good deal of the argument of Sir Hugh Cairns as to this doctrine of pressure. Many grounds on which a Court of equity has acted in such cases do not apply in this case. The parties were not standing in any fiduciary relation to one another; and if this had been a legal transaction I do not know that we should have thought that there was any pressure that would have warranted the decree made by the VICE CHANCELLOR. But here was a pressure of this nature. We have the means of prosecuting, and so transporting your son. Do you choose to come to his help and take on yourself the amount of his debts,—the amount of these forgeries? If you do, we will not prosecute; if you do not, we will. That is the plain interpreta-

tion of what passed. Is that, or is it not, legal? In my [* 213] opinion, * my Lords, I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers; and I come to that conclusion upon this short ground, that in *Wallace v. Hardacre*, 1 Camp. 45; 10 R. R. 629, although the decision there, founded upon the facts of that particular case, was against the view I am taking, yet there Lord ELLENBOROUGH positively states that which has always been understood to be the correct view of the law upon this subject, namely, that although in that case there was no reason for treating the agreement as invalid, yet it would have been otherwise if the agreement had been substantially an agreement to stifle a criminal prosecution. And although that was merely a *dictum* in a *nisi prius* case, yet on all occasions I have found, on looking at the reports, by the late Lord Campbell, of Lord ELLENBOROUGH's decisions, that they really do, in the fewest possible words, lay down the law, very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognised as giving a true view of the law as applied to the facts of the case. Now, is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can be properly given to an agreement I think that this is such a case, and therefore, in my opinion, the decree is perfectly right. Yet I am bound to say, speaking only for myself, I do not think that on the mere grounds upon which it is put by the VICE CHANCELLOR I should have been inclined to concur with him. At the same time, he, having the whole of the facts before his mind, came substantially to the same conclusion, although he did not express exactly the same grounds on which I rest the propriety of the decree. I have, therefore, no hesitation in moving your Lordships that this appeal be dismissed, with costs, and that the decree be affirmed.

Lord CHELMSFORD: —

My Lords, I agree with my noble and learned friend on the woolsack that the object of the arrangement between the [* 214] parties * was to save William Bayley from a prosecution for forgery; and I make that the foundation of the opinion which I have formed with regard to the agreement having been

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extorted from the father by undue pressure. It appears to me to be quite clear that the negotiations between the parties proceeded upon the footing of forgery having been committed by William Bayley, and of his being liable to a criminal prosecution; and that the bankers, both personally and by means of their agents, — Mr. Thursfield, their solicitor, and Mr. Deakin, their manager, — availed themselves of the fears of the father for the safety of his son to press the arrangement upon him.

It is unnecessary to refer to various passages of the evidence to establish this point. It is sufficient to take the expression of Philip Williams, so often adverted to in the argument, and also by my noble and learned friend. In the affidavit of Mr. Deakin it is stated that he said, “If the bills are yours” (addressing the plaintiff) “we are all right. If they are not, we have only one course to pursue, — we cannot be parties to compounding a felony.” I think the interpretation which my noble and learned friend has put upon those expressions is perfectly correct. Then, again, in the answer of the bankers there is this paragraph: They, Henry Williams and Philip Williams, say that they “believe that the said Mr. Thursfield did once, in the course of the discussion, say, ‘it is a serious matter,’ and that Mr. Duignan immediately said, ‘it is a case of transportation for life;’ but Mr. Thursfield had not said for whom or in what respect it was a serious matter; and no remark was made upon the succeeding observation of the said Mr. Duignan, namely, that ‘it was a case of transportation for life.’” But it is quite clear that Mr. Duignan understood the meaning of the expression of Mr. Thursfield, that “it was a serious matter,” and Mr. Thursfield accepted the interpretation of Mr. Duignan that “it was a case of transportation for life.”

Then, again, I must also advert to the suspicious expression (which has been referred to by my noble and learned friend) of Mr. Deakin, that “the Messrs. Williams did not wish to exercise any pressure on the plaintiff if it could be satisfactorily arranged,” which evidently shows what was passing at least in Mr. Deakin’s mind upon this subject. It was never suggested throughout * the whole negotiation that there was any civil liability on the part of the father. You have the evidence on that subject of Thomas Abishai Bayley, who is said to be a person of very excellent character. He says, “At none of the interviews referred to, nor at any other time, in my presence or hearing, was

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it ever alleged or suggested by the defendants, or either of them, or by any one on their behalf, that the plaintiff's signatures to the said promissory notes were either in his handwriting, or made with his knowledge, permission, privity, or sanction; nor was it even contended, or suggested by the defendants, or by any one on their behalf, that the plaintiff was, or was considered to be, in any way personally liable to the defendants upon them."

It was asked by Sir Hugh Cairns this morning whether there was anything that could be used against the bankers to prevent their insisting on the liability of the father. Probably not. But the questions in this case are: what was the nature of their defence; whether they have insisted at any time that there was any civil liability on the part of the father. Now, let us look at the way in which they put their case in their answer. They say, "The plaintiff rests his case mainly on two grounds; first, that the transactions which led to the said agreements were equivalent to compounding a felony; secondly, that he was induced by force to execute them. But we say, first, that, if any felony was committed (which we do not admit, but which is, as we insist, immaterial as regards the question in this suit), we never compounded it, that is to say, we never forbore, or agreed to forbear, an intended prosecution for it, or even threatened or contemplated a prosecution; and, secondly, we say that no force whatever was used against the plaintiff. He had the advice of his solicitor throughout the negotiations which led to his signing the agreements." Therefore they place their defence entirely upon those two grounds: That there was no compounding of felony, even if a felony had been committed; and that there was no force used, no undue influence exerted on the plaintiff, who acted throughout on the advice of his solicitor.

Then the defence of the bankers being rested entirely on these two grounds, as I have already said, in my opinion, this negotiation proceeded upon an understanding between the parties that [*216] *the agreement of James Bayley, to give security for the notes, would relieve William Bayley from the consequences of his criminal act; and the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers. It appears to me, therefore, that the case comes within the principles on which a Court of equity proceeds in setting aside an

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agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him. Therefore, I agree in thinking that this appeal ought to be dismissed, and the decree of the VICE CHANCELLOR affirmed, with costs.

LORD WESTBURY: —

My Lords, there are two aspects of this case, or rather two points of view, in which it may be regarded. One of them is: Was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? That regards the case with respect to the plaintiff alone. The second question regards the case with reference to the defendants alone. Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?

Now, with regard to the first point, namely, whether this was the voluntary act of the plaintiff, I would put two questions; First, what was the basis of the transaction or negotiations, between the appellants and the respondent, that led to giving the security in question? And, secondly, what was the motive, or inducement, that was brought to bear on the respondent in order to induce him to give the security?

It was skilfully contended on the part of the appellants, by the learned counsel, that the basis of the transaction was either the actual or the possible liability of the father to the debt. But that is an argument wholly unsupported by the evidence; and, on the contrary, it is in every way contradicted by the evidence. There is no ground for concluding, from anything that has been said, that the bankers treated the father as a person who was civilly responsible. There was no attempt on the part of the son, William *Bayley, notwithstanding his distress, to assert at [*217] any time that he had the authority of his father; in point of fact, the father's aid is invoked throughout upon the basis that the son alone was liable, and that, in addition to civil liability, he had contracted a criminal liability. Now that is apparent, not only from the passages which have been read by my two noble and learned friends, but from the whole conduct of the appellants. It must be remembered throughout, that the appellants did not speak out distinctly, for the reason that is given by one of them in a passage that has been referred to, namely, that they could not in any manner be implicated in compounding a felony.

Again, there is a small incident that brings home, at least to my mind, in a satisfactory manner, the truth of the conclusion that the criminal liability of William Bayley was the basis of the whole transaction, and that is the circumstance that Henry Williams wrote on a slip of paper, and communicated to his brother Philip, during the discussion, his own doubt whether the father might not be civilly liable. Now it is quite plain that if the discussion had proceeded, either wholly or partially, upon the notion that there might have been civil liability on the part of the father, the necessity for making such a suggestion by Henry to his brother Philip never could have arisen; and it is perfectly clear also from the fact of the slip of paper not being either read out or acted upon, but, on the contrary, being thrown into the fire by Philip, that he was willing that the transaction should go on on the basis on which it had been started, namely, that there was a *constat* of all parties that the forgeries had been committed, and that William Bayley, therefore, stood in the liability of a felon.

So much in regard to the basis of the transaction. Now what was the motive or inducement which was brought to bear on the respondent? It is necessary to examine a little what was the history of the proceedings, and the interviews that took place. It is perfectly clear that, in the outset, there was a desire on the part of the bankers, and certainly a very great desire on the part of the solicitor for the respondent, Mr. James Bayley, that security should be given for the amount of the debt by means of the property of William Bayley himself, and by means of the property of his wife. There was an attempt made to carry out that mode [* 218] of *securing the debt; and that mode undoubtedly might not have been attended with any objectionable character, so far as the father was concerned. The mode suggested was, that the property of William should be valued; that his brother Thomas should enter into partnership with him; that Thomas should be responsible for one-half of the amount of the valuation, and that the father should add to Thomas's liability his own liability; and that the amount of the debt thus incurred by Thomas and the father should be made available for the partial payment of the bankers. In addition to that, it was proposed that the residue of the debt should be secured by the property of the wife.

Now I desire your Lordships to remark particularly that when that failed, upon the fact being ascertained that the property of the

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wife could not be made the subject of a security, there remained only the application to the father, and the inducing the father at once to take on himself the whole debt of the dishonoured bill of the son. It is very distinctly stated by several witnesses, and though it is partially denied, yet it is but imperfectly denied (for it is denied only to the extent of recollection and belief, and the facts speak for themselves), that after the attempt to get a good and unobjectionable security failed, the discussion did not terminate, but it was renewed on the basis of the plaintiff's coming forward to relieve his son from the situation of peril in which he was placed. The bankers admit, most clearly and distinctly, that they all knew that it was a case of transportation for life. It is perfectly clear that they did not pretend that the father was liable. What remained then as a motive for the father? The only motive to induce him to adopt the debt, was the hope that by so doing he would relieve his son from the inevitable consequences of his crime.

The question, therefore, my Lords, is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security *for the debt of another, which is a contract [*219] without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation.

I have, therefore, my Lords, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father under such circumstances was not the security of a man who acted with that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description.

My Lords, I would add to that, the great folly, nay, impropriety, of the bankers proceeding to take this security from the defenceless old man after his solicitor had left him, protesting in such an emphatic manner against the proceedings which he knew they were about to enter upon. The respondent's solicitor remained so long as a valid contract, namely, that touching the property of William Bayley, was regarded as possible. When that was impossible, and the bankers began to exert pressure on the father, the solicitor left, remonstrating with all parties against the impropriety of what they were about to do.

My Lords, there remains the other aspect of the case, which is this: Was the transaction, regarded independently of pressure, an illegal one, as being contrary to the settled rules and principles of law? Now I concur in a good deal that was said by the learned counsel for the appellants, namely, that if there be an existing debt, to which is superadded an independent security, or if there be a valid legal document in existence, and then a transaction which is open to the charge of forgery, the contract touching the existing debt is not affected by the superadded engagement which may be invalid on the ground of forgery. For example, if I have lent a man £10,000 on the security of an insufficient estate, and he, some time afterwards, brings me a bill of exchange with a forged [* 220] acceptance, to induce me to forego *exercising my right with respect to the mortgage, that mortgage will not be affected by the forgery, and I may abstain from dealing with the forgery, and, nevertheless, pursue my remedy on the original contract. But this is not a case where the bankers are proceeding as against the person liable to them on a contract independent of the forgery. We must take the nature of the contract from the agreement which was entered into, the original agreement, written at the moment, which, no doubt, clearly expresses what was in the mind of the father. The liability of the father is created and embodied in this memorandum, in which, addressing the bankers, the father says, "In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge my colliery." It is impossible, therefore, to have any hesitation as to the fact that the liability of the father is obtained entirely by the consideration of the bankers delivering up the acceptances. That is a wholly different case from the one to which I have referred as put in the argument at the bar.

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Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, "misprision of felony." That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he *was [* 221] aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself.

It is impossible, therefore, if you look at this matter wholly independently of the question of pressure, and confine your attention to the act of the bankers alone, not to come to the conclusion that a great *delictum* was committed when the transaction is viewed simply with reference to the course which they took.

I asked, in the first place, were you not well aware that these bills were forgeries? That is perfectly true. Did you not obtain an additional advantage and benefit, in fact, the payment of your debt, by trading with these bills? That is undoubtedly true. Were you not very well aware that when you so traded with these bills you would either prevent the possibility of a prosecution, or render the possibility of a prosecution so remote, that it could hardly be expected to succeed? That was the inevitable consequence. But if a man does an act which is attended necessarily with an inevitable consequence, he must be taken in law to have foreseen that consequence, and, in point of fact, to have deliberately intended that it should be the result of his action. Here you have these bankers violating that rule of policy, and that rule of justice

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and morality, by using these forged bills to extort from the father a security which he was not liable for, they giving up the bills, and thereby violating their duty, and placing the parties in a situation in which the demands of public justice could not by any possibility be complied with.

My Lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree.

I do not mean for one single moment, by anything I have said, to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law. They might, perhaps, fairly have thought that they were doing the best for the family of

Mr. William Bayley and for the father. I beg particularly [* 222] * that it may not be understood that I mean to convey, by any words that I have used, any reproach on their character. I have used those words as necessary to vindicate the policy and justice of the rule of law, and to show how highly requisite it is that a Court of equity should undo a transaction such as this, whether it is regarded as proceeding from a father who cannot be considered as a voluntary agent, or, taking the other aspect of it, as violating the rules of law which prescribe the duties of individuals under such circumstances. On both of these grounds I think that this is a transaction which ought to be set aside.

Decree or Order affirmed and Appeal dismissed with costs.
Lords' Journals, 21st June, 1866.

ENGLISH NOTES.

Compulsion by overmastering fear, so that the apparent consent is not the act of the free-will of the party, is accepted by all civilized systems of law as a reason for not giving legal effect to a contract. This ground is considered in the Digest, Book IV., title 2, at a length which suggests that the use of illegal compulsion by powerful persons was not infrequent in ancient Rome. It is, perhaps, questionable whether the kind of compulsion in the principal case would have come within the rule of the civil law, which distinguished between the fear of illegal vengeance and that of just punishment. B. IV. II. 7. § 1. And see Stairs' Institutes of Scotch Law, I. 9. 8.

No. 42. — *Taylor v. Chester*, L. R., 4 Q. B. 309, 310. — Rule.

No. 42. — TAYLOR *v.* CHESTER.

(1869.)

No. 43. — DIGGLE *v.* HIGGS.

(C. A. 1877.)

RULE.

WHERE money has been paid under an illegal contract the question whether it can be recovered back depends on whether the parties are *in pari delicto*; and the test is whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party.

But where money has been paid to a stakeholder upon a wagering agreement which is void, but not illegal, by statute, it may be recovered back if demanded before it is paid over to the winner.

Taylor v. Chester.

L. R., 4 Q. B. 309–315 (s. c. 38 L. J. Q. B. 225; 21 L. J. 359).

Contract. — Immoral Consideration. — In pari delicto potior est conditio possidentis.

The plaintiff deposited with the defendant the half of a £50 bank [309] note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note: —

Held, that the maxim, *in pari delicto potior est conditio possidentis*, applied: and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back.

This was an action to recover the half of a £50 Bank of England note. The pleadings, facts, and course of the trial are fully stated in the judgment of the Court.

Feb. 2. Hopwood (Holker, Q. C., with him), for the defendant, in the course of the argument cited *Holman v.* [310]

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Johnson, Cowp. at p. 343; *Biggs v. Lawrence*, 3 T. R. 454, 1 R. R. 740. *Clugas v. Penultima*, 4 T. R. 466, 2 R. R. 442.

Feb. 3. *Herschell* (Pope with him), for the plaintiff. — It [*311] is not the plaintiff, but the defendant, *who relies upon the immorality. The plaintiff does not claim to succeed upon any contract, but on his right of property in the half-note. The cases which may be cited against the plaintiff are divisible into two classes, — first, where it is sought to enforce an illegal contract; secondly, where the person from whom the illegal consideration has moved relies upon the illegality to recover back the money paid under the contract. But these cases do not apply, because here it is the defendant who, by means of an immoral contract, seeks to detain the note deposited.

[HANNEN, J. Parke, B., in *Scarfe v. Morgan*, 4 M. & W. at p. 281, says: "If an illegal contract is executed, and a property either special or general has passed thereby, the property must remain."]

That has never been decided; if it were law, the Court would have to go into all the circumstances of the illegal contract to see if the property had passed. If the plaintiff be right in his contention, it will be unnecessary for the Court to consider the question of illegality; and if it decides in his favour, they will not enforce the immoral contract; but if they decide in favour of the defendant, they will uphold an illegal agreement. If the contract to supply the plaintiff with the means to commit immorality be void, the deposit to procure the means is also void, *Cannan v. Bryce*, 3 B. & Ald. 179; and on the same principle a covenant to pay for the price of land sold to the covenantor for an illegal purpose has been held not to be enforceable. *Bridges v. Fisher*, 3 E. & B. 642; 23 L. J. Q. B. 276.

[MELLOR, J. It is well established by *Pearce v. Brooks*, L. R., 1 Ex. 213; 35 L. J. Ex. 134; No. 32, p. 326, *ante*; and the cases there cited, that if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose, he cannot recover upon it.]

Those were all cases where the Court was asked to enforce the illegal contract.

[HANNEN, J. If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment? In this case a special property has passed to the defendant, and

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according to *Ferret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185, where an interest in realty has *passed, it cannot be [*312] avoided on the ground that it has been gained by a misrepresentation.]

The special property can only be given by the special contract, and the defendant must set up the special contract to detain the note. Suppose the plaintiff had tendered the amount for which the half-note was pledged, the defendant's lien would be at an end; could it then be argued that the plaintiff would not be entitled to recover the half-note?

Holker, Q. C., replied.

Cur. adv. vult.

April 20. The judgment of the Court (MELLOR and HANNEN, J.J.) was delivered by

MELLOR, J. In this case the plaintiff declared on the bailment of the half of a £50 Bank of England note, to the defendant, to be redelivered on request, alleging a refusal by the defendant to redeliver such half-note. The second count was in detinue for the same half-note.

The defendant, after traversing the delivery and detention of the note, and to the second count denying that it was the property of the plaintiff, pleaded separately and specially to both counts in effect, that the half-note in question had been deposited by the plaintiff with the defendant by way of pledge, to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due.

The plaintiff joined issue on the defendant's pleas, and also replied specially that the alleged debt or sum, in respect of which the defendant justified the non-delivery and detention of the half-note, was for wine and suppers, supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly, and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct.

The defendant rejoined, taking issue on the replication, and also demurred to its validity.

On the trial before me at Manchester, the case of the plaintiff was that the note had not been deposited at all with the defend-

[*313] ant, *but had been fraudulently taken and appropriated by her. The jury, however, did not adopt his view of the facts, but found that the note was deposited by way of security, as alleged by the defendant, and they further found upon the evidence that the debt was incurred and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings, the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for £50, to be reduced to nominal damages in case the note should be returned to the plaintiff.

A rule was accordingly obtained to enter the verdict for the plaintiff, on the ground that the jury had found all the issues tendered by the plaintiff in his favour.

This rule and the demurrer to the replication came on together for argument at the sittings *in banco* after last Hilary term, before my Brother HANNEN and myself, and at the close of the argument we took time to consider our judgment.

It was argued on the part of the defendant, in showing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the jury and the facts as admitted by the demurrer, the plaintiff and defendant were *in pari delicto*, and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was argued that it was the defendant who was relying on the illegal transaction as an answer to a claim of the plaintiff, founded on his ownership of the note, and his rights to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that *in pari delicto potior est conditio possidentis*, is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the Courts will not

assist an illegal transaction in any respect:" per Lord
[*314] ELLENBOROUGH in **Edgar v. Fowler*, 3 East, 222, 7 R. R. 433;
Collins v. Bluntern, 2 Wils. 341; Lord MANSFIELD in *Holman v. Johnson*, Cowp. at p. 343.

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The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. *Simpson v. Bloss*, 7 Taunt. 246; 17 R. R. 509; *Firaz v. Nicholls*, 2 C. B. 501. It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Ferret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185, which was cited for the plaintiff, but is the direct result of the transaction upon which the deposit of the half-note took place.

Mr. Herschell's argument was based upon the hypothesis that, in spite of the finding of the jury, the plaintiff was entitled to recover by virtue of his property in the half-note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim.

This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim *in pari delicto potior est conditio possidentis* clearly applies, and is decisive of the case.

*It would also appear from the case of *Scarfe v. Morgan*, [* 315] 4 M. & W. at pp. 281, 282; per PARKE, B., in delivering the judgment of the Court, that, notwithstanding the illegality of the transaction itself, out of which the deposit in this case arose, the lien would exist, because the contract was executed and the special property had passed by the delivery of the half-note to

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the defendant, and the maxim would apply *in pari delicto potior est conditio possidentis*.

It is, however, sufficient in the present case to determine it on the ground that the plaintiff could not recover without showing the true character of the deposit; and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining "the assistance of the law" to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, and there is nothing to raise any such question in this case.

The result, therefore, will be that the verdict must stand for the defendant on the issues taken on the special pleas, and for the plaintiff on the issue taken on the replication; but as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

Diggle v. Higgs.

46 L. J. Ex. 721-725 (s. c. 2 Ex. D. 422; 37 L. T. 27; 25 W. R. 777).

Contract. — Wagering. — Stakeholder.

[721] The deposit of a sum of money by two persons in the hands of a third, to abide the event of a lawful game between the two, is a wager, and not "a subscription or contribution to a prize" within 8 & 9 Viet. c. 109, s. 18.

Such a deposit may be recovered by the depositor from the stakeholder, if demanded, before it is paid over to the winner.

The plaintiff and one M. Simmonite entered into the following agreement:—

Articles of agreement between M. Simmonite and T. Diggle, both of Sheffield, to walk at Higginshaw Ground, Oldham, on the 19th of October, for £200 a side, T. D. to receive 100 yards' start in a mile, £25 a side down, in the hands of C. Higgs, stakeholder; second deposit to be made of £25 each more on the 5th of August, at Mr. Unwin's, to be made up to nine o'clock; the third deposit of £50 on the 16th of September; the final of £100 each to be made at 12 o'clock the day of walking. The men to be on their marks at one o'clock; all the money to be deposited in C. Higgs's hands; the final deposit to be made on the ground. W. Jen

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kins, referee, and C. Higgs, final stakeholder and pistol-firer. If either parties not agreeing to these articles to forfeit the money down.

THOMAS DIGGLE.

M. SIMMONITE. +

The money was duly deposited with Higgs, and the race was run. A dispute arose as to the event, it being alleged that the plaintiff had not fair play; but the referee decided that the race had been won by Simmonite. After the race, while the defendant, as stakeholder, still had the plaintiff's deposit in his hands, the * plaintiff wrote to him giving him notice not to pay [*722] over the money to Simmonite. The defendant, however, disregarded the notice, and paid the money over.

The plaintiff thereupon brought this action against the defendant for the amount of his deposit.

At the trial, before HUDDLESTON, B., at Manchester Spring Assizes, a verdict was given for the plaintiff, and the learned Judge reserved judgment that the point of law might be argued.

On the 15th of May the plaintiff moved for judgment accordingly, and HUDDLESTON, B., gave judgment for the defendant on the authority of *Batty v. Marriott*, 5 C. B. 818; 17 L. J. C. P. 215, at the same time expressing his dissent from the judgment in that case.

Against this decision the plaintiff appealed.

Edwards, for the plaintiff. — This case is really governed by *Hampden v. Walsh*, 1 Q. B. D. 189; 45 L. J. Q. B. 238. It has been decided over and over again that until the money has been actually paid over to the winner, the depositor has a right to recover his money from the stakeholder, and that whether the wager is legal or not; see *Varney v. Hickman*, 5 C. B. 271; 17 L. J. C. P. 162. In that case MAULE, J., says that the statute does not apply to an action where a party seeks to recover his deposit from a stakeholder upon a repudiation of the wager. And no distinction is made between a case where the event of the wager has been ascertained and where it has not. And if we look to the older authorities, *Martin v. Hewson*, 10 Ex. 737; 24 L. J. Ex. 174, and *Hastelow v. Jackson*, 8 B. & C. 221, we see that it does not matter whether the demand is made before or after the event. The question is whether the money has been paid over or not. The case on which the other side will rely is *Batty v. Marriott*. That

case is wrong. The proviso made so applies to *bonâ fide* contributions, not to cases where the subscribers are the competitors.

[CAIRNS, L. C. But how could a *bonâ fide* contribution, such as you mention, be supposed to be a wager? What is the use of the proviso?]

It is added *ex abundanti cautela*. In *Batson v. Newman*, L. R., 1 C. P. 573, MELLISH, L. J., mentions *Batty v. Marriott*, without approval, and the Irish courts disregarded it in *Graham v. Thompson*, Ir. L. R. 2 Com. Law, 64.

C. Russell and C. Crompton, for the defendant. — *Batson v. Newman* is quite consistent with *Batty v. Marriott*. There was no contest in that case, but merely a wager against time. The present case is an action to recover back a contribution, subscribed for a lawful game, after the event. The right to recover depends upon whether the event has happened or not. Till the event the authority of the stakeholder may be withdrawn at any moment. But once the event has taken place, the stakeholder holds the money as money had and received for the use of the winner. The present case does not come within section 18.¹ But if it did, the defendant is protected by the proviso. Suppose there were ten subscribers and competitors; then it would clearly not be a bet, but a contribution. Where is the line to be drawn? It must always be a question of fact whether, in a particular case, it is a wager or a contribution.

[BRAMWELL, L. J. The section applies to lawful and unlawful games alike. Why is this not a contract by way of [* 723] wagering within the first part of the section? I *do not see why the first part should not apply as much as the second. CAIRNS, L. C. I should certainly think it was a wager; and it comes within the first part of the section, unless saved by the second.]

In *Batson v. Newman*, MELLISH, L. J., says the proviso only applies where there is a contest. He does not impugn *Batty v. Marriott*.

¹ By 8 & 9 Vict. c. 9, s. 18, it is enacted that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the

hands of any person to abide the event on which any wager shall have been made, provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

No. 43. — *Diggle v. Higgs*, 46 L. J. Ex. 723.

If this is a wager, why is it not equally a wager when a number of people subscribe? In *Graham v. Thompson*, the contract was admitted to be an illegal wager; and in *Varney v. Hickman*, the demand was made before the event. Those cases therefore do not apply. The section is composed of three parts: the first two apply to wagers generally; the third, where a subscription to a prize has the appearance of a wager. The proviso would be useless, except in doubtful cases. Supposing this to be a wager, *Hampden v. Walsh* no doubt is an authority for the proposition that the money can be recovered from a stakeholder before it has actually been paid over. But in *Savage v. Muller*, 36 L. J. Ex. 178, it is pointed out that an action against the stakeholder is within the very words of the second part of the section. The law says the stakeholder is to decide, and the law will not interfere; then comes the proviso with regard to contributions. The case of *Emery v. Richards*, 14 M. & W. 728; 15 L. J. Ex. 49, shows that a stakeholder in a legal wager, before the passing of 8 & 9 Viet. c. 108, was not in the position merely of agent to two principals, but of trustee under a contract. Then comes the statute, which does not make the contract illegal, but only null and void. This does not alter the position of the stakeholder, who after the event is no longer the agent of the depositor, but still trustee of the money for the winner. He is like an arbitrator at common law whose authority may be revoked before the event, but not afterwards.

CAIRNS, L. C. The first question we have to decide in this case is whether the contract was a wager or not. It appears to me beyond a doubt that it was a wager and nothing but a wager. It was a walking match for £200 a side. The one bet the other £200 that he would beat him in a walking race, and it is not the less a wager because the form was gone through of depositing the stakes with a third person as stakeholder. The winner would have the £200 of the other competitor paid over to him, and would also receive back his own £200, nominally receiving a prize of £400, but really only winning £200.

Then what is the meaning of the statute? Is a contract of this kind excepted from the operation of the 18th section by the proviso? We start with this, that the contract was a wager, and therefore came within the first part of the section, which says, "that all contracts, whether by parole or in writing by way of gaming or wagering, shall be null and void." And the proviso follows

after an intervening sentence, in these words: "and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which the wager shall have been made;" the proviso itself being, "provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." It is perfectly clear there may be in scores of forms "agreements to subscribe or contribute" to prizes without any wager at all; and we cannot read the proviso, which is capable of a rational and intelligible meaning, in a different way,—in the way contended for by the defendant, which would have the effect of neutralising to a great extent the effect of the first part of the section. We cannot suppose that it in effect says though Parliament has declared that no actions shall be brought on wagering contracts, yet such actions shall be brought when the wager takes the form [* 724] * of a deposit, on an agreement that the winner is to take the whole.

I, therefore, read the proviso as if it ran, "Provided always, that where there is a contribution or subscription which is not a wager, this section is not to apply." There is no authority in favour of the defendant's contention in this case, except *Batty v. Marriott*. If that case is to be followed, it cannot be denied that it is very much in point here. But the Court in that case seem to have considered that the question was whether the game or exercise was lawful or unlawful; and having come to the conclusion that it was a lawful game, they seem to have considered that, in consequence of the words "winner or winners of any lawful game" in the proviso, there was nothing in the contract which was struck at by the Act of Parliament; and that the Act was only intended to strike at unlawful games; overlooking the general words in the beginning of the section, which apply equally to all wagering contracts, whether in respect of lawful or unlawful games. When the case of *Batson v. Newman* came before the Court, though there was certainly a difference between that case and the case of *Batty v. Marriott*, one cannot help seeing that *Batty v. Marriott* did not meet with much approval; and, there-

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fore, we cannot consent, sitting in this Court, to follow the latter case. We, therefore, arrive at the conclusion that this was in reality a wager, and that all the consequences follow which are entailed on wagering contracts by the section.

But then it is said that this is an action by one party to the contract, who has revoked the authority given to the stakeholder, on the principle that the contract was null and void; and that section 18 has taken away the plaintiff's right to recover, under words which at first sight seem general enough to have that effect, since they prohibit actions to recover "any sum deposited in the hands of any person to abide the event on which any wager shall have been made." On that I must first observe that the Queen's Bench Division in the case of *Hampden v. Walsh*, seems to have held an action of this kind maintainable; and in *Batty v. Marriott* the objection was not taken. Be that as it may, I am of opinion that the objection cannot be maintained, and what the section amounts to is this: all wagering contracts are null and void. Then, dealing with actions upon those contracts, it says that they cannot be maintained, and enacts that "no suit or action shall be brought or maintained for recovering any sum or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," that is to say, the contract is null and void, and you shall not maintain any action upon it, either against the party to the contract, or against the stakeholder if the sum is deposited. This interpretation seems to make one member of the sentence to correspond with the other; and while the consequences which would follow a valid contract are taken away, any legal right there may be to recover the sum of money paid under the void contract, seems to me to be left untouched. That explanation seems to me to meet the whole of the case, and, with all respect to the learned Judge, I think that judgment ought to be entered for the plaintiff.

COCKBURN, L. C. J. I concur in the result of the LORD CHANCELLOR's judgment, and I quite agree that this is a wager. On that point I cannot entertain a shadow of a doubt. I do not think that this case is protected by the proviso, which, in my opinion, was intended to meet the case of *bond fide* contributions to a prize, to be given to the winner in some lawful competition. But I entertain considerable doubts on the other question. If this were *res integra*, I should have thought that this action was excluded by

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the enactment against the recovery of a sum of money deposited in the hands of any person to abide the event of a wager. It seems to me that what the Legislature intended to effect was, that whereas but for the statutory provision the winner might insist on having the money after the event, or before the event the person who had deposited the sum might have recovered it back [* 725] again from the *stakeholder, the provision of the statute should prevent the waste of the time of Courts of law over litigation in either of the possible cases, and should enact that neither should the wagerer recover his bet from the loser, nor should the depositor have any aid from the Courts of law, but should get back the money deposited in the best way he could. But that question, whatever might have been my opinion if it were *res integra*, has already been before strongly constituted courts in *Varney v. Hickman*, and *Martin v. Hewson*; once in the Common Pleas, before Mr. Justice MAULE, and once in the Exchequer, before Baron PARKE; and I am not desirous of disturbing a question which has been so settled. And perhaps it may be advantageous that people should feel how precarious and uncertain contracts of this nature must of necessity be.

BRAMWELL, L. J. I am of the same opinion, and I will only add one word,—not for the sake of aimless difference. I think the construction put on the section by the LORD CHANCELLOR is right, and I think that the words “no suit shall be maintained,” &c., are needless, and would have been as well omitted, and were only put in by way of pointing out the consequence of the earlier part of the section. And I should be inclined to read them as if they ran, “no suit shall be brought or maintained on any such contract.” I, therefore, agree that our judgment should be for the plaintiff.

Judgment for the plaintiff.

ENGLISH NOTES.

The principle in *Taylor v. Chester* underlies those cases where property has been conveyed or given for an immoral or illegal consideration. *Agerst v. Jenkins* (1873), L. R., 16 Eq. 275, 42 L. J. Ch. 690, 29 L. T. 126, 21 W. R. 878; *Begbie v. Phosphate Sewage Company* (1876), 1 Q. B. D. 679, 35 L. T. 350, 25 W. R. 85; *Herman v. Jeuchner* (1885), 15 Q. B. D. 561, 54 L. J. Q. B. 340, 53 L. T. 94, 33 W. R. 606. In the last mentioned case the plaintiff was held not entitled to recover a sum of money deposited with the defendant to indemnify him against the risks incurred by the latter by becoming surety for the plaintiff in

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a criminal prosecution. If the illegal act has been substantially executed the consideration is irrecoverable. *Kearsley v. Thomson* (1890), 24 Q. B. D. 742, 59 L. J. Q. B. 288, 63 L. T. 150, 38 W. R. 614.

But where the illegal act remains unexecuted, the consideration paid for it may be recovered. *Tappenden v. Randall* (1801), 2 Bos. & P. 467, 5 R. R. 662. There the plaintiff was entitled to recover £200 paid by him on an illegal contract, which had not been executed at the time. In *Symes v. Hughes* (1870), L. R., 9 Eq. 475, 39 L. J. Ch. 304, 22 L. T. 462, A. assigned his property to a trustee, with the intention of defeating his creditors. He then made an arrangement with his creditors and sued the trustee for a re-conveyance of the property. He was held entitled to succeed. In *Taylor v. Bowers* (1876), 1 Q. B. D. 291, 45 L. J. Q. B. 163, 34 L. T. 938, 24 W. R. 499, A. assigned his goods under a fictitious sale to B. in order to defraud his creditors. B. executed a bill of sale to C., who was privy to the previous dealings with A. Before any fraud against the creditors was accomplished, A. claimed the goods from C. He was held entitled to recover them.

The consideration is recoverable where the person who paid it did so under coercion or fraud. *Atkinson v. Denby* (1860), 6 H. & N. 778, 30 L. J. Ex. 361, 4 L. T. 252, 9 W. R. 539; *Williams v. Bayley*, No. 41, p. 455, *ante*; *Regnell v. Sprye* (1852), 1 De G. M. & G. 660. In *Regnell v. Sprye* a conveyance of property in pursuance of a champertous agreement was set aside on the ground that the plaintiff had been induced to make it by fraud of the other, who falsely represented that it was a usual and proper course among men of business to advance money to take up litigation on the terms of undertaking all the risk and sharing the proceeds recovered. In *Atkinson v. Denby*, the plaintiff paid the defendant £50 in order to get his consent to a composition deed, which the defendant had refused to give unless he received something more than the others. The money was held recoverable.

The principle of *Diggles v. Higgs* was involved in *Barclay v. Pearson* 1893, 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. 709, 42 W. R. 74. The defendant in this case had started a *missing word* competition which was in the nature of a lottery. Every competitor sent in a shilling and his guess, and the money so obtained was to be divided amongst the successful. The plaintiff was one of the successful competitors, but an order was made restraining the distribution of the fund owing to the illegal nature of the competition. Mr. Justice STIRLING decided that the plaintiff had no right to the assistance of the Court in demanding this money; and left the defendant in possession of the fund on his undertaking to pay the costs of the action. He was thus left at liberty to distribute the fund according as he might deem himself in honour bound to dispose of it; but he remained subject to the claims of the unsuccessful competitors, each of whom was legally entitled to recover his shilling.

AMERICAN NOTES.

In this country, as in England, the law leaves parties to an executed illegal contract, when equally in fault, to their fate, and therefore will not sustain an action to recover money paid, or goods or lands delivered, under such a contract. *Newstadt v. Hall*, 58 Illinois, 172; *Myers v. Meinrath*, 101 Massachusetts, 366; 3 Am. Rep. 368; *St. Louis, &c. R. Co. v. Mathers*, 71 Illinois, 592; *Kirkpatrick v. Clark*, 132 Illinois, 312; 22 Am. St. Rep. 531; *Waite v. Merrill*, 1 Maine, 102; 16 Am. Dec. 238; *Boutelle v. Melendy*, 19 New Hampshire, 196; 49 Am. Dec. 153; *Patton v. Gilmer*, 42 Alabama, 548; 94 Am. Dec. 665; *Chalfant v. Payton*, 91 Indiana, 202; 46 Am. Rep. 586 (money paid on a contract in restraint of marriage). And so of money paid over in a wager or lost at play. *Babcock v. Thompson*, 3 Pickering (Mass.), 416; 15 Am. Dec. 235; *Meech v. Stoner*, 19 New York, 26, and other cases cited in Lawson on Contracts, § 54, note 7, and Id. § 51 (c), note 3. So of money advanced by one to his partner in the unlawful business of betting on horse races. *Shaffner v. Pinchbeck*, 133 Illinois, 410; 23 Am. St. Rep. 624.

But if the parties were not equally at fault, as for example, where the plaintiff was induced to make the illegal contract through fraud, undue influence, or oppression, he is not without remedy. *Brooks v. Martin*, 2 Wallace (U. S. Supr. Ct.), 81; *Worcester v. Eaton*, 11 Massachusetts, 368; 7 Am. Dec. 155; *Richardson v. Crandall*, 48 New York, 348; *Knowlton v. Congress, &c. Co.*, 57 New York, 532. In the last case the Court recognize the distinction in question, but continue: "We have not been referred to any authority, nor have I found any, where money paid in part performance, and in furtherance of an illegal contract has been recovered back, when both parties were *particeps criminis* and *in pari delicto*, and when its execution was in the control of the contracting parties themselves."

It is however only in the case of a fully executed illegal contract that the recovery is denied. A leading case illustrating this principle is *Spring Co. v. Knowlton*, 103 United States, 49, on removal from New York, disapproving the decision in the same case in 57 New York, *supra*, and citing *Taylor v. Bowers*, 1 Q. B. Div. 291; and *Tylor v. Carlisle*, 79 Maine, 210; 1 Am. St. Rep. 301; *Clarke v. Browne*, 77 Georgia, 606; 4 Am. St. Rep. 98. See also *Shannon v. Baumer*, 10 Iowa, 210; *Bank v. Wallace*, 61 New Hampshire, 24; *Wheeler v. Spencer*, 15 Connecticut, 28; *Adams E. Co. v. Reno*, 48 Missouri, 264.

The doctrine of *Diggle v. Higgs* is supported by a multitude of cases, and is the universal doctrine of the American Courts. See Lawson on Contracts, § 51 (c), note 3; *Reynolds v. McKinney*, 4 Kansas, 94; 89 Am. Dec. 602; *Hardy v. Hunt*, 11 California, 343; 70 Am. Dec. 787. The cases mostly agree that the money may be recovered from the stakeholder before payment by him, after notice not to pay, although the event upon which it was staked has occurred. *Hale v. Sherwood*, 40 Connecticut, 332; 16 Am. Rep. 37; *Gilmore v. Woodcock*, 69 Maine, 118; 31 Am. Rep. 255; *Moore v. Trippe*, 20 New Jersey Law, 263; *Fisher v. Hildreth*, 117 Massachusetts, 558, and many other cases cited by Mr. Lawson. In *Wilkinson v. Tonsley*, 16 Minnesota, 299; 10 Am. Rep. 139, it is said: "There is a remarkable approach to unanimity in

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the authorities in answering this question in the affirmative." See also *Deaver v. Bennett*, 29 Nebraska, 812; 26 Am. St. Rep. 415. But the contrary was held on this point in *Yates v. Foot*, 12 Johnson (New York), 1; *Hill v. Kidd*, 43 California, 615; *Hickerson v. Benson*, 8 Missouri, 8; 40 Am. Dec. 115; and see *Bernard v. Taylor*, 23 Oregon, 416; 37 Am. St. Rep. 693, and note, 697; 18 Lawyers' Rep. Annotated, 859, with notes.

It has even been held that if the stake-money is in the hands of the other party, the party rescinding before the event occurs may recover it. *McKee v. Manice*, 11 Cushing (Mass.), 357; *Harper v. Crain*, 36 Ohio St. 338; 38 Am. Rep. 589.

Under the New York statute the losing party may recover the money staked, although it has been paid over to the winner, by action against the winner or the stakeholder, and it has been held that he may recover it from the stakeholder although it had been paid to the winner at the plaintiff's direction. *Ruckman v. Pitcher*, 1 New York, 392.

It is also held that the parties are not *in pari delicto* where the illegality is created by a statute designed to protect one class of men against another.

There is a conflict in the authorities respecting the recovery of money paid for usurious interest. Some States have statutes giving this right, but it has been held that it is a common-law right. *Palmer v. Lord*, 6 Johnson's Chancery (New York), 95. The recovery may be had in New York, New Hampshire, Pennsylvania, Vermont, Texas, Kentucky, Maine, Ohio, South Carolina, Georgia, Indiana, Mississippi, Wisconsin; but not in North Carolina, Minnesota, Iowa, Illinois, Missouri, Louisiana. See Lawson on Contracts, § 54 (b), note 2.

Money paid for a lottery ticket may be recovered. *Gray v. Roberts*, 2 A. K. Marshall (Kentucky), 208; 12 Am. Dec. 383. So of money deposited in a bank, payable at a future day, in violation of a statute. *White v. Franklin Bank*, 22 Pickering (Mass.), 181; *Parkersburg v. Brown*, 106 United States, 487. So where an agent takes of a pensioner a fee in excess of the statutory allowance, although both were innocent, and the money had been paid to the principal. *Smart v. White*, 37 Maine, 332; 40 Am. Rep. 356.

The common-law doctrine that some wagers were valid and enforceable was from the beginning regarded with disfavour in this country. In *Stoddard v. Martin*, 1 Rhode Island, 1; 19 Am. Dec. 643 (A. D. 1828), the Court observed: "This admission [of the legality of wagers] is made with regret in many of the modern decisions, and were the question *res integra*, there is little doubt that all wagers would now be declared illegal." In *Eldred v. Malloy*, 2 Colorado, 320; 25 Am. Rep. 752, the Court said: "The earlier decisions were founded on a misapprehension of the common law. The courts have enough to do without devoting their time to the solution of questions arising out of idle bets on dog and cock fights, horseraces, the speed of ox teams, the construction of railroads, the number on a dice, or the character of a card that may be turned up." And the Court might well have added, "whether be more ways of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick to seven," a question which Lord Loughborough declined to pass upon, although his Lordship *obiter* observed that it

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was "a question admitting of no doubt, and capable of mathematical demonstration." The Colorado Court concluded: "Appreciating the regrets of the English Judges over the establishment of a wrong rule in Great Britain, we are in favour of making a correct start here, and accordingly hold that no wagering contract is enforceable." See note 37 Am. St. Rep. 697. A rather different view was taken in *Yates v. Foot*, *supra*, where the Court thought that the "virtue of the people" had prevented any harm from bets on election.

Where a contract is void under the Statute of Frauds, with nothing done by the seller (as in case of a contract for the sale of lands resting wholly in parol), the vendee may recover back the money paid thereon, as money had and received, without previous demand. *Nelson v. Shelby Man. & L. Co.*, 96 Alabama, 515; 38 Am. St. Rep. 116. The Court disapprove the English cases and some in the States, holding that the purchase-money may not be recovered back if the vendor is able and willing to convey, although under no legal obligation to do so. See *Marcy v. Marcy*, 9 Allen (Mass.), 8.

Where a woman procures an insurance on the life of her husband, without his knowledge, at the suggestion of the insurer's agent, and on his assurance that it was valid, she may recover back the premiums paid by her. *Fisher v. Met. L. Ins. Co.*, 160 Massachusetts, 386; 39 Am. St. Rep. 495.

SECTION VI. — *Essential Terms or Conditions.*

No. 44. — *BEHN v. BURNES.*

(EX. CH. 1863.)

RULE.

STATEMENTS intended to be a substantive part of the contract, and which are essential to its primary objects, constitute a "warranty" in the sense of a condition on the failure or non-performance of which the other party may repudiate the contract *in toto*.

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32 L. J. Q. B. 204-208 (s. c. 3 Best & Sm. 751; 9 Jur. N. S. 620; 8 L. T. 207).

Contract. — Essential Condition. — Representation.

[204] By a charter-party, dated London, the 19th of October, 1860, the plaintiff's ship was chartered to the defendant as follows: "It is this day mutually agreed between A. B., owner of the good ship or vessel called the *M.*, of 420 tons or thereabouts, now in the port of Amsterdam, and J. B., of London, merchant, that the said ship, being tight, staunch, strong, and every

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way fitted and ready for the voyage, shall with all possible despatch proceed direct to Newport, Monmouthshire," &c., and there take in cargo. On the 15th of October the ship was at N., sixty-two miles from Amsterdam, and not in the port of Amsterdam, and under favourable circumstances would have reached the docks at Amsterdam in twelve hours more, but in consequence of contrary winds and the absence of steam-tug power, she remained at N. till over the 19th of October, and did not reach the docks at Amsterdam till the 23rd of October. She discharged her cargo with all possible despatch, was immediately made ready for sea, and proceeded direct to Newport, where she arrived on the 1st of December. The defendant altogether refused to load the ship. In an action brought against him for such refusal, it was held, by the Court of Exchequer Chamber, reversing the judgment below, that the words "now in the port of Amsterdam," in the charter-party, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charter-party was made, the defendant was justified in saying that there had been a failure of performance of a condition precedent, and in refusing altogether to carry out the contract.

Error was brought in this case by the defendant to review the judgment of the Court of Queen's Bench on a special case (reported below, 31 L. J. Q. B. 73). The action was for breach of contract in not loading the plaintiff's vessel pursuant to a charter-party, dated London, the 19th of October, 1860, which stated, in substance, that it had been agreed "between A. Behn, Esq., owner of the good ship or vessel called the *Martaban*, of 420 tons or thereabouts, now in the port of Amsterdam, and James Burness, Esq., of London, merchant, that the said ship, being tight, staunch, strong, and every way fitted and ready for the voyage, shall with all possible despatch proceed to Newport, in Monmouthshire," there to take in cargo for Hong Kong.

On the 15th of October, 1860, the ship was at Nieuwediep, not within the port of Amsterdam, and about sixty-two miles from the port of Amsterdam, which, under favourable circumstances, she could have reached in twelve hours, but through strong contrary winds she was detained at Nieuwediep till over the 19th of October, and did not reach the docks at Amsterdam till the 23rd of October.

She then discharged her cargo with all possible despatch, and proceeded at once to Newport, where she arrived on the 1st of December, and was ready to receive cargo on the 5th, of which notice was on that day given to the defendant's agent. The defendant however refused to load the ship at all, and hence arose the action.

The defendant pleaded that time and the then situation of the ship were essential and material parts of the contract, and that the ship was not in the port of Amsterdam at the time of the making of the contract, of which fact the defendant then had no knowledge.

The case was argued (Nov. 26, 1862, before ERLE, C. J., POLLOCK, C. B., WILLIAMS, J., CHANNELL, B., and BYLES, J.) by

Sir G. Honyman (F. M. White with him), for the defendant, who contended, as in the Court below, that the expression in the charter-party "now in the port of Amsterdam," made it a condition precedent to the plaintiff's right to enforce the contract against the defendant, that the ship should have been in the port of Amsterdam at the time when the contract was made.

Manisty (M'Lachlan with him) urged, on the contrary, [* 205] that the words "now in the * port of Amsterdam" did not

import a warranty or condition precedent that the ship was in that port at the time stated; that the fact of the ship not being then in the port only gave the defendant a right to maintain a cross-action to recover such damages, if any, as he might have sustained by reason of the ship not being in the port at the time specified, and that it could only amount to a defence to an action for not loading, if it could be shown by the charterer that his main object in entering into the contract had been frustrated by the delay.

Sir G. Honyman replied.

The chief of the authorities cited were referred to below, and are commented on in the judgment. *Cur. adv. vult.*

WILLIAMS, J., delivered the judgment of the Court. — The question in this case is, whether the statement in a charter-party that the ship is "now in the port of Amsterdam" is a representation or a warranty, using the latter word as synonymous with "condition," in which sense it has been for many years understood with respect to policies of insurance and charter-parties. It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Although it is sometimes contained in a written instrument, it is not an integral part of the contract, and, consequently, the contract is not broken, although the representa-

tion proves to be untrue, nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand upon a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, or with a reckless ignorance whether it was true or untrue — see *Elliott v. Von Glehn*, 13 Q. B. 632; 18 L. J. Q. B. 221; and *Wheelton v. Hordisty*, 8 El. & B. 232; 27 L. J. Q. B. 241. If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree, perhaps, sanctioned by judicial authority, — see *Barker v. Windle*, 6 El. & B. 675, 680; *sub nom. Windle v. Barker*, 25 L. J. Q. B. 349, — that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, a representation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable. Although representations are not usually contained in the written instrument of contract, yet they sometimes are, but it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction, which the Court and not the jury must determine. If the Court should come to the conclusion, that such a statement by one party was intended to be a substantive part of this contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but can only be a cause of action for compensation in damages. In the construction of charter-parties this question has been often raised with reference to stipulations that some future thing should be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail or be ready to receive a cargo on or before a given day, has been held to be a condition, — see *Glaholm v. Hays*, 2 Man. & G. 257; 10 L. J. C. P. 98; *Oliver v. Fielden*, 4 Ex. 135; 18 L. J. Ex. 353; *Crockerit v. Fletcher*, 1 Hurl. & N. 893; 26 L. J. Ex. 153; and *Seeger v. Duthie*, 8 C. B. (N. S.) 45; 29 L. J. C. P. 253, — while a stipulation that she shall

[*206] sail * with all convenient speed, or within a reasonable time, has been held to be only an agreement — see *Turra-bochia v. Hickie*, 1 Hurl. & N. 183; 26 L. J. Ex. 26; *Dimech v. Corlett*, 12 Moo. P. C. C. 199; see also *Clipham v. Vertue*, 5 Q. B. 265; 13 L. J. Q. B. 2. But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages — see *Ellen v. Topp*, 6 Ex. 424; 20 L. J. Ex. 241, 245; *Graves v. Legg*, 9 Ex. 709; 23 L. J. Ex. 228, adopting the observations of Williams, Serj., on the case of *Boone v. Eyre*, 2 Black. 1312; see 1 Wms. Saund. 320, *d.*; see also *Elliott v. Von Glehn*. Accordingly, if a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract, — see *Bannermann v. White*, 10 C. B. (N. S.) 844; 31 L. J. C. P. 28, — but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing sold and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for the breach of which he may bring an action to recover damages.

In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply whether, in the true construction of the charter-party, the Court ought to infer that the statement as to the ship being at that date in the port of Amsterdam was meant to be as a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the averment in the plea, that time and the situation of the vessel were essential and material parts of the contract. On the trial of the issue joined thereon, it was no part of the Judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port (supposing it to be untrue) was an essential part of the contract, or a mere representation, and to direct the jury to find for the defendant or the plaintiff accordingly. The question it should seem might also be raised by pleading the material circumstances — as was done in *Graves v. Legg* — on which the defendant relies as leading to the construction which the plea seeks to put on the instrument. Unless one or other of these modes of pleading were adopted, the Court, in case there should be a demurrer to the plea, or an application for judgment *non obstante veredicto*, would be precluded from taking the surrounding circumstances into consideration in aid of the construction.

It is plain that the Court must be influenced in the construction not only by the *language of the instrument, [*207] but also by the circumstances under which and the purposes for which the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in the charter-party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty. Whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So, if it were shown that the charter-party was made for a purpose, such that unless the vessel began her voyage from the port of loading with a cargo on board by a certain time, it was manifest that the object of the charter-party would in all probability be frustrated, the Court might properly be led by these circumstances to conclude

that a statement as to the locality of the ship, coupled with the stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion that appears to have been, to some extent, sanctioned by high authority, — see *Dimch v. Corlett*, — that a statement of this kind in a charter-party which may be regarded as a mere representation, if the object of the charter-party be still practicable, may be construed as a warranty, if that object turns out to be frustrated, because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterwards occur. It is true that in some of the cases in which the question has been whether a stipulation in a charter-party amounted to a condition, the Court decided that question in the negative, and in so doing took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract, might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it; and further suggested that in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated the material object which the charterer had in view — see *Freeman v. Taylor*, 8 Bing. 124; 1 L. J. (N. S.) C. P. 26; *Tarrabochia v. Hickie*, and *Dimch v. Corlett*, see pp. 221, 227 of the report, 12 Moo. P. C. C. But the Court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition if it were not originally intended to be one.

The question on the present charter-party is confined to the statement of a definite fact, the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, when the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For in most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary course of charters in general, it would be so. The evidence for the defendant shows it

to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us, that we ought to hold it to be a condition upon the principles above explained, unless we can find, in the contract itself or the surrounding circumstances, reason for thinking that the parties did not so intend. If it was a condition, and not performed, it follows that the obligation of the charterer dependent thereon ceased at his option, and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. Such was the decision of *Glabholm v. Hays*, where the stipulation in the charter of the ship to load at Trieste, was that she should sail from England on or before the 4th of February ("to sail on or before the 4th of February"); and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-performance. So in *Ollive v. Booker*, 1 Ex. 416, 17 L. J. Ex. 21, the statement in the charter of a ship which * was to load at Marseilles, [* 208] was that she "was now at sea, having sailed three weeks ago," and it was held to be a condition, for the reasons above stated. And we would note that the marginal abstract of this case, in the report, 1 Ex. 416, makes the statement to have been "having sailed three weeks ago, or thereabouts." If the statement had been really so indefinite, it may be that the Court would have come to a different conclusion.

We think these cases well decided, and that they govern the present case. We think that the decision of *Dimech v. Corlett* does not conflict with them, because it is immersed in the specific facts there set out, so as to be a precedent only for cases with very analogous specific facts. The statement in that charter, that the ship was "now at anchor in this port" (Malta), did not avail to release the charterer, because the ship was in the port in the dry dock, although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while, in truth, she was in a dry dock, being built, and was not completed for a month; yet as the defendant was at Malta, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charter-party was broken, but allowed the ship to sail from Malta for Alexandria, without objection, his defence on this point failed.

The Court below, in a manner, referred the case to a Court of

error to say whether the decision should be governed by *Ollive v. Booker* or *Dimech v. Corlett*. We are of opinion, for the reasons assigned, that the decision of *Ollive v. Booker* was sound, and that it governs our decision here. And we are further of opinion that in so holding, we do not at all conflict with the decision in the case of *Dimech v. Corlett* as above explained. On these grounds, we think that the judgment of the Queen's Bench should be reversed.

Judgment reversed.

ENGLISH NOTES.

In all cases of variation between the description of the subject-matter of a contract and the subject-matter of the performance tendered, the test of deciding whether the variation is essential or not, is whether the object tendered is different in *kind* from the object described.

For instance, where goods are sold under a certain denomination, the buyer has a right to expect that they will be such as commercially fall under that description. The fact that they were bought after inspection of the bulk and without warranty makes no difference. *Josling v. Kingsford* (1863), 13 C. B. (N. S.) 447, 32 L. J. C. P. 94. Compare with this *Hopkins v. Hitchcock* (1863), 14 C. B. (N. S.) 65, 32 L. J. C. P. 154. The plaintiff, H. & Co., carried on business as iron manufacturers, having succeeded to a firm of S. & H. The defendant was acquainted with the iron manufactured by the latter firm, which was always marked "S. & H." Knowing of the change in the firm, he ordered "S. & H." bars of H. & Co. The plaintiffs sent iron of the same quality as "S. & H.," but marked "H. & Co." The jury found that there was no value in the brand S. & H. It was held that there was no stipulation for a particular brand, the letters "S. & H." being used to describe a particular quality of iron only. So if a ship when chartered is described as "A. 1," she must have classed at the time as such at Lloyd's. *Routh v. MacMillan* (1864), 2 H. & C. 750, 33 L. J. Ex. 38, 9 L. T. 541, 12 W. T. 381. In *Azemar v. Casella* (1867), L. R., 2 C. P. 431, 677, 36 L. J. C. P. 124, 263, the defendants, through brokers, bought of the plaintiff "the following cotton, viz. ^{D. C.}/_{C.} 128 bales at 25*d.* per lb., expected to arrive in London per *Cheriot* from Madras. The cotton guaranteed equal to sealed sample in the broker's possession; should the *quality* prove inferior to the guarantee, a fair allowance to be made." The sample was of long-staple Salem cotton, and the goods tendered were known as "Western Madras." Held, that the defendants were not bound to accept the cotton with an allowance, for the allowance clause had reference only to inferiority of *quality* and not to difference of kind. With this may be contrasted *Heyworth v. Hutchin-*

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son (1867), L. R., 2 Q. B. 447, 36 L. J. Q. B. 270. There the defendant bought of the plaintiffs at a price named "413 bales of wool to arrive *ex Stige*, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling brokers' possession; and if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." The wool was not similar to sample, and the brokers, after protest from the defendant, awarded an abatement in the price. Held, that as the contract was for the sale of specific goods, the guaranty was not a condition, but a collateral warranty.

In contracts for acting or singing at music halls and theatres, it is implied as an essential condition that the person engaged shall appear in the first and early performances. *Poussard v. Spiers & Pond* (1876), 1 Q. B. D. 410, 45 L. J. Q. B. 621, 34 L. T. 572, 24 W. R. 819. An express stipulation as to attending rehearsals may or may not be essential according to circumstances. In *Bettini v. Gye* (1876), 1 Q. B. D. 183, 45 L. J. Q. B. 209, 34 L. T. 246, 24 W. R. 551, the condition in question was considered not essential.

Where a party has benefited by part performance of the consideration he cannot insist upon treating as essential a condition which has not been complied with, in order to rescind the contract. *Carter v. Scargill* (1875), L. R., 10 Q. B. 564, 32 L. T. 694.

AMERICAN NOTES.

The principal case is cited by Mr. Lawson as "the leading case," and largely quoted from in his text (Contracts, § 217) (b).

It is agreed, in several very important recent American cases, that mere expressions of opinion or recommendation, however false and deceptive, fall short of legal fraud, especially where the party making them had no superior means of knowledge and used no artifice to prevent inquiry. *Ellis v. Andrews*, 56 New York, 83; 15 Am. Rep. 379, and note, 382; *Homer v. Perkins*, 124 Massachusetts, 431; 26 Am. Rep. 677; *Chrysler v. Canaday*, 90 New York, 272; 43 Am. Rep. 166; *Watts v. Cummins*, 59 Pennsylvania State, 84; *Shade v. Creviston*, 93 Indiana, 591; *Gordon v. Butler*, 105 United States, 553; *Cahot v. Christie*, 42 Vermont, 121; 1 Am. Rep. 313; *Neidefer v. Chastain*, 71 Indiana, 363; 36 Am. Rep. 198; *Graffenstein v. Epstein*, 23 Kansas, 413; 33 Am. Rep. 171. To constitute legal fraud, there must be a false and fraudulent statement as to some material fact, as distinguished from a mere alleged opinion, belief, or recommendation. Thus a deceptive and false statement that a farm last year produced a certain quantity of hay would be fraudulent, but not so of a statement it would produce that quantity. *Coon v. Atwell*, 46 New Hampshire, 510; and cases cited in Browne on Sales, p. 106, note 33; especially *Lewis v. Jewell*, 151 Massachusetts, 315; 21 Am. St. Rep. 454; *Clark v. Edgar*, 84 Missouri, 106; 54 Am. Rep. 84; *Conlan v. Roemer*, 52 New Jersey Law, 53.

False statements as to the cost of an article have been considered venial, and so as to the amount the seller had been offered, and as to the amount of

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a business. *Holbrook v. Connor*, 60 Maine, 578; 11 Am. Rep. 212; *Poland v. Brownell*, 131 Massachusetts, 138; 41 Am. Rep. 215; *Haak v. Brownell*, 120 Illinois, 161. But as to cost, see *Luckie v. Berlin M. Works*, 88 Wisconsin, 112; 43 Am. St. Rep. 913.

On contracts of sale, if the seller gives assurance of some fact, coupled with an agreement, express or implied, to make the assurance good or pay for the deficiency, this is a warranty. Bennett's Notes to Benjamin on Sales (6th Am. ed.), p. 622; *Fairbank Canning Co. v. Metzger*, 118 New York, 260; 16 Am. St. Rep. 753.

The word "warrant" need not be used; mere averments of opinion, or praise, do not constitute a warranty; a positive statement of a material fact intended and relied on as a warranty is sufficient. *Kircher v. Conrad*, 9 Montana, 191; 18 Am. St. Rep. 731; *Drew v. Edmunds*, 60 Vermont, 401; 6 Am. St. Rep. 122.

Some Courts hold the intent essential. *McFarland v. Newman*, 9 Watts (Pennsylvania), 55; 34 Am. Dec. 497; *Foster v. Estate of Caldwell*, 18 Vermont, 176; *Ender v. Scott*, 11 Illinois, 35; *Enger & Co. v. Dawley & Co.*, 62 Vermont, 165. Others hold it immaterial. *Reed v. Hastings*, 61 Illinois, 266; *Hackins v. Pemberton*, 51 New York, 198; 10 Am. Rep. 595; *Bower v. Fenn*, 90 Pennsylvania St. 359; 35 Am. Rep. 662.

If the words are ambiguous, the question is for the jury. *Tuttle v. Brown*, 4 Gray (Mass.), 457; 64 Am. Dec. 80 (a cow "is all right"); *Baum v. Stevens*, 2 Fredell Law (Nor. Car.), 411 ("a young, likely, healthy negro"); *Herron & Holland v. Dibrell*, 87 Virginia, 289 (tobacco "sound, sun-dried, and would certainly keep"); *Roberts v. Morgan*, 2 Cowen (New York), 438 ("sound horse except bunch on his leg," but he had glanders); *Cook v. Moseley*, 13 Wendell (New York), 277 (not afraid to warrant horse sound so far as he knew). See *Robson v. Miller*, 12 South Carolina, 586; 32 Am. Rep. 518; *Alexander v. Dutton*, 58 New Hampshire, 282 (corns on a horse's foot).

If the words are unambiguous, they are for the Court. *Daniells v. Aldrich*, 42 Michigan, 58; *Stroud v. Pierce*, 6 Allen (Mass.), 413 (piano "well made and would stand up to concert pitch").

Mr. Bennett thinks the true rule to be that the jury may judge whether the words were of mere opinion or commendation, or of positive affirmation of quality and intended to be so understood and relied on by the buyer, and if the latter, they constitute a warranty in law, and the seller's intent is immaterial. Bennett's Notes (Benj. Sales, 6th Am. ed. p. 625); *Commonwealth v. Jackson*, 132 Massachusetts, 16; *Beals v. Olmstead*, 24 Vermont, 111; 58 Am. Dec. 150; *McClintock v. Ewrick*, 87 Kentucky, 167; *Ormsby v. Budd*, 72 Iowa, 80; *Drew v. Ellison*, 60 Vermont, 401; *Whitworth v. Thomas*, 83 Alabama, 308; 3 Am. St. Rep. 725; *State v. Tomlin*, 29 New Jersey Law, 13; *Bigler v. Flickinger*, 55 Pennsylvania State, 279.

The following have been considered warranties: Piano "warranted for five years," warranty of strength, *Snow v. Schomacker Man. Co.*, 69 Alabama, 111; 14 Am. Rep. 509; horse "sound and kind," *Hobart v. Young*, 63 Vermont, 366; 12 Lawyers' Rep. Annotated, 693; horse "all right but will shy," warranty against partial blindness, *Kingsley v. Johnson*, 49 Connecticut, 462;

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horse "sound and right," but turning out a "cribber," *Walker v. Hoisington*, 43 Vermont, 608; see notes, 3 Lawyers' Rep. Annotated, 181; 12 Id. 639.

The following have been held not warranties: horse "considered kind," *Wason v. Rowe*, 16 Vermont, 525; horse "kind, sound, and gentle," *Holmes v. Tyson*, 147 Pennsylvania State, 305; 15 Lawyers' Rep. Annotated, 200; "wine in merchantable order, to be approved by buyer in three days," *Gen'li v. Starace*, 133 New York, 140; growing crop of tobacco, "to be well cured and in good condition," *Reed v. Randall*, 29 New York, 358; 86 Am. Dec. 305; horse "all right every way for livery purposes," but with foal, *Whitney v. Taylor*, 54 Barbour (New York Supr. Ct.), 536.

The buyer of warranted goods is not bound to return them; he may retain them and sue for damages for breach of warranty, or he may return them and sue for damages. Tiedeman on Sales, § 197; cases cited in Lawson on Contracts, § 454, notes, 1, 3. The return is allowed in Maryland, Massachusetts, Maine, Iowa, Wisconsin, and Illinois, but not in New York, Kentucky, Pennsylvania, Tennessee, Vermont, Indiana, Texas. See Browne on Sales, p. 196; *Day v. Pool*, 52 New York, 416; 11 Am. Rep. 719.

SECTION VII. — *Non-essential Conditions.*No. 45. — *PARKIN v. THOROLD.*

(CH. 1852.)

No. 46. — *HOULDSWORTH v. EVANS.*

(1868.)

RULE.

Time is *primâ facie* not of the essence of the contract. It may be made so, expressly or impliedly, from the nature of the contract or by notice.

Parkin v. Thorold.

16 Beav. 59-76 (s. c. 22 L. J. Ch. 170; 16 Jur. 959).

Contract. — Essential Condition. — Time.

In equity, the time appointed for the completion of a contract is not, as [59] at law, of the essence of the contract; but it may be made so by direct stipulation or necessary implication.

Though time be not originally an essential part of a contract, yet either party may, by notice, insist on its being completed within a reasonable time.

On the 25th of July, 1850, the plaintiff agreed to sell to the defendant a freehold estate. The abstract was to be delivered within

ten days, and by the fifth condition of sale it was stipulated as follows: The purchaser shall pay a deposit, "and sign an agreement for completing the purchase and for payment of the residue of the purchase-money on or before the 25th of October next," at the office of Mr. F., "at which time and place the purchase is to be completed."

The seventh condition provided, "that in case the completion of the purchase, through the default of the purchaser, shall not take place on the 25th of October next, the purchaser shall pay interest, at five per cent., up to the time of actually completing the purchase."

The fifteenth condition provided that if the purchaser "should neglect or fail to comply with the conditions and to complete his purchase by the time and in manner aforesaid," his deposit should be forfeited to the vendor, who should be at liberty to resell, &c.

The conditions were signed by both parties, and the deposit paid.

[* 60] * The abstract was delivered, but difficulties arose, in consequence of a settlement dated in 1804 having been mislaid. A correspondence took place respecting it, and on the 17th of October the vendor's solicitors stated, "I only require time to be able to find the settlement. I believe I have found out where it is."

On the 21st of October, the purchaser's solicitor gave notice, that unless the settlement were produced and the other requisitions satisfied on or before the 5th of November he would treat the contract as at an end, and require a return of the deposit.

On the 7th of November, the deposit was formally demanded. The vendor, on the 8th of January, 1851, offered to produce the deed, but the purchaser then stated that he had long abandoned the contract, and on the 28th of February, 1851, he brought an action for the recovery of the deposit. On the following day (1st of March), the vendor instituted this suit for the specific performance of the contract.

On a motion to dissolve the common injunction to stay the proceedings at law, Lord CRANWORTH, holding that time was at law and in equity of the essence of the contract, and that it had not been waived, dissolved the injunction. The action went on, but was afterwards discontinued, and the cause now came on for hearing.

No. 45. — *Parkin v. Thorold*, 16 Beav. 60-62.

Mr. Stuart and Mr. Terrell for the plaintiff. — Though, at law, time may be of the essence of the contract, yet in equity, where there is no unreasonable delay, the circumstance that the purchase is not completed within the time anticipated by both parties, will not avoid the contract. 1 Sugden, Vendors and Purchasers * (10th ed.), 407; *Seton v. Slade*, 7 Ves. 272; 6 R. R. [* 61] 124; and see Dart's Compendium, &c. 232 (2nd ed.). The time at which a contract is to be performed is not essential in equity as at law. *Radeliffe v. Warrington*, 12 Ves. 326.

"Where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deducted at the time appointed." Sugden's Concise View, &c. 188, p. 2. The case now comes on under circumstances differing from those under which Lord CRANWORTH decided it, and is not therefore governed by his decision. Secondly, the defendant himself has waived the obligation to complete on the day stated, by extending the time.

Mr. R. Palmer and Mr. Speed for the defendant. If time be of the essence of the contract at law, there is no reason why a different rule of interpretation of the same contract should exist in this Court. Lord CRANWORTH has decided, in the present case, that the contract was at an end, and there is no evidence now before the Court which changes the rights then existing between the parties.

But even if time be not essential, still this Court will not interfere where there has been laches and delay on the part of the plaintiff. *Lloyd v. Collett*, 4 Bro. C. C. 469; *Guest v. Homfray*, 5 Ves. 818; 5 R. R. 176; *Alley v. Deschamps*, 13 Ves. 225; *Harrington v. Wheeler*, 4 Ves. 686; *Walker v. Jeffreys*, 1 Hare, 341, 11 L. J. Ch. 209. "The tendency of the Court, in modern cases, has been to restrict the exercise of its jurisdiction in enforcing specific performance * of contracts to those cases [* 62] in which the plaintiff has been prompt in seeking his equitable remedy." *Southcomb v. The Bishop of Exeter*, 6 Hare, 213; 16 L. J. Ch. 378; and see Dart's Compendium, &c. (2nd ed.) 580. At any rate, the purchaser had a right, by notice, to limit a time for the completion, and in default of the vendors making out their title within the specified period to abandon the contract. *Heaphy v. Hill*, 2 Sm. & St. 29; *Watson v. Reid*, 1 Russ. & M. 236; *King v. Wilson*, 6 Beav. 124; and see *Taylor v. Brown*, 2 Beav. 180.

The extension of the time to the 5th of November was for the accommodation of the vendors, and its effect must be limited to that period.

Mr. Stuart, in reply, referred to *Omerod v. Hurdman*, 5 Ves. 736, and argued that there had been “no gross negligence” or “laches” here, but an inevitable accident, arising from the loss of a deed, which the vendors had used every diligence to discover.

THE MASTER OF THE ROLLS. I will take time to consider this case.

THE MASTER OF THE ROLLS (Sir JOHN ROMILLY):—

The plaintiff in this case prays the specific performance of a contract for sale of a freehold estate called Preston, near Southmolton in Devonshire, sold by him by auction on the 25th July, 1850.

The defendant, the purchaser, resists the performance of the contract, and contends, that in the circumstances of this case, he ought not to be compelled to perform it.

[* 63] * The defendant brought an action to recover the deposit on the 28th of February, 1851, and on the following day (the 1st of March, 1851), the plaintiff filed his bill for specific performance, and for an injunction. On the answer being filed, the plaintiff showed cause on the merits against dissolving the injunction, and this motion was heard before Lord CRANWORTH the VICE-CHANCELLOR (2 Sim. (N. S.) 1); it appears that his Lordship, after taking time to consider his judgment, dissolved the injunction. The facts, as they appear in evidence before me, were correctly stated in the answer of the defendant, and substantially the question before me is the same and upon the same materials as the case before Lord CRANWORTH: the only difference being that I have now to determine the cause on the hearing instead of making an order to dissolve or continue an injunction. It is, in truth, obvious to me that the decision of Lord CRANWORTH governs this case; and that I cannot, in this case, make any decree or order other than one dismissing the bill, without coming to a conclusion opposite to that at which his Lordship arrived. If I could, consistently with my sense of propriety, have avoided coming to any decision on this case, I should undoubtedly have done so. I have repeatedly stated that in my opinion uniformity of decision was so important to be obtained, that whenever I found a decision pronounced by one of the VICE CHANCELLORS, I should consider myself to be bound by that

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decision, where it related either to a new matter or was not opposed by contradictory decisions, or on some one of those principles of equity on which all decisions are founded; and that I should do so, even though, if it had originally come before me uninfluenced by any such decision, I * might have come to a different conclusion. It is therefore with great reluctance and with considerable pain that I am about to take upon myself the responsibility of pronouncing a decree in favour of the plaintiff for a specific performance of the contract in question. It is no doubt extremely probable that I may have come to an erroneous conclusion, but I am bound to decide every case according to the best of my judgment on what I believe to be settled principles of equity; and I have the satisfaction of reflecting that as my decision will undoubtedly undergo the ordeal of a higher tribunal, the errors I may commit will not pass unredressed. But I have not thought myself at liberty to decline giving to the plaintiff the decree, which, after the most careful consideration of the principles of equity and the settled decisions, I think he is entitled to, although it is not in accordance with the conclusion expressed by a most learned and able Judge, but which I am not able, consistently, as I think, with these principles or with those decisions by which I am bound, to follow.

The facts of the case are so fully set forth in the report in Mr. Simons' Reports, that it is not necessary for me to refer to them further than to state the conditions of sale containing two provisos, which, though referred to, do not appear in the case before Lord CRANWORTH. The 5th and 7th conditions of sale are to this effect: [*His Honour read them.*] The question upon the facts so appearing is, whether the defendant, by writing the letter of the 21st of October, which was in these terms [*His Honour read it*], and the deed in question not having been produced on the 5th of November, was at liberty to abandon the contract.

The case appears to me to be resolvable into the following questions: The first is, whether time was of the * essence of [* 65] this contract; if it was, the contract was not performed within the time. If it be determined that time was an essential part of the contract, then a second question will arise, whether this part of the contract was waived by the defendant. If it be determined that time was not originally of the essence of the contract, the next question will be, whether the notice of the 21st of October, specifying the 5th of November as the time for the com-

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pletion of the contract, made that time an essential part of the contract, or if not, whether the conduct of the plaintiff, by acquiescence in that notice, or by laches in not actively enforcing his rights, have deprived him of any right to relief in this Court.

Upon the first question, there is no great difficulty in stating the rule, although there may be considerable in applying it to the facts of individual cases. At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a Court of equity; and although the *dictum* of Lord THURLOW, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication. The cases of direct stipulation are, where the parties to the contract introduce a clause expressly stating that time is to be of the essence of the contract. The implication that time was of the essence of the contract is derived from the circumstances of the case, such as where the property sold is required for some immediate purpose, such as trade or manufacture; or where the property is of a determinable character,

as an estate for life. It is needless to refer to the authorities, [* 66] which are numerous, to support these propositions. * Un-

less I am wholly mistaken, they establish, that unless in the cases of direct stipulation, or of necessary implication, time is not considered in Courts of equity to form such a portion of the contract as either party can treat to be an essential part of it.

Against this, it was argued that the later decisions of the Court had, in a great measure, destroyed this distinction between law and equity; that the distinction itself rests on no very intelligible grounds, and is opposed to the provisions of the Statute of Frauds; that a contract must be construed alike at law and in equity; and that a contract to purchase, conditionally, upon a title being made by a given day, cannot be converted into a contract to purchase, provided the title be made out at some day other than that specified in the contract; and that consequently a Court of equity, unless it considers time to be of the essence of the contract in all cases, will be enforcing a contract other than that which has been actually entered into.

I do not concur in this view of the subject. A contract is undoubtedly construed alike both in equity and at law; nay more, a

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Court of law is the proper tribunal for determining the construction of it; and if a serious doubt should arise as to the effect of the words contained in a contract, a case would be directed to a Court of law for its opinion¹ as to the true construction to be put upon the words, which construction would be adopted in equity. But Courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form the substance will be *defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A. has contracted to sell an estate to B., and to complete the title by the 25th October; but no stipulation is introduced that either party considers time of the essence of the contract. A. completes the title by the 26th; at law the contract is at an end, and B. may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds that, unless B. can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action, or to avoid the performance of the contract; not certainly on the ground that the 25th of October was not a part of the contract, but on the ground that it is unjust that B. should escape the performance of a contract, which has been substantially performed by A., by reason of some omission in a formal but immaterial portion of it.

The jurisdiction of equity in the execution of the specific performance of contracts accordingly is eminently discretionary; it will not enforce a contract where doing so would be productive of peculiar hardship on one party to it. This was acted upon lately by the LORDS JUSTICES in the case of *Webb v. The Direct London and Portsmouth Railway Company*, 1 De G. M. & G. 521, 9 Hare, 129. Neither will equity enforce a contract where, though the Court considers the title good, yet considers it sufficiently doubtful that it might reasonably give rise to litigation hereafter between the purchasers and persons not bound by the decree of the Court in the suit for specific performance. It is, I apprehend, on a similar principle, that the Court has regarded the question of time in these matters, *when it has not been specifically [*68] and precisely contracted for, as an essential clause in the contract. It then considers how far either party is injured by the

¹ Cases to law have since been abolished See 15 & 16 Vict. c. 86, s. 61.

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delay, and will not permit one to insist upon that, which, although a formal part of the contract, would in reality defeat the object which both had in view at the time when it was made. It is, I apprehend, on a similar principle also that the whole doctrine relating to equities of redemption, as administered by this Court, is founded. The contract between the mortgagor and mortgagee is precise; if the money and interest is not repaid on the day twelve-month on which the mortgage is made, the estate is to be the property of the mortgagee; the contract is positive and unambiguous, but a Court of equity will not permit that contract to be enforced, and will restrain the parties from enforcing it at law. It treats the substance of the contract to be a security for the repayment of money advanced, and that portion of the contract which gives the estate to the mortgagee as mere form; and accordingly, in direct violation of the contract, it compels the mortgagee, so soon as he has been repaid his principal money and interest and the costs he has been put to, to restore the estate; and this, although the parties have acted on the contract, and the mortgagee has taken possession on the day when default arose, and has continued in possession for many years; in truth, as a general rule it may be said, any number of years not exceeding twenty, acknowledging no title in the mortgagor.

I am of opinion, therefore, that the later decisions of the Court have not altered the doctrine I have stated as to the cases where time is of the essence of the contract.

[* 69] I turn therefore to this contract for the purpose of *examining it by the principles I have already laid down. In the first place, the time specified is not by express words made an essential part of it. This was, in truth, admitted at the bar, and could not be denied; nay more, the seventh condition of sale appears to me to be inconsistent with such a proposition, even if any such could have been maintained on the rest of the contract; and except that it is confined to the default of the purchaser, it is the condition which, in the precedents at the end of the larger edition of *Vendors and Purchasers*, is suggested as proper to be introduced when it is intended by both parties that time shall not be of the essence of the contract.

Do then any such circumstances exist in this case analogous to those to which I have already referred, as raising the presumption that time was an essential part of the contract? I find none. The

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property is not of a perishable nature, the interest in it sold is not of a determinable character, and possession is not required for any purpose of trade or manufacture. I have therefore on the first question come to the conclusion that time was not originally of the essence of this contract.

Having come to this conclusion on the first question, it may be superfluous to express my opinion on the next subordinate point, which would have arisen had I come to an opposite conclusion; but as it may have some bearing on the subsequent part of this case, I think it desirable to do so. I am of opinion then that, if time had been originally of the essence of this contract, the defendant has waived that part of it. The time mentioned in the contract for the completion of the purchase is the 25th of October, 1850, but the defendant, by his solicitor, on the 21st of October, 1850, extends that time till the 5th of November, 1850. If time was * of the essence of the contract, the contract was at an end, [* 70] if the title had not been made out on or before the 25th of October, 1850, but after that letter, the defendant would, beyond all question, have been compellable in equity to complete the purchase, if the title had been completed by the 1st November, 1850, or any other day before the 5th November, 1850. It appears to me, therefore, that after writing this letter the defendant abandoned his right to insist on the completion of the title on the 25th of October, 1850, which was the day specified in the contract.

Assume that he did so at the request and for the convenience of the plaintiff, still the motive for his so acting will not prevent the fact that this letter was an abandonment of their right to insist on the completion of the contract on the 25th October, 1850, and that he could not have refused to complete it if the title had been made out within the time specified in that letter. But, in truth, the only thing resembling a request from the plaintiff was in a letter from his solicitor of the 17th of October in these words: "I only require time to be able to find the settlement. I believe I have found out where it is." And the notice does not certainly state that this further time is given either at the plaintiff's request or for his convenience.

It may undoubtedly be urged that the defendant waived the time only conditionally upon another day being inserted and upon that day being made an essential part of the contract; but this is not, in my opinion, the effect of the letter, nor was it accepted as such

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by the plaintiff, who did not agree to substitute the 5th of November for the 25th of October, or to make that day an essential part of the contract between them. It is obvious that one party [* 71] to a contract cannot at his * will vary one of the terms of it; the assent of both parties to the variation must be obtained, and this was not done, nor do I well understand how, after the letter of the 21st of October, the defendant could maintain an action at law for the breach of the contract by not completing the purchase on the 25th of that month. I have therefore come to the further conclusion that, even if time had been an essential part of the contract, the defendant waived that term in it by the letter of the 21st of October, 1850.

The next question I have to consider is, whether the notice contained in the letter of the 21st of October, 1850, specifying the 5th of November, 1850, as the time for the completion of the contract, made that time an essential part of the contract; or rather, whether it bound the plaintiff to complete within that period of time or to abandon the contract. It is, I consider, the undoubted law of this Court, that although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete, within a reasonable time to be specified in such notice; and if the party receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the parties to their remedies and their liabilities at law. The doctrine on this subject is I think well laid down in *Walker v. Jeffreys*, 1 Hare, 341, 11 L. J. Ch. 209; and *Southcomb v. Bishop of Exeter*, 6 Hare, 213, 16 L. J. Ch. 378; by Sir JAMES WIGRAM.

To determine whether the letter of 21st October was such a notice binding the plaintiff to complete by the 5th November, 1850, it is necessary to refer to the facts. The state of the case was this: In order to make out the title, the original of a [* 72] settlement, a copy of which * was before the defendant's solicitor, was required to be produced for the purpose of examination with the copy. On the 17th of October, 1850, the plaintiff's solicitors wrote to say, they only required time to produce it, and that they believed that they have found where it was. Four days after this, the defendant gives notice, that if the title is not completed by the 5th November, he shall treat the contract as abandoned. On the 7th November, the defendant's solicitor applies

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for the deposit and treats the contract as at an end, and does not afterwards to acknowledge its existence. The question is, whether, in these circumstances, this period of fourteen days was or was not a reasonable time within which to require the plaintiff to produce the deed in question and complete the title, or else to put an end to the contract, and I am of opinion that it was not.

In none of the reported cases can I discover any such time being treated as sufficient for such or a similar purpose. If time was not of the essence of the contract, as for the purpose of considering this question I assume that it was not, it is plain, that this notice must be treated as given pending the discussion on the title, and having no reference to the time mentioned in the contract. The defendant knew the contents of it; the comparison of the copy with the original when produced was all that was required; the draft conveyance was to be prepared and engrossed, which was to be done by the purchaser; and with the strongest desire and intention, on my part, not to weaken the tendency of the modern decisions, which have, in my opinion rightly, held a stricter rule on the subject of time than the earlier ones, I cannot come to the conclusion that this was a reasonable or sufficient time for the purpose specified in the notice.

* But although the notice was not sufficient, then the [*73] next question arises, the plaintiff may have acquiesced in it, or he may, by laches, have waived his right to seek for any relief from this Court. *Heaphy v. Hill* and *Watson v. Reid* establish this proposition, which I apprehend to be the settled law of the Court, viz., that if one of two parties to a contract for the sale of land, give to the other notice that he will not perform the contract, and the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment of the contract, and will leave the parties to it to their remedies at law; and the tendency of modern decisions has been to diminish the time allowed to either party for enforcing his right under the contract. It remains to apply these principles to the facts of the present case. Even though the time given by the notice of the 21st October, 1850, be not, in my opinion, sufficient, the defendant is entitled to have it treated as an express notice of his abandonment of the contract on the 5th of November, 1850; then the question is, whether the plaintiff have acquiesced

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in this notice, or been guilty of such laches, as to prevent him from seeking the assistance of a Court of equity.

On this subject the dates are material. On the 7th of November, 1850, the defendant's solicitor applied for a return of the deposit; on the following day, the plaintiffs' solicitor sent an answer, stating, that in a few days he would be able to produce the deed, and stating the name of a gentleman, who, if the defendant wished to get rid of his contract, would, he believed, take it, and referred to a conditional request for an extension of time made

by the defendant at the time of the sale. During the [*74] month of November the *correspondence is continued as to

whether the defendant did or did not ask for or obtain an extension of the time for completing the purchase till Christmas. In the month of December several applications for the deposit were made by the defendant's solicitor, which were met by evasive answers from the plaintiff's solicitor, till, on the 6th January, 1851, the plaintiffs' solicitor writes to say, that he is in a condition to produce the deed in question, and gives notice where it may be inspected. The following day the defendant's solicitors reiterated their statement of the contract being at an end. On the 22nd January, 1851, the plaintiffs' solicitor states, that he has instructions to file a bill for specific performance. Various other letters take place, showing that steps are taken on both sides for the institution of proceedings, both at law and in equity; and on the 28th February, 1851, the action is brought by the defendant for the deposit, and on the following day this bill was filed.

This statement shows, that there has been no actual acquiescence by the plaintiff in the notice of abandonment given by the defendant. Has there been any implied acquiescence, or any laches on his part, sufficient to prevent him from obtaining the assistance of a Court of equity? The time to be accounted for is from the 21st October, 1850, till the 7th of January, 1851, *i. e.*, two and a half months; but the evidence shows that during that time the plaintiff was, by his solicitors, employed in discovering where the deed in question was, and in freeing it from the lien which prevented its production. On the 7th of January notice of its production is given, and from that time as soon as it appeared the defendant insisted on his previous abandonment of the contract in

spite of the production of the deed, proceedings appear to [*75] have been going on on *both sides for the purpose of enforcing their rights at law and in equity.

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I am convinced that no Court, having regard to these decisions on this subject, will hold, that under these circumstances the plaintiff can be said to have forfeited what rights he had in equity, by reason of any implied acquiescence in the notice of the 21st of October, 1850, or by reason of his having been too negligent and dilatory in the enforcement of his claim.

The short result of the opinion that I have come to is,

First.—That time was not originally of the essence of the contract.

Secondly.—That although express notice will make time of the essence of the contract, where a reasonable time is specified, that the notice of the 21st October did not specify a reasonable time for this purpose.

Thirdly.—That although acquiescence in the abandonment of a contract or laches in seeking the assistance of a Court of Equity will bar a party to a contract enforcing his rights, yet that there are not any facts in evidence before me to justify the Court in holding that the plaintiff acquiesced in such abandonment, or that he has been guilty of such laches as will prevent this Court from enforcing the specific performance of this contract.

There are other parts of this case respecting which evidence is given, which I think it unnecessary to refer to, such as the evidence respecting the conditional *request made [* 76] by the defendant for an extension of the time for completing the purchase on his part till Christmas. It is obvious that this case will be carried to a higher tribunal; and as I have felt myself compelled to differ from the very learned and careful Judge who decided this case on the motion for dissolving the injunction, I have considered it incumbent upon me to state, as clearly as I could, the grounds on which I proceeded, and to state those grounds only on which my decision rests. It is with great regret, but under an imperative sense of duty, that I have thought myself bound to state the conclusion I have come to.

The decree pronounced by me will be the common decree for specific performance, with a reference to the Master as to title, unless that be accepted; and as the suit has been rendered necessary by the resistance of the defendant to perform the contract, it follows, as a necessary consequence from my decision, that the defendant must pay the costs of the suit, so far as the same has been incurred by reason of his resisting his liability specifically to perform the contract.

Houldsworth and others, executors of T. Houldsworth, deceased, v. Evans.

L. R., 3 H. L. 263–284 (s. c. 37 L. J. Ch. 800 ; 19 L. J. 211).

[263] *Company. — Directors' Powers. — Date Specified by Notice.*

Where a general meeting of the shareholders of a company had agreed to certain conditions on which dissenting members were to be allowed to retire from the company, one of which fixed the date at which assent to the arrangement was to be declared : —

Held, that that date was an essential part of the proceeding, and that the directors had no power, after the expiration of that date, to receive proposals and enter into arrangements with any member who desired to retire but had not expressed his wish to do so within the stipulated time.

This was an appeal against an order of the MASTER OF THE ROLLS (made without argument, after the decision by Lord Chancellor CHELMSFORD in *Stewart's Case*, a similar case reported in L. R., 1 Ch. 511), directing that the appellants should be included in the list of contributories in respect of ten shares held by their testator in this company.

The circumstances under which Mr. Houldsworth claimed to have his name omitted from the list of contributories are stated in detail in the judgment of the Lord Chancellor, Lord CAIRNS, and the reference made in that opinion to other cases only requires the following brief general account of the circumstances of the company.

The Agriculturalists' Cattle Assurance Company was formed in 1845 for the purpose which its name implies. Losses were made; and in 1848 difficulties had arisen in carrying on the business, and differences of opinion had arisen between the shareholders as to whether it should be carried on or not. A meeting of shareholders was held at Chippenham on the 2nd of November, 1848, at which certain terms known as "the Chippenham arrangement" were proposed. The terms were in substance that a call of £3 a share should be made; and that shareholders wishing to retire might do so on payment of a certain proportion of the call. The terms were communicated to the shareholders, and amongst others, to Mr. Houldsworth who had not attended the meetings, by a letter which is fully set forth in the judgment of the LORD CHANCELLOR (p. 520, *infra*), and which in short invited acceptance of the terms on or before the 13th November when an adjourned meeting was

to be held. Mr. Houldsworth did not attend the adjourned meeting, nor did he intimate his acceptance on or before the 13th November. He afterwards sent a communication purporting to accede to the arrangement; and the directors purported to cancel his shares accordingly. The Company being wound up in 1861 his name was put on the list of contributories.

Sir R. Palmer, Q. C., Mr. Pearson, Q. C., and Mr. G. [264] Marten, appeared for the appellants.

Mr. Amphlett, Q. C., Mr. Druce, Q. C., and Mr. F. W. Bush, appeared for the respondents.

For the appellants it was contended (in addition to the arguments already advanced in the other cases), that no time was fixed within which members of the company were bound to accede to the terms of retirement agreed upon at the meetings of the 4th and 13th of November, 1848; that all the members of the *company must be taken to have notice of what was [*265] done; and that there was perfect good faith in the case.

For the respondents the arguments in the other cases were repeated, and it was, in addition, contended that assuming the Chippenham arrangement to be binding, Mr. Houldsworth had not duly complied with the terms of it, and that the special arrangement made with him was not assented to by all the shareholders.

The following cases were cited: *Whitmore v. Turquand*, 1 J. & H. 444; affirmed 3 De G. F. & J. 107, 30 L. J. Ch. 345; *Ex parte Gouthwaite*, 3 Mac. & G. 187, 20 L. J. Ch. 188; *Ex parte Blakeley's Executors*, 13 Beav. 133; affirmed 3 Mac. & G. 726; and *Hamer's Devisees' Case*, 2 De G. M. & G. 366; 21 L. J. Ch. 832.

THE LORD CHANCELLOR (LORD CAIRNS): —

My Lords, this is the third of the cases which have been brought before your Lordships by way of appeal in the matter of the Agriculturists' Cattle Assurance Company. In each of them the leading facts are the same, and the question which, as it seems to me, your Lordships have now to determine in this third case is, how to apply those general principles which you have already laid down in the two cases which have been disposed of.

My Lords, in the second of those cases, namely, the case of Smallecombe, your Lordships have considered that the compromise which has been termed the Chippenham arrangement, communicated as it was to the shareholders in the company, and I will not say acquiesced in (for that is hardly the fitting term), but not

actively opposed by them during a long current of years, has become binding upon all the company in such a way as that it cannot be disturbed. In the first of the three cases, namely, that of *Spackman v. Evans*, L. R., 3 H. L. 171, a shareholder who went out, or attempted to go out, not under the Chippenham arrangement, but under a compromise peculiar to the case of himself and a few other shareholders, your Lordships have held that there not having been that public communication of that particular compromise to the shareholders, the exit from the company of that shareholder could not be supported. Now, my Lords, the shareholder whose interests are connected with this appeal is Mr.

Houldsworth, and the question which your Lordships, as [*266] it *seems to me, have to determine is, did Mr. Houldsworth go out of this company under the terms of the Chippenham arrangement, as that arrangement ought to be understood and construed? If he did, then, as it appears to me, the case will be ruled by the decision in *Smallcombe's Case*. If he did not go out under the Chippenham arrangement, but went out under some other arrangement, then it will be for your Lordships to say whether any substantial difference can be taken between the principle applicable to this case and the principle which your Lordships have applied to the case of *Spackman*.

The only facts which in investigating this case your Lordships need be reminded of are these: The Chippenham arrangement began, I think I may say, on the 2nd of November, 1848; the terms of it were communicated and defined on the 13th of November, 1848. Mr. Houldsworth was not present at, and did not in any way intervene in the negotiation for, and the settlement of, the terms of that arrangement. He, in fact, did not in any way indicate even his knowledge of the compromise until the 12th of December, 1848, when he wrote a letter, which I shall have occasion to refer to, to the secretary of the company.

Now, was there, or was there not, anything in the Chippenham arrangement which confined its operation, as regards the persons who would be entitled to avail themselves of it, to the period antecedent to the 12th of December, 1848? For the purpose of answering that question I must ask your Lordships to consider the precise wording of the arrangement itself. But before I do that, I will take leave to remind your Lordships of the general position of the company, and of the circumstances which led to this arrangement being set on foot.

The company was in a very critical position; it had become considerably embarrassed; there was a large amount of debt actually owing, and for this there were no funds to provide. There was considerable division of opinion among the shareholders with regard to the policy to be pursued by the company for the future. There was a strong indication of a disposition on the part of a certain number of the shareholders to despair of the fortunes of the company altogether, and, if they could, to get quit of the company. On the other hand, there were symptoms that some of the *shareholders thought well of the company, [*267] or, at all events, considered that if the company could be put upon a better footing, and some alteration made in its arrangements, it might yet be made to be a prosperous or thriving concern. In that state of things, if there was to be a compromise or arrangement entered into upon the footing of payments being made to the company, and thereupon of releasing shareholders from all future liability, and cancelling their shares, so that they might return to the common stock of the company, I think it is obvious that there could be nothing of greater importance than that it should be ascertained at the earliest possible moment, and in the most definite possible way, what funds, by means of this arrangement, would be coming to the company; what persons would avail themselves of the permission to leave the company; and who for the future must be looked to as the actually remaining shareholders in the company; who might be entitled to say, if the company did become a prosperous concern, that the benefit of that prosperity enured to them and not to those who had elected, or shown a disposition to elect, to leave the company and forsake its fortunes.

My Lords, that being the general character of the arrangement indicated by the circumstances of the company, let me now refer for a moment to the wording of the documents which are before your Lordships upon the subject. Now, I take first the resolution which was proposed at the meeting on the 2nd of November, 1848: it was a resolution of adjournment, but it indicated on the face of it the purpose for which the adjournment was made: —

“That the meeting be adjourned to be held at the New Hall, Chippenham, on Monday the 13th of November instant, at ten o’clock precisely, and that all legal proceedings against shareholders, on the part

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of the company, be stayed until after that date, and that notice be given to all the shareholders of the proposal made by a considerable body of shareholders present personally, or represented, in order that their opinion might be taken thereof."

That was the resolution that was passed.

Then, on the 4th of November, 1848, a circular-letter was sent by the secretary to the different shareholders in these terms : —

"SIR, — I am instructed by the directors of this company to inform you that the enclosed propositions were made by a considerable body of shareholders at the special general meeting held yesterday, and request that you will sign the accompanying form should you wish to re-
[* 268] tire from the company upon the proposed * terms. The special general meeting has been adjourned to be held at the New Hall, Chippenham, on Monday the 13th instant, at twelve o'clock at noon precisely, and in case you should not attend, or return the accompanying form duly signed, on or before that date, you will be held as declining to concur in the proposition submitted to the meeting."

Then follow the terms proposed by the shareholders as to the payments to be made, and the amount of call, which I need not read to your Lordships ; and then appended to those terms there was this blank form to be signed by the person receiving the letter who was minded to sign it : "I beg to inform you that I am desirous of retiring from the Cattle Assurance Company on the above terms."

On reading these documents I own that I cannot entertain any doubt but that the main object of forwarding those propositions to each shareholder, and telling him that there was to be an adjourned meeting, and requesting him to sign the memorandum if he was disposed to sign it, was to enable the adjourned meeting, when it reassembled on the 13th at Chippenham, to know, as far as could be known, who were the persons who, under the arrangement that was proposed, would be desirous of leaving the company ; and on the one hand contributing the sums which upon that footing they were to contribute, and on the other hand surrendering their shares for the benefit of the remaining shareholders.

My Lords, I think it matters not whether you interpret the words at the end of the circular, "and in case you should not attend, or return the accompanying form duly signed on or before that date, you will be held as declining to concur in the proposition submitted to the meeting," as meaning "if you do

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not sign the form you will be understood as refusing to assent to any shareholders leaving the company," or whether you interpret them as meaning, "if you do not sign the form, or attend at the meeting, you will be understood as saying that you do not mean that you wish to retire from the company." I think it matters not in the least which construction you adopt, because whether you adopt the one construction or the other, the consequence follows that the person who received the circular, and who did not either attend the meeting or return the circular signed, must be understood upon the face of it as not concurring in the arrangement that was proposed, either as objecting to it as a * whole, or as objecting to leave the company on the terms [* 269] of it. In either view the person who so acted certainly could not be a person, I think, who could afterwards say that he had assented to the compromise or the arrangement, so far as the terms of this first document are concerned.

Then the adjourned meeting took place on the 13th of November, and now I come to the resolutions passed at that meeting. The first is this : —

"That the sums paid by retiring shareholders shall be paid into a bank in the names of the directors, Mr. Jones, Mr. Goldney, and Mr. Mullins. That the shareholders who have paid the call shall be allowed 5 per cent. interest to the present time;"

pointing, therefore, to the present time, the date of the resolution, as that which, at all events for the purpose of calculating the interest upon the calls, was to be the critical point of time to be looked to.

Then it goes on : —

"That the following agreement between the retiring shareholders and Mr. Deere, on behalf of the shareholders continuing in the company, be agreed to and confirmed."

I do not read this agreement at length, but I will direct your Lordships' attention to one or two features in it. In the first place, the engagement to pay money is an engagement to pay it to the directors, "within one month of the date hereof," the date of the instrument being upon the face of it, the 13th of November, 1848. In the next place, the object is stated to be —

“To effect a dissolution of partnership as regards ourselves in the interest of the said company, and making a return, under the provisions of the Joint Stock Companies Act, of a list of shareholders of the said company, exclusive of our names, so that as regards any future policies to be granted by the said company we shall be in no way responsible thereon.”

“Future,” of course, meaning obviously at a date subsequent to the date of the deed which is thus speaking; the object being that any one who comes to this agreement should be free from the responsibility upon the policies granted after the 13th of November.

Then it is provided —

“The directors shall enforce the payment of the instalment of £1 10s. per share on the said call against all shareholders who have not paid £1 on account of the call to be made, and 10s. per share on such [*270] shareholders who have paid £1 in advance * of the call, on all parties not signing this agreement, the sums to arise from the instalments £1 10s. and 10s., and from the payments to be made by us, the undersigned, and also all moneys to be raised from calls now made or to be made, and moneys now due and owing to the company from agents or others, to be placed in the London and Westminster Bank to the credit of the directors and Gabriel Goldney, Alfred Jones, and Richard Mullins, on the part of the retiring shareholders, and to be appropriated wholly in liquidation of the existing debts and liabilities of the company of the under-mentioned total sums, one-half to be paid on the execution hereof, and the remaining half to be paid within one month from the date hereof.”

My Lords, I do not understand the meaning of language if this means anything but that the parties were agreeing, so far as such an operation could be performed on a joint stock company, for a dissolution of the partnership to take place, and for accounts to be adjusted as at the date of the instrument which I am reading; and if that be so, the essence of the document was this, that the persons to whom it should apply should be persons coming in and assenting to it, whether by the execution of the deed or by mere assent is immaterial, but coming in and assenting to it at the time when it is made, and at which it bears date, they agreeing at that time that those who wished to leave the company should cease to be partners in the company, no longer liable for its engagements, and no longer entitled to any profits or earnings which it might make.

My Lords, I am quite unable to place upon this document which I have read, or upon the documents which precede it, anything which would warrant the idea that if the agreement is to be collected from these documents, any person was to have benefit from it, or to be a party to it, who had not assented to it at the time when this agreement upon the face of it purports to have been made.

Well, my Lords, if that be so, I do not know whether it is material to consider what expressions were afterwards used by the secretary of the company in communicating that agreement to the shareholders in the company. If the communication made by the secretary fell short in stating what had been agreed upon, that is to say, fell short of stating an agreement as large as that which had been come to, it might become, under the question whether shareholders had notice or not, a subject worthy of consideration. But if it be the case (I do not at present say that it was the case) that the secretary went beyond the terms of the agreement in his statement, inasmuch as the question to be determined is, what was *the Chippenham arrangement? it appears to [*271] me to be utterly immaterial whether the secretary did or did not state that arrangement correctly in his letter.

However, a reference was made at the Bar to the letter of the secretary on the 25th of November, in which the secretary stated, that

“The directors deemed it advisable, in consequence of doubts having arisen as to whether some technical irregularity did not exist in the notice of the call made on the 3rd of August last, to make that call over again, giving those shareholders who have paid it credit for the amount paid, as paid in advance of the present call, and allowing them interest thereon accordingly, shareholders therefore electing to remain in the company, who have duly paid the call of the 3rd of August last will be required to pay 10s. per share only, and those who have not paid that call £1 10s. per share only on account of this last call of £4.”

It was said that the word “electing” in this letter meant shareholders who shall or may hereafter elect. Now the word as here used is of course equivocal, because it may mean either shareholders *who shall elect*, or it may mean shareholders *who have accepted the opportunity of election* which was given them by the Chippenham arrangement. But, however that may be, it seems to me impossible to suppose that the true and proper construction of

the Chippenham arrangement, as we find it in its own documents, can be affected, and either enlarged or restrained by the statement of that compromise in this circular letter of the 25th of November.

But, my Lords, there are two circumstances which I should refer your Lordships to, as showing to my mind very satisfactorily that there was no doubt entertained at the time as to the meaning of the Chippenham arrangement, and as to the persons who were entitled to the benefit of it, and that the meaning assigned to it at the time was the meaning which I have ventured to suggest to your Lordships as the proper meaning. One of those circumstances was this. I have already reminded your Lordships that it was on the 12th of December, 1848, that, for the first time, Mr. Houldsworth appears to have taken any notice of the Chippenham arrangement. He did that in a letter, which was written by his brother, dated the 12th of December, 1848, in which he writes to the secretary in these terms: He asks —

“The names of the directors; the nominal value of the shares; the number subscribed for; the number now in the hands of the [* 272] public; the number of shares *the owners of which have retired; the number of shareholders now liable for the present and future proceedings. Whether the option remains to shareholders to forfeit their shares, and retire, and if so, on what terms.”

It is perfectly obvious that it was a matter of doubt in his mind, from the documents which had been communicated to him, whether any longer he had the option of retiring. Now what does the secretary say? The secretary, on the 14th of December, writes in these words: “The time has now elapsed permitted to shareholders to form their opinion, and no more can now retire.” A letter of a different complexion was afterwards written, to which I shall afterwards refer; but your Lordships do not find any explanation given of how it came to pass that this letter was written by the secretary, and I think it impossible not to see that this letter was written by the secretary in the ordinary course of his business, and was the expression, by him, of what he knew at that time was the mind and understanding of the directors of the company: and more than that, it was the expression, by him, of a fact which is of great significance, with regard to the present inquiry. My Lords, I take this to be a statement by the secretary that the directors, at the time at which he was writing, had concluded and

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ended their action under the Chippenham arrangement, and that they had ceased at that time from receiving, or acting upon, any farther applications for retirement from the company upon that footing.

My Lords, at a later period, the 31st of January, another letter was written by the secretary to Mr. Houldsworth, and in that letter he says: —

“In reply to your favour of the 19th instant, I am instructed by the directors to inform you that the deed of the company is too long to furnish you with a copy, but that it is open to you, either to yourself or your solicitor, whenever you may wish to see it, and that if you are desirous of retiring from the company you can do so on payment of all calls, and a farther sum of £2 10s. per call, on receipt of which sum and your scrip your shares would be cancelled.”

My Lords, I think that is nothing more than this, that whereas on the 14th of December the directors thought and avowed that they ceased to have any power of acting any longer upon the Chippenham compromise, they changed their minds between that date and the 31st of January, and they were willing on the 31st of January, if they had power (which I think they had not), to *recommence acting in the direction of releasing [* 273] shareholders from the company upon the terms of the Chippenham arrangement.

My Lords, the other circumstance which I said I thought your Lordships should bear in mind is this: when, after the 31st of January, the directors proceeded to apply, as they thought, the Chippenham arrangement to the case of Mr. Houldsworth, of course they found it was necessary to obtain his signature to an agreement in the form of the resolution approved of by the meeting of the 13th of November, and they sent that form to Mr. Houldsworth to be signed. The moment they came to prepare that form they felt the difficulty in which they were placed, and in order to solve that difficulty they sent to Mr. Houldsworth a form which did not tally with the form agreed to in the resolution of the 13th of November, because it omitted the date which was appended to the form given by the resolution — thereby entirely altering the contents of the instrument itself — because, inasmuch as there were frequent references to the date on the face of the instrument, to which I have already called your Lordships' attention, the

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moment that date was omitted, and another date substituted, the agreement became, not the agreement which was approved by resolution of the meeting at Chippenham, but an agreement wearing an entirely different aspect in its terms.

My Lords, I ought, before leaving this subject, to make this farther observation. It was said in the argument, that it was entirely an irrational thing to suppose that the shareholders in a company of this kind, during the interval between the 4th of November and the 13th of November, would be able to satisfy themselves as to whether it was desirable, or not desirable, for them to come in under the Chippenham arrangement, and to leave the company. My Lords, if the period assigned was too short, the only consequence would be that the shareholders would lose that opportunity which was given them of coming into that arrangement, which might be either adopted or refused. But, in truth, there was no difficulty of that kind in the case, because what led to the arrangement (as I have already pointed out) was this, that the company was divided into two sections, that some were for going on, and some were for not going on. The only object, as I

understand it, of adjourning this meeting, and issuing the [*274] *circular was, that it might become known at the adjourned meeting what were the relative proportions of those two sections of the company; and I believe, judging from the evidence in the case, that not only was ten days a sufficient time for that purpose, but that twenty-four hours, if there had been sufficient opportunity for answering by post, would have been quite sufficient; because I believe that the minds of the shareholders of the company had become agitated by the proceedings which had been taken in the company, and that all that was necessary to be known was upon which side each shareholder would be willing to range himself.

My Lords, if that is at all a true and proper view of the facts of the case, and of the construction to be put upon the documents, the general principles following from the case which your Lordships have already determined, appear to me to be most easy of application. If I am right in my view of the facts and construction of the documents, the arrangement under which Mr. Houldsworth left the company was not the Chippenham arrangement, but a different one. As regards the sum to be paid, it tallied with the Chippenham arrangement, but as regards the time of payment,

and as regards the stringency of the Chippenham arrangement with reference to liability for the engagements of the company from the 13th of November, and abandonment of interest in the profits of the company, if there should be any, the arrangement which Mr. Houldsworth entered into was not the Chippenham arrangement, but was an arrangement which had its inception, not on the 12th of November, 1848, but upon the 19th of February, 1849, on which, for the first time, he became as one with the directors of the company as to his retirement from the concern. My Lords, if that is so, although the variations between the terms of Mr. Houldsworth's arrangement and the terms of the Chippenham arrangement were not so large as they were in Mr. Spackman's case, still, it seems to me, that the principle which led your Lordships to determine Spackman's case must lead to the same conclusion in the present case. In both cases the arrangement called the Chippenham arrangement, which was the only one disclosed to the shareholders, was a different arrangement from that under which both Mr. Spackman and Mr. Houldsworth retired, * and the only question remaining would be as to [* 275] this new and different arrangement under which Mr. Houldsworth retired, whether it was in its turn communicated to the shareholders of the company.

My Lords, I find no evidence whatever of such communication. The only evidence that was attempted to be suggested was this, that in the three balance sheets in the years 1848, 1849, and 1850, certain aggregate sums are brought to charge, on the one side or the other, under the head of "cancelled shares," and that when you read these balance sheets, and go back to the day books and other books of the company, you find that these aggregate sums are, as to one of them, composed of the value of the shares of Mr. Houldsworth. But the question is, did the mention in the balance sheets of "cancelled shares" of itself convey to the minds of the shareholders the knowledge not merely that some shareholders had retired under the Chippenham arrangement, but that another shareholder, Mr. Houldsworth, had subsequently retired under another arrangement, which, if I am right, was not the Chippenham arrangement? My Lords, I think it is impossible to ascribe that effect to the mere mention of "cancelled shares," which might well be shares cancelled under the Chippenham arrangement, because it might be quite possible that, from delay in paying the instalments

or calls, those shares might not be brought to charge, and, in point of fact, some of them were not brought to charge until a year later, so that the terms "cancelled shares" might refer to shares strictly and legally forfeited under the Chippenham arrangement. But, at all events, just as I think your Lordships, in the case of Spackman, if you had nothing in the shape of disclosure to the shareholders but the mention of cancelled shares in the balance sheet, would not be disposed to hold that to be sufficient information to the shareholders, so here I think your Lordships can hardly hold that if this arrangement be not the Chippenham arrangement, but a different one, the mention of cancelled shares in the balance sheets was notice of this arrangement.

My Lords, I therefore advise your Lordships that this appeal should be dismissed, and the only question remaining is the question of costs. In the case of Spackman you thought it right that the appeal should be dismissed without costs. That was [*276] a case in which a shareholder was the appellant. In

the case of Smallcombe your Lordships had before you as an appellant the official liquidator, who, as we were informed, in bringing an appeal in that case as a sample of others, had the sanction of the learned Judge from whom the appeal came. In that case — inasmuch as if you had dismissed the appeal without costs, the effect would have been virtually to leave Smallcombe, the successful party, to bear his own costs — you thought it right, under the circumstances of the case, that the costs of all parties should be provided out of the estate. In the present case we have again an instance of a shareholder who, like Mr. Spackman, appeals here against the decision by which he is fixed as a contributory to the company, and I think it would be right that the appeal should be dismissed without costs, as was done in *Spackman's* case, and then I think your Lordships will have acted, as to costs, upon an intelligible and consistent principle throughout.

LORD CRANWORTH: —

My Lords, it is my misfortune in this case to differ from the conclusion at which my noble and learned friend on the woolsack, and, I believe, also my noble and learned friend on my left (Lord CHELMSFORD), have arrived. In the case of a difference of opinion in the ultimate Court of Appeal it is always very satisfactory to know that the difference is not a difference arising from any doubt as to the principles by which the case ought to be governed, but

merely as to the application of the principles to the particular case. Now, that is the only difference in this case between my noble and learned friend who has just addressed your Lordships and myself. I think with him that it is a most essential proposition, to be rigidly enforced, that in these joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do. If, with knowledge of that fact, the shareholders remain a long time, and take no step whatever, still more if they so remain while great alterations are going on in the company, * they must [*277] be taken to have retrospectively sanctioned what has been done.

Now, my Lords, I put my views of the principles of law upon this subject in as condensed a form as I could in the first of these cases that came before this House, the case of *Spackman*, and I do not intend to trouble your Lordships again in this particular case. The only question here is this: There has been a divergence from the *Chippenham* arrangement in this respect,—that whereas the *Chippenham* arrangement provided that the persons agreeing to that arrangement were to pay one-half of the sums that were applied to their shares in the signing of the agreement, namely, on the 13th of November, and the other half within a month from that period, which would be on or before the 13th of December, the terms on which Mr. *Houldsworth* was allowed to retire were exactly the same as those terms, except that they were not entered into at the date of the *Chippenham* arrangement, nor, indeed, till several months afterwards. Mr. *Houldsworth* applied very soon after the date of the *Chippenham* arrangement to know whether he could get out of the company, and there was a little difference about it. First of all, the secretary wrote one thing, and afterwards he wrote another, but eventually Mr. *Houldsworth* and the other appellants wished to retire, and the directors allowed them to retire upon signing an agreement similar to that which was agreed to at *Chippenham*, except that it had no date put to it. In the copy I had there was no date. I suppose that was the case also in the original.

[Mr. Amplett: That is so, my Lord.]

LORD CRANWORTH:—It was found that the date was inapplicable, and therefore they left it out, the directors having allowed these parties to retire five months after the date of the Chippenham arrangement.

Now, my Lords, the question is, whether the absent shareholders had notice, or that which must be considered notice, that in respect of the date, at all events, the directors had diverged from what had been sanctioned at Chippenham. If they had not, I think, though it certainly would be somewhat unjust, that the principles of *Spackman's case* would apply. But here it appears to me [*278] that, looking *at all the facts of the case, it is impossible

to say that the absent shareholders had not notice, for this reason. Let us see exactly what it was that they had notice of. The first intimation that the shareholders got was by the letter of the 4th of November. By that letter they were informed that a considerable body of shareholders had wished to retire, and that there was to be a meeting on the 13th, at which it was to be proposed that they should retire upon certain terms, which I may designate as the Chippenham terms; except with reference to the date of the meeting there is no mention of date there. Well, the meeting took place at Chippenham and those terms are adopted, except that, upon the formal agreement being drawn up, the term is added that the shareholders agreeing to come into this agreement are to sign this agreement, and to pay one-half of the sums agreed upon on the 13th of November, and the other half on or before the 13th of December. That, I must observe, was never communicated to the absent shareholders, they did not know that there had been that term of the date inserted. I do not, however, absolve them from notice of that, because I think they did know that the details of the scheme were to be settled on the 13th, and it would, therefore, be very difficult to say that they had not notice that it was open to the shareholders at the meeting on the 13th November to make certain alterations in the terms.

Then the next intimation which reaches the shareholders is the letter of the 25th following up the letter of the 4th, calling for the £4 per share, and explaining why they had adopted a call of £4 instead of £3. In fact, it was no substantial alteration; it was only an alteration of the form, enabling the company to get more conveniently payment of the calls which had been made. Then it ends, "shareholders, therefore, electing to remain in the company

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who have duly paid the call of the third of August last, will be required to pay 10s. per share only, and those who have not paid that call £1 10s. per share only, on account of this last call of £4." Now, I think that a shareholder on receiving that letter, and coupling it with the preceding letter of the 4th of November, inasmuch as the letter of the 4th of November had said nothing about any particular date, and as the letter said that shareholders electing to retire are to pay so and so, conformably to the letter of *the 4th of November, would necessarily infer that [* 279] shareholders electing not to remain in the company, but to retire from the company, were to pay according to the notice which had been given in that letter, namely, a certain proportion according to the value and number of their shares. That is the notice which they got, and everything that was done was in conformity to those two notices. Because nobody could say that the arrangement made in this case would not come within the fair meaning and scope of the two notices, putting out of the question the actual detail of the dates fixed by the Chippenham arrangement. That being so, if those were the only terms of the agreement, I should say that the shareholders, having had notice of them, were clearly bound, because they went on for years without making any complaint or taking any steps upon the subject. Applying strict principles to the case I quite agree with my noble and learned friend that, inasmuch as the shareholders knew by the notice of the 4th of November that the terms were to be settled in form, or that they might be altered in any way at Chippenham, they must be taken to have had notice of what was done at Chippenham, and I will take it that they had notice that at Chippenham it was said, "You must pay your agreed amount, one-half on or before the 13th of November, and the other half on or before the 13th of December." Assume that to be so, had the absent shareholders, or had they not, notice that that part of the arrangement had been entirely departed from by the directors, — wrongfully, if you please, but departed from? I think, my Lords, that they had, because I think it is impossible that they could have misunderstood the three balance sheets, one of them being a balance sheet for two successive half years, ending in June and December, 1848; the next being for the half year ending in December and the 30th of June, 1849; and the next being for the year ending the 30th of June, 1850. In the balance sheets for all these periods, ending in 1848, 1849,

and 1850, there were three entries. In the first two there were entries of very large amounts of "cancelled shares," in the last, not so large, but still considerable.

Now, I cannot listen to the suggestion that the absent shareholders might have thought that those were shares forfeited under the terms of the deed because the parties had become insolvent — [*280] solvent — *that is preposterous. Although I would allow the greatest latitude to the principle that shareholders are not bound to inquire, one cannot suppose that they thought anything so absurd as that more than half the shares of the company had been forfeited because the holders had become insolvent, — coupling that with the notices which they had received, we may fairly conclude that they must have supposed that during this period the directors had been taking upon themselves to cancel the shares. If so, they must have known that the directors were doing something which, according to the terms of the Chippenham arrangement, taking time as part of the arrangement, they were not authorized to do. Well, but it was a divergence from what they were authorized to do of the minutest importance, and they might think it very unimportant to them whether the money was paid a little sooner or a little later.

Now, I say they must have known it. It occurred to me, however, at one time, that, perhaps they did not know it, for they might think that, although the parties had come into those terms at the proper date, the shares had not been forfeited till later. But that could not be; they must have known that the entries were made when the agreements were made with persons to forfeit their shares. Why do I say that? The shares could not be forfeited till two months after there had been default. Then there could have been no shares forfeited appearing in the balance sheet ending with the year 1848, because two months had not elapsed. Therefore, the shareholders must have known that those entries of forfeited shares did not relate to the time when, in point of form, the forfeiture was to take place, but to a later time when the directors agreed with parties to let them out upon those terms.

My Lords, under these circumstances I own that it appears to me that the shareholders must be taken to have had notice that in that respect, in point of date, the arrangements that had been made at Chippenham were not adhered to. That might have been very good reason for any of those who had entered into that

arrangement, saying, "I will not be bound by it, because you have gone on allowing shares to be cancelled after the time when you were authorized to allow them to be cancelled." But they did not interfere, and not having so interfered, I think, for the reasons * which I put forward more at length in the judg- [* 281] ment in *Spackman's Case*, that they ought to be bound. Now, one word as to the judgment in *Spackman's Case*. My opinion in *Spackman's Case* was (and I believe I so expressed it) that if at the time that that arrangement was entered into the directors had written, or Spackman had written, to every shareholder, saying that Spackman had been let out, but not on the terms of the Chippenham arrangement, telling them what the terms were, I should have held that Spackman was certainly not liable, any more than I think that the Houldsworths are now liable. The difference between the two cases is this: that in this case there were communicated to the shareholders, as I think, facts which showed that the directors could not have been acting in conformity with the Chippenham arrangement in point of date. But in *Spackman's Case* there was not communicated anything which showed to them that the terms in point of money payment upon which Spackman was allowed to retire were different from that of the Chippenham arrangement.

My Lords, I thought it my duty to the parties to show that I did not differ from my two noble and learned friends in this case without having well considered the subject; but having done so, it is a great satisfaction to me to know that I concur with both my noble and learned friends upon the general principle, and only differ from them on the ground that I think the variations from the terms of the Chippenham arrangement were substantially communicated to the shareholders in this case, and that therefore they were not entitled to set aside the arrangement.

Lord CHELMSFORD: —

My Lords, the question to be decided upon this appeal is whether, assuming the Chippenham arrangement to have been valid, any shareholder could have the benefit of it who did not accede to it on or before the thirteenth of November.

It appears to me that the proposed arrangement was of a nature to require that a certain day should be fixed for its completion. There were liabilities pressing upon the company, and a schism amongst the shareholders, some wishing to break up the company,

and some to continue it. Under these circumstances, it was essential that the directors should know by a certain [* 282] time *whether they would have funds to meet their liabilities, and what shareholders were disposed to retire, and what to remain. Accordingly they fix upon the day of the meeting (the 13th of November) as the day upon which they were to be definitively informed upon these points. The agreement which the retiring shareholders were to sign was dated on this day. Under it the retiring shareholders were to pay the amounts set opposite to their respective names within one month from the date; and at the meeting it was resolved that the shareholders who had paid the call should be allowed 5 per cent. interest "to the present time." I am satisfied that it was the original intention of the directors that it should be determined, on the day named, who were the retiring and who the continuing shareholders, and that they never contemplated, at the time it was proposed to the shareholders, that the Chippenham arrangement should be a standing offer to the shareholders to retire from the company on the terms proposed at any subsequent period. Nor could the shareholders, whose acquiescence would alone give validity to the arrangement, understand it in that sense. Supposing that all the shareholders must be presumed to have acquiesced in the Chippenham arrangement, and so to have given it validity, they could only be taken to have consented to it in respect of those shareholders who came in under it, in compliance with what they must have understood to have been its terms. Therefore, assuming the Chippenham arrangement to have been valid, Mr. Houldsworth was excluded from its benefit by not having made his election to avail himself of it in due time.

I must notice an objection which was made on the part of the appellants on the former argument, because if well founded, the appellants ought to prevail upon this appeal. It was objected that they, as executors of Mr. Thomas Houldsworth, were not shareholders in the company at the time of the winding-up order, and that consequently they were not liable to be placed on the list of contributories. In support of this objection, reference was made to the 173rd clause of the deed of settlement of the company, by which it is provided that the executors or administrators of deceased shareholders shall not be holders of any shares, nor entitled to receive any dividend which may be appropriated and declared

No. 46. — *Houldsworth v. Evans*, L. R., 3 H. L. 283, 284.

* thereon after such death, but that such dividends shall [*283] remain in suspense until some person shall become a shareholder in respect of such shares. And also to the 25th and 26th sections of the 7 & 8 Vict. c. 110, by which remedies are given against shareholders in a company, but none against their representatives. And the case of *Ness v. Armstrong*, 4 Ex. 21, 18 L. J. Ex. 473, was cited, where the deed of settlement of a joint stock banking company-partnership, established under the 7 Geo. IV., c. 46, provided that the executor of a deceased shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or, at his option, to become a member upon complying with certain provisions, and that if he did not elect to become a member he was not to be entitled to any dividend accruing after the testator's death, and it was held that the executor of a deceased shareholder who received a dividend which accrued due after the death of his testator, but had not complied with the provisions of the deed of settlement, was not a member for the purpose of execution against him by *scire facias* upon a judgment against the public officer of the company.

I think that neither the clause of the deed nor the provisions of the Act of Parliament, nor the case in the Exchequer, prove that the executors ought not to be placed upon the list of contributories. They merely show that an executor is not a shareholder in name, and that therefore remedies which are given against shareholders will not reach executors as such. But granting this, it does not follow that they are relieved from all liability in respect of the shares of their testator. In considering this point it must be taken as if Mr. Thomas Houldsworth had died possessed of his shares. They would unquestionably have formed part of his personal estate, and though his executors would not have had the *status* of shareholders, they would have been owners of the shares. And it would be a strange result of this state of things that, because they were not nominally shareholders they were relieved from all liability.

But the liability of an executor to be placed upon the list of contributories where the testator died possessed of shares before an order for winding up a company had been made, upon the ground * that the estate of the shareholder continued [*284] liable, is established by the case of *Blakesley's Executors*, 13 Beav. 133, affirmed upon appeal (3 Mac. & G. 726, 19 L. J. Ch

566), and by *Ex parte Gouthwaite*, 3 Mac. & G. 187; 20 L. J. Ch. 188.

The appellants have no claim to be excluded from the list of contributories, and the decree appealed from ought therefore to be affirmed, and the appeal ought to be dismissed, and, I agree with my noble and learned friends, without costs.

It was ordered and adjudged, that the said order of the MASTER OF THE ROLLS, of the 10th of November, 1866, so far as complained of in the said appeal, be affirmed, and that the appeal be dismissed. And that the costs incurred by the respondents Lewis Henry Evans, the official manager of the Agriculturists' Cattle Assurance Company, and Thomas Hughes, Esq., Member of Parliament, the creditors' representative in respect of the said appeal, be paid out of the assets of the said company.

Lords' Journals, 26th June, 1868.

ENGLISH NOTES.

Where a time is mentioned for the performance of a contract, the case, as laid down in the principal case of *Parkin v. Thorold*, resolves itself into the following questions, viz., I. Whether the time was of the essence of the contract; if so, whether it has been waived. II. Whether time has been made essential by notice. Each of these will bear a detailed examination.

Time is essential to the contract where the real express or implied intention of the parties is to make it so. Mere mention of a date is not sufficient. The express condition to make time essential must be clear. Thus in a contract to grant a new lease upon condition of the intending lessee paying a premium of 1000 guineas on a certain day, Lord ELDON refused to treat the time as essential, on the ground that the amount of the premium was the only thing contemplated by the parties, and that there was nothing to show that time was regarded by the parties as essential. *Hearne v. Tennant* (1806), 13 Ves. 287. In *Roberts v. Berry* (1855), 3 De G. M. & G. 284, a day fixed for the delivery of the abstract was held to be non-essential. Where the condition to make time essential is clear, the Court gives effect to the intention of the parties. Thus in *Williams v. Mostyn* (1863), 33 L. J. Ch. 54, 9 L. T. 476, 12 W. R. 69, where A. covenanted to pay a composition of 6s. 8d. in the pound to all creditors of his father and grandfather who executed the deed within a given time, and there was a special provision excluding from the benefits of the arrangement all creditors who did not execute it within the time, it was held essential. So where a railway company agreed with a landowner, whose lands they purchased, to make and

maintain for his convenience certain crossings of such kind as the land-owner's surveyor should direct and notify in writing "within one month after the company's obtaining possession of the land," and it appeared that the company, in settling the terms of the agreement, had stipulated for a reduction from two months the period originally proposed; time was regarded as essential. *Earl of Darley v. London, Chatham, and Dover Railway Co.* (1863), 1 De G. J. & S. 204, 33 L. J. Ch. 9. Where the contract fixes a specified number of days from the delivery of the abstract to send in objections to the title, and time is made essential, the time runs only from the delivery of a complete abstract; *Hobson v. Bell* (1839), 2 Beav. 17; *Upperton v. Nicholson* (1870-1871), L. R., 10 Eq. 228, L. R., 6 Ch. 438, 39 L. J. Ch. 758, 40 L. J. Ch. 401, 23 L. T. 4, 19 W. R. 733; *Want v. Stallibrass* (1873), L. R., 8 Ex. 175, 42 L. J. Ex. 108, 29 L. T. 293, 21 W. R. 685. The time thus reckoned is essential; *Oakden v. Pike* (1865), 34 L. J. Ch. 620, 12 L. T. 527, 13 W. R. 673. In *Barelay v. Messenger* (1874), 43 L. J. Ch. 449, 30 L. T. 350, 22 W. R. 522, it was decided that where time is essential, an extension of it does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. The *dictum* of Lord ROMILLY in the principal case of *Parkin v. Thorold* to the contrary was disapproved of.

Where a date is definitely fixed for the completion of a contract, and the conditions of sale provide for payment of interest in case of non-completion by that date, time is not essential. Thus where on a sale of a reversion the conditions of sale provided for payment of a deposit by the purchaser and the completion of the purchase on the 17th of August (adding that "should the completion of the purchase be delayed from any cause whatever beyond that period" the purchaser shall pay interest at a specified rate), and rendered the deposit forfeit if the purchaser failed to comply with any of the conditions; time was held to be non-essential. *Patrick v. Milner* (1877), 2 C. P. D. 342, 46 L. J. C. P. 537, 36 L. T. 738, 25 W. R. 790; *Webb v. Hughes* (1870), L. R., 10 Eq. 281, 39 L. J. Ch. 606, 18 W. R. 749.

Time will be implied to be essential either where non-performance within the time would entail special hardship on one of the parties, or where the object contracted for varies in value from day to day. For instance, where a person bought a house for immediate residence and stipulated for delivery of the possession on a fixed date, failure of the vendor to deliver possession with a good title entitled the purchaser to rescind the contract. *Tilley v. Thomas* (1868), L. R., 3 Ch. 61, 17 L. T. 422. So where a tenant, without any definite interest, agreed for the sale of his good-will and business to A., the purchase to be completed on or before the 25th of March, time was essential: for if the

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contract had not been completed on that day, the vendor might render himself liable as tenant for the ensuing year. *Costlake v. Till* (1826), 1 Russ. 376. Instances of cases where time is implied to be essential from the varying value of the subject-matter are: —

Sales of collieries and mines, *Macbryde v. Weeks* (1860), 22 Beav. 533. There the plaintiff agreed to purchase the lease of a colliery adjoining his own, to procure an assignment of the term, and to do other things requiring time. The purchaser was allowed to rescind the contract after giving notice to the vendor to complete the purchase within a fixed time, and the vendor had failed to do so.

Sales of public houses, *Costlake v. Till* (1826), 1 Russ. 376; *Day v. Lahke* (1868), L. R., 5 Eq. 336, 37 L. J. Ch. 330, 16 W. R. 717; *Cowles v. Gale* (1871), L. R., 7 Ch. 12, 41 L. J. Ch. 14, 25 L. T. 524, 20 W. R. 70.

Sales of reversions, *Spurrier v. Hancock* (1799), 4 Ves. 667.

Sales of shares, *Campbell v. London and Brighton Railway Co.* (1846), 5 Hare, 519.

Contract for the supply of coals, *Pollard v. Clayton* (1855), 1 H. & J. 462, 3 W. R. 349.

Contract for obtaining patents, *Payne v. Banner* (1846), 15 L. J. Ch. 227.

Where time is of the essence of the contract it may be waived expressly or impliedly. The leading case on this point is *Seton v. Slade* (1802), 7 Ves. 265, 6 R. R. 124. There the abstract was not delivered until a few days before the day fixed for completion. The defendant examined the abstract and took various objections to it. The LORD CHANCELLOR (Lord ELDON), although he was of opinion that there was nothing in the agreement making time essential, dealt with the case on the assumption that such a condition had been expressed; and held that the receiving of the abstract and keeping it without objection until the time named for conveyance had expired was a waiver of the objection.

Time if not originally essential may be rendered so by notice, particularly if the party to whom the notice is given has been guilty of unnecessary delay, and the time mentioned in the notice is reasonably sufficient for the purpose. Where after a delay of two years on the part of the vendor, he gave notice to the purchaser to complete his contract within three weeks, the notice was held to be unreasonably short. *Green v. Serin* (1879), 13 Ch. D. 589, 49 L. J. Ch. 166. And in *Crawford v. Thogood* (1879), 13 Ch. D. 153, 49 L. J. Ch. 108, 41 L. T. 549, 28 W. R. 248, although a purchaser was in default, notice by the vendor to complete or rescind within six weeks was held too short. The principle is also illustrated by the decision of KAY, J., in

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Hatten v. Russell (1888), 38 Ch. D. 334, 57 L. J. Ch. 425, 58 L. T. 271, 36 W. R. 317.

AMERICAN NOTES.

The rule states the American doctrine. If an offer requires an acceptance within a specified time, a subsequent acceptance will be invalid. *Longworth v. Mitchell*, 26 Ohio State, 342; *Potts v. Whitehead*, 20 New Jersey Equity, 55. As "by return mail," *MacLay v. Harvey*, 90 Illinois, 525; 32 Am. Rep. 35; *Carr v. Duval*, 14 Peters (U. S. Supr. Ct.), 77, but if deposited in the post-office on the same day that the offer was received, the acceptance is valid, although not in time for the first mail. *Palmer v. Phoenix Iron Co.*, 84 New York, 63.

If no time is specified, a reasonable time is allowed. *Buttman v. Morford*, 76 New York, 622; *Keck v. McKinley*, 98 Pennsylvania State, 616; *Loring v. City of Boston*, 7 Metcalf (Mass.), 109; *Farrier v. Storer*, 63 Iowa, 481; 50 Am. Rep. 752; *Morse v. Bellows*, 7 New Hampshire, 549; 28 Am. Dec. 372. *Hoffman v. Strahecker*, 7 Watts (Pennsylvania), 86; 32 Am. Dec. 740, seems to the contrary.

What is reasonable depends on the nature of the proposal and the situation of the parties, *Averill v. Hedge*, 12 Connecticut, 424; *Trounstone v. Sellers*, 35 Kansas, 447; *Kempner v. Cohn*, 47 Arkansas, 519; varying from holding forty-eight hours or one month unreasonable, to holding five days not unreasonable.

The buyer may refuse goods not delivered within the agreed time. *Rouse v. Lewis*, 2 Keyes (New York), 352. If he fails to remove the article sold, within the stipulated time, his right is forfeited. *Woodward v. Boston*, 115 Massachusetts, 81; *Holton v. Goodrich*, 35 Vermont, 19; *Boisambin v. Reed*, 1 Abbott Ct. App. Dec. (New York), 161. But *Davis v. Emery*, 61 Maine, 140; 14 Am. Rep. 553, holds that he is merely liable in damages for the delay.

The doctrine in question was considered with great learning by KENT, Chancellor, in *Benedict v. Lynch*, 1 Johnson Chancery (New York), 370; 7 Am. Dec. 484, where he comes to the conclusions declared in the Rule, in respect to an action for specific performance. In a note, 7 Am. Dec. 492, it is stated that the doctrine of *Benedict v. Lynch* is approved in some thirteen of the States, citing the cases. See also note to that case, 1 N. Y. Ch. Rep. (Lawyers' Co. Ap. Pub. ed.), 370, and *Thornton v. Sheffield, &c. R. Co.*, 84 Alabama, 109; 5 Am. St. Rep. 337; *Martin v. Morgan*, 87 California, 203; 22 Am. St. Rep. 241, citing Pomeroy on Specific Performance, § 162, and Parsons on Contracts, to the same effect as the Rule. Mr. Pomeroy cites *Parkin v. Thorold* (Equity Jurisprudence, p. 2171), with a great number of American cases, and it is cited by Mr. Bench (Equity Jurisprudence, p. 662), with *Cheney v. Libby*, 131 United States, 68.

As to rewards, see notes, *ante*, p. 137.

As to telegrams, see notes, *ante*, p. 89.

No. 47. — *Peachy v. Somerset*, 1 Str. 447. — Rule.

No. 47. — PEACHY *v.* SOMERSET.

(1784.)

No. 48. — SLOMAN *v.* WALTER.

(1784.)

No. 49. — BIRD *v.* LAKE.

(1863.)

RULE.

WHERE there is added to the contract a clause for the payment of a sum of money in the event of non-performance, equity presumes it to be a penalty for which relief will be given on fair compensation being made. The presumption may be rebutted by showing that the sum was intended by the parties to be liquidated damages, or an alternative mode of performance. The stipulation for a penalty does not prevent the Court from ordering specific performance of the contract. But where a sum is agreed upon as liquidated damages, the party wronged is entitled to the sum as compensation, and to no other remedy.

Peachy v. Somerset.

1 Str. 447-454.

Penalty. — Forfeiture. — Relief in Equity.

Relief in equity against a penalty or forfeiture according to the terms of the contract conferring a legal right depends on the intention of the parties to the contractual relation: and, in general, equity will only relieve against the penalty or forfeiture where it was designed as a security for the payment of money.

[447] The plaintiff brought his bill to be relieved against a forfeiture of his copyhold by making leases contrary to the custom of the manor without license of the lord, felling timber, digging stones, and grubbing up hedges; offering to make a recompense. And on the pleadings the case was this: Sir Harry Peachy, being seised of a copyhold estate of inheritance of £90 per annum, held of the manor of Petworth, of which the Duke of

No. 47. — *Peachy v. Somerset*, 1 Str. 447-452.

Somerset is lord, made a lease of part of it for seven years without license at £13 per annum. The Duke upon this brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his son an infant's name for relief. The Duke in his answer insisting on other causes of forfeiture, besides the making the lease without license, Sir Harry brought a supplemental bill for discovery and relief against those other forfeitures: upon the plaintiff's giving judgment in ejectment subject to the order of the Court, an injunction was granted, and now upon the hearing the case came out to be this.

Upon Sir Harry's marriage in 1693, all the copyhold lands were surrendered to the use of Sir Harry for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose, but no admittance was ever taken upon that surrender. Before Sir Harry came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir Harry's time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father; the plaintiff had topped those trees that were on the copyhold part of the avenue, by which from timber they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed; but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without license, or any custom of the manor to warrant it.

Upon this it came in question (*inter alia*) whether a forfeiture, if it had been incurred at law, was relievable in equity?

The judgment, so far as relates to this question was as follows: —

LORD CHANCELLOR. This is a point of so great consequence, that if relief could be given in this Court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecility of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been indeed very favourable constructions for the copyholder

in that particular, because he is called tenant at will *secundum consuetudinem manerii*; it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words *secundum consuetudinem manerii* was not to bound the lord's pleasure in the determination of his will, but that the tenant as long as he continued tenant was to hold his land under those terms and conditions which the custom had established.

These matters which are mentioned as forfeitures are indeed limitations of the estate; such as determine it, when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right which he had before, and yet he does no damage to the remainder-man. So tenant by copy taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate: the law has made it so; and what is there in this case to ground relief upon, and require me to set aside the law?

It is a hard law, and therefore the party must not be subject to it; but is not this directly repealing the law?

In action of waste for recovery of the place wasted, it is certain and admitted this Court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law *which is known and equal to all? Nor can I see any difference, whether the statute makes this condition, or the common law makes it.

It is not sufficient to say here is no damage in this case, and therefore it is there can be no recompense given by this Court, for it is the recompense that gives this Court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired: but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose, as for non-payment of rent or fines, which are only by way of security of the rent or fine; and therefore when these are paid afterwards with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases.

No. 48. — *Sloman v. Walter*, 1 Bro. C. C. 418.

Cases of agreements and conditions of the party, and of the law are certainly to be distinguished; you can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of this kind of forfeitures. But what equitable circumstances are there peculiar to this case? It is certain there may be circumstances, which may make it fit and equitable for this Court to relieve, either in these cases or in actions on the statute of waste: if the lord should give the tenant encouragement by *parol* only to pull down a messuage, and he did it accordingly; this might induce the Court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making the lease, and advised it, relief might be reasonable: but the steward's standing by, or even engrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping the trees, and the destroying the boundaries, there does not enough appear to determine whether they are legal forfeitures or no: but if they are, I think they are all, as the making the * lease, under the same consideration in this Court, [*454] and not proper for relief.

Sloman v. Walter.

1 Bro. C. C. 418, 419.

Penalty. — Collateral Object. — Relief in Equity.

Where the penalty of a bond is only to secure the enjoyment of a col- [418] lateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus*, to try the real damage.

Upon showing cause why an injunction should not dissolved, the case appeared to be thus: That the plaintiff and defendant were partners in the Chapter coffee-house, and upon entering into the partnership it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty

of £500. After some time, the defendant demanded the use of the room, and, being refused, brought an action for the penalty of the bond.¹ Plaintiff filed this bill, praying an issue to try *quantum damnificatus*, and an injunction in the meanwhile. He obtained an injunction till answer or further order; and, the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was, whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. Scott and Mr. Harvey (for the defendant) contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon an issue of *quantum damnificatus*, could assess any other damages than those already assessed by the parties themselves. They referred to the case in the House of Lords, where £5 per acre [* 419] penalty for plowing up meadow land * was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed. *Rolfe v. Peterson*, 6 Brown's P. C. 470, and also cited 2 Atk. 190; *Roy v. The Duke of Beaufort*, and Ch. Ca. 183.

LORD CHANCELLOR (Lord THURLOW) said the only question was whether this was to be considered as a penalty, or as assessed damages. The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.²

¹ A verdict had been obtained in that action in the full penalty of the bond. The bill was filed upon the ground of those damages being excessive, alleging that the refusal had been made by the plaintiff in equity in the heat of temper, of which irritation the defendant insidiously took advantage to drive the plaintiff to a breach of the obligation. It therefore prayed "for an issue *quantum damnificatus*, to ascertain the real amount of the damages sustained by the aforesaid breach of the condition of the said bond;

and that upon the plaintiff's paying such amount the defendant might be restrained from all further proceedings on the said bond." *Reg. Lib.*

² The same had been done by the late Lords Commissioners, in a case of *Hardy v. Martin*, 7th of May, 1783, where plaintiff and defendant had been partners as brandy-merchants; on plaintiff's quitting the business, and selling the lease and good-will of the shop to the defendant for £300, he entered into bond in £600 penalty not to sell, for nineteen years, any quantity

No. 49. — Bird v. Lake, 1 H. & M. 111, 112.

Bird v. Lake,

1 H. & M. 111-122, 338-343.

Where a deed contains an absolute covenant not to do an act, such covenant will not, in the absence of a bill to rectify the deed, be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages.

In the year 1856, the defendants, George Lake and George Mills Hill, entered into partnership together as *eating- [*112] house keepers, and carried on the said business at two different houses, one No. 49 Cheapside, which had originally been Lake's, and the other, No. 13 Gracechurch Street, which had from the first belonged to Hill. In December, 1856, the partnership was dissolved; and articles of dissolution were signed by the partners, but no deed was then executed for the purpose.

By an indenture dated the 31st December, 1858, and made between George Lake of the one part, and Hill of the other part, after reciting the agreement for the dissolution, it was recited that it had been also stipulated that the deed of dissolution should contain, amongst other things, a covenant by Lake that he would not use any means to obtain the custom or business from Hill, nor carry on the trade or business of an eating-house keeper within the distance of one mile from the said house, No. 13 Gracechurch Street, without paying to Hill the sum of £1500, as or by way of stated or liquidated damages, and that he would enter into all necessary assurances for carrying the purposes aforesaid into effect: It was witnessed, that in consideration of £15,000 then paid or secured to Lake, he Lake assigned to Hill all his share and interest in the premises and in the said trade or business, and in all the fixtures, fittings, and stock-in-trade on the premises, together with the good-will of the business and all other partnership effects, for

of brandy less than six gallons, within the cities of London and Westminster, or five miles thereof, or to permit any person so to do in his name, &c. Upon a breach, action brought, and a verdict for the penalty, plaintiff filed this bill, praying that an account might be taken of the actual damage sustained by defendant, and an issue directed for that purpose; and that,

on payment of the damages, defendant might be restrained from taking out execution for the penalty of the bond. Upon motion to dissolve the injunction, and cause shown, the injunction was continued, and an issue directed, when the jury gave a verdict for the plaintiffs at law (defendants in this Court) with 1s. damages.

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his own benefit; and thereby Lake covenanted with Hill, his executors, administrators, and assigns (amongst other things), that he Lake should not nor would at any time thereafter, either alone or together with or for any other person or persons, carry on or be engaged in the trade or business of an eating-house keeper, or any matter or thing whatsoever in anywise relating thereto, within the distance of one mile from the said messuage or tenement, No. 13

Gracechurch Street aforesaid; and that in case he Lake [* 113] should act contrary to or in infringement of that * agreement, he would immediately thereupon pay to Hill, his executors or administrators, the sum of £1500 as liquidated damages.

By another indenture of the same date, Hill mortgaged the premises to Lake to secure £9000, part of the said sum of £15,000; but this sum was paid to Lake and a release of the mortgage executed on the 30th September, 1860.

By a memorandum of agreement, dated 11th May, 1861, Hill sold the house in Cheapside to the plaintiffs for a sum of £10,000; and amongst the covenants contained in the assignment then executed, was one that Hill would not at any time, directly or indirectly, by himself or in partnership with any person whomsoever, or in any other manner, carry on or be engaged in carrying on the trade or business of an eating-house keeper, or retailer of wine or spirits or beer, or any branch thereof, within the distance of half a mile measured in a direct line from No. 49 Cheapside aforesaid, except as theretofore at No. 13 Gracechurch Street, and also (but without prejudice to the right of obtaining an injunction against any breach of this covenant), would in case of any breach thereof pay a sum of £2500 as and for liquidated damages; and there was also a covenant, that if Lake should act contrary to or in infringement of the covenant contained in the said indenture of 31st December, 1858, then and in such case Hill would, at the request of the plaintiffs, and at the joint expense of Hill and the plaintiffs, institute and prosecute with all due dispatch a suit for an injunction against Lake restraining him from so acting, or institute and prosecute with the like dispatch on the like terms an action at law against Lake on the said covenant for the recovery of the sum agreed to be paid by him as aforesaid; and that if and when that sum or any other sum should be recovered from Lake, such sum should be apportioned between Hill and the plaintiffs in equal moieties: and in case Hill should neglect to prosecute such

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* suit or action for one week after request by the plaintiffs [* 114] to do so, then and in such case the plaintiffs were to be at liberty to enforce the said covenant themselves, on indemnifying Hill against costs.

In the month of March, 1863, Lake agreed to purchase two houses, Nos. 66 and 67 Cheapside (which had been used by one Fisher as an eating-house, called the Anchor) for the sum of £1600; and he stated to his vendor as a reason why he could not give more, that, if he carried out his intention of converting the said houses into an eating-house, he should have to pay Hill £1500, to entitle him to carry on the business.

Immediately after the conclusion of this agreement, Lake entered into possession of the houses, and he caused bills to be placed on the premises, announcing that the house would shortly be re-opened as an eating-house by "Lake, late of No. 49 Cheapside, and of No. 13 Gracechurch Street."

It was admitted that these premises were within one mile of No. 13 Gracechurch Street.

Immediately after Lake had announced his intention of opening Nos. 66 and 67 Cheapside as an eating-house, the plaintiffs objected to his doing so; and thereupon Lake offered to pay Hill the £1500 in satisfaction of his intended breach of covenant. Hill was willing to accept this offer; but the plaintiffs refused to acquiesce in this arrangement and told Lake that they required him specifically to perform his covenant.

After various communications between the parties, the plaintiffs filed their bill against both the Lakes and Hill for an injunction to restrain the Lakes from opening the said [117] premises as an eating-house, and from carrying on in any other premises within one mile from No. 13 Gracechurch Street, any business of an eating-house keeper, established or the capital whereof should be found by George Lake, or wherein or in any matter or thing * relating to which the said George [* 118] Lake was or should be engaged either alone or with or for James Lake; and also for an injunction against George Lake in the terms of the covenant. And a motion for an injunction being made, after argument,

Vice-Chancellor Sir W. PAGE WOOD:—

[119]

I think an injunction must issue, to restrain George Lake till the hearing or further order, in the words of the covenant;

and to restrain James Lake in similar terms from carrying on such business as partner of George Lake, or otherwise on his behalf, so long as George Lake has any interest in the profits of such business. I do not feel myself at liberty to restrain James Lake, if he has *bond fide* purchased this business for himself.

After some observations on the affidavits, he continued: The main facts appear to stand thus:—

George Lake sold to Hill a very valuable business, carried on in two different houses, one in Gracechurch Street, the other in Cheapside; and on the occasion of the sale he [*121] entered into the covenant in question, which was *clearly intended to include both houses, which are within one mile of one another. George Lake appears to have mistaken the effect of the covenant; and upon the recitals of the deeds there certainly is some ground for saying that the parties were looking to something other than an absolute covenant; it might well be that George Lake believed that he could escape from the force of this covenant by paying £1500; but that is not so: and I do not think that I can on this Bill control the covenant by any presumption arising out of the recital, at least so far as that recital appears in the bill—I have already given my reason for refusing further evidence as to this—and I think I give this gentleman the fullest advantage to which he is entitled, when I say that I quite believe that he was acting *bond fide* when he bought his present house and tendered the £1500 to the plaintiffs and Hill. He paid large sums of money on the faith of his being able in this manner to get rid of the covenant; and Hill was willing to accept the £1500, or his share of it, and let him go on; but the plaintiffs refused the tender, and determined to stand upon the covenant. He then took a course, which, if *bond fide* completed before bill filed, would have entitled him to say, “The case is very different from that raised by the bill; I am doing nothing, and have no power to hinder the act you complain of.” That would have been the case if the transfer had been *bond fide* concluded before bill filed; but upon the facts it appears that he had not really parted with his interest until after the institution of the suit, and this would in itself entitle the plaintiffs to an injunction. It appears that no instrument which would have the effect of depriving George Lake of his interest in this business was executed till four days after the filing of the bill. Then, has the right of the

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plaintiffs to insist upon an injunction been displaced by anything that has occurred since the filing of the bill? I think not. I should not have parted with this case without much further inquiry, * even on the supposition that it entirely [*122] rested on the evidence of George Lake and his assignee.

George Lake says: "I have a young family, and I must do my best for them." How does he do that by buying a house and selling it again immediately afterwards? He clearly in the first place wants the business for himself; then finding that he cannot carry out that intention, he goes to James Lake, who has no capital, and no means of paying any money except out of the profits of the business. Then his solicitor writes a letter, in which he says that George Lake has no interest in the concern; whereas in truth nothing which could affect his interest had then been done, and nothing was done until the parties were put under the pressure of this suit. Then, again, they refused to produce this deed of assignment when it was asked for; and though they now endeavour to use that deed for their own purposes, I have been obliged to hold it inadmissible. In this state of things the plaintiffs offered to allow the motion to stand over on the ordinary undertaking; but the defendants, no doubt under proper advice, refused to give any undertaking, and therefore the motion was forced on, and I am obliged to dispose of the question. The refusal of such an undertaking always gives rise to grave suspicion in my mind; for the undertaking prejudices nothing, and I can see no ground for such refusal, unless there be something behindhand. I have the strongest possible suspicion that there never has been any such total assignment as is necessary to support the case of James Lake. Can he have paid £2000 merely for the good-will of the Anchor? I do not think that George Lake has parted with this property without retaining some hold on the profits. I must, therefore, grant the injunction, but it must be in the limited form which I have pointed out. It will have the disadvantage of raising the whole question at issue in the cause on motion for committal; but that cannot be avoided: it will be for James Lake to see that he keeps within the terms of the injunction.

Subsequently, James Lake having (on 13th June) entered into partnership with one Turner, and the partners having opened the premises in question as an eating-house, Turner was brought

before the Court by a Supplemental Bill, and a motion was made on behalf of the plaintiffs that the Lakes should be committed for breach of the injunction and for an injunction against all the defendants. After argument: —

[340] Vice-Chancellor Sir W. PAGE WOOD: —

The plaintiff stands here solely on his legal right under the covenant, which I must take care shall not be infringed.

[* 341] * George Lake dissolved his partnership with Hill in 1856, and it was then agreed between them that he should not use any means to injure the business he was selling, in the following terms:— [His Honour read the agreement, see *ante*, p. 545.]

Then when the parties are afterwards carrying this agreement into effect by a deed, they recite the agreement, and introduce into the deed, as founded thereon, the covenant in question. [His Honour read it, see *ante*, p. 545.]

Now giving all possible weight to the authorities which state that you must gather the purport of the covenant from the intent of the whole instrument, I do not think that I can hold this covenant to have been infringed.

Covenants of this kind are sometimes held to be restricted by the recitals in the deed, but I never knew of a case in which such a covenant was enlarged by the recital, and I do not think that this particular recital could in any case have that effect.

I agree that the covenant and recital should be read together; but I think, that, giving their full effect to the general words contained in this covenant, there is nothing to prevent George Lake from lending his money to any person on whose bond he might be content to rely, even though he might know that such borrower was about to open an eating-house within the prohibited district, and that there was really no security for the payment of his debts except the profits of the business.

Mr. Bagshawe says, "You cannot employ your capital in any way in the business;" but this seems to me far too extensive a construction of the covenant; it can be carried to this extent, and no further—that he will not act as director, manager, assistant, &c., perhaps not even as waiter, in such an establishment; but it is impossible to contend that he may not advance money

• to enable others to do so.

[* 342] * Mr. Cleasby was therefore, I think, well advised in

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grappling at once with the chief difficulty, and arguing the question on the assumption of perfect *bona fides*.

It is admitted that George Lake originally intended to break his covenant; he thought he could honestly do so by paying the penalty; then he was advised that all he could do was to part with the business. Now, suppose that there was no antecedent connection between vendor and purchaser, and that he had sold this business to a stranger on the terms now relied on, namely, £8000, of which £500 are to be paid down, with an undertaking of the vendor to lay out £1500 in fitting up the premises, and a mortgage of such premises to secure the whole of the purchase-money and interest, payable by instalments, with a peremptory power of sale on default, but without any stipulation that any payment should be made out of profits; I further assume that he knew that he had only the profits to look to for payment: all this would not be a breach of the covenant, — it merely amounts to an advance of money to an eating-house keeper. As I read the covenant, there is nothing to prevent Lake from buying any number of eating-houses and selling them again, if the sales be *bonâ fide*.

When this case was before me on the 25th of May I was not satisfied that this gentleman really intended to leave the business, and I therefore granted the injunction in terms which were directed against the scheme which I suspected.

But I think that the partnership of June 13 sets that question at rest; there seems to have been a *bonâ fide* payment on the part of Turner; and there is no trace of George Lake's hand in the arrangement in any form which would give him a lien on the profits. True, the partners agree *inter se* to appropriate the profits to the redemption of their borrowed capital, which is a very reasonable arrangement as between them; and I cannot infer anything from the provision, *singular as it is, that [*343] two persons, both of whom are *sui juris*, may by mutual consent alter their own deed. It seems to have been inserted *ex abundanti cautela* by the conveyancer who prepared the deed, probably to enable them more effectually to exclude George Lake if the existing deed were held to give him an interest in the business.

Of course, Turner is a purchaser with notice; but he had notice merely that George Lake cannot open this house for his own benefit, and he had notice also that the house had not been so opened.

No order on the motion. Costs to be costs in the cause.

ENGLISH NOTES.

The question whether a sum mentioned as payable in the event of non-performance of a contract is a penalty or liquidated damages, is a question of intention upon the whole tenor of the contract, having regard to the surrounding circumstances, and is not solved by a mere mention of the sum as a penalty or as liquidated damages. In *Astley v. Weldon* (1801), 2 Bos. & P. 346, 5 R. R. 618, there was an agreement whereby the plaintiff, in consideration of the services of the defendant thereafter mentioned, agreed to pay her during the term of three years £1 11s. 6d. per week and travelling expenses, except for extra luggage, which was to be paid for by herself; and the defendant in consideration of such weekly salary agreed to act and perform at the theatres as required by the plaintiff during the said period, and to attend at the theatre beyond the usual hours on any emergency and at rehearsals, or be subject to such fines as are established at the theatres, and to be at the theatre half an hour before the performances begin. It was also agreed by both parties that "either of them neglecting to perform that agreement should pay to the other £200." The defendant broke her part of the agreement, and was sued for the £200. At the trial at *nisi prius*, the agreement and the breach being proved, and evidence having been adduced to show that by the regulations of the theatre the performers were subject to certain fines for unpunctuality, inebriety, &c., a verdict was found for the plaintiff with £20 damages; but leave was reserved to the plaintiff to enter a verdict for £200 if the Court should think that the sum was liquidated damages. A rule *nisi* was obtained but discharged. In giving judgment ELDOX, C. J., said: "What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz., that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Walter* (*ante*, p. 543) did not stand in need of this principle; for there by the very form of the instrument the sum appeared to be a penalty, in which case a Court of Equity could never consider it as liquidated damages, but must direct an issue of *quantum damnificatus*. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterson*, 6 Bro. P. C. 470, where the tenant was restrained from stubbing up timber. But nothing

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can be more obvious than that a person may set an extraordinary value upon a particular piece of land or wood on account of the amusement which it may afford him. . . . It has been held, however, that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it. Necessity in these cases seems to have obliged the courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of *Ponsonby v. Adams*, 6 Bro. P. C. 417, the landlord may have set a value upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated that if such tenant should cease to reside there his rent should rise to £150? Both in *Rolfé v. Peterson* and in *Ponsonby v. Adams* I should have said, that what was matter of contract bottomed on a good consideration should not be looked upon as penalty, but should be considered as rent reserved or liquidated damages. In *Lowe v. Peers*, 4 Burr. 2229, No. 34, p. 347, *ante*, it is quite clear that the breach of promise of marriage was to be compensated for in damages. . . . The case of *Fletcher v. Dyche*, 2 T. R. 32, 1 R. R. 414, is very strongly to the present purpose. In that case a bond in a penal sum was conditioned to perform certain work within a certain time, or to pay £10 for every week beyond that time. The £10 per week was secured by the penalty of the bond; and to have said, that one term of a contract secured by a penal sum should also be a penal sum, would have been absurd. Indeed, Lord HARDWICKE in *Roy v. The Duke of Beaufort*, 2 Atk. 190, was of opinion that a person who had entered into a bond with a penalty of £100 if he poached, must have paid the £100 if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of £100 with condition that the obligor should not kill a partridge, or if he did that he should pay £5, in that case it is most clear that the £5 must have been considered as liquidated damages. With respect to the case of *Hardy v. Martin*, 1 Bro. C. C. 419 n., p. 544, *ante*, I do not understand why one brandy merchant who purchases the lease and good-will of a shop from another may not make it matter of agreement that if the vendor trade in brandy within a certain distance he shall pay £600; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I must wish that the principle laid down by Lord SOMERS in *Prec. in Chan.* had been adhered to. Let us then see what this case amounts to. It was contended at the trial that the last clause is not in the form of a penal bond. It is thus: 'And lastly, it is hereby agreed that either party failing to perform their undertaking shall pay to the other £200.' *Prima facie* this certainly is contract,

and not penalty; but we must look to the whole instrument. In consideration of the defendant's services the plaintiff undertakes to pay her £1 11s. 6d. per week, and also her travelling expenses. It would be absurd to hold that, because the £1 11s. 6d. is a liquidated sum, therefore the plaintiff could not be called upon for more, and yet that in consequence of his non-payment of the defendant's travelling expenses he should be liable to the whole sum of £200 because those expenses are not ascertained. Again, there are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we then to hold that if the defendant happens to offend in a case which has been so provided for by those laws she shall pay only 2s. 6d. or 5s., but if she offend in a case which has not been so provided for, she shall pay £200? I can find nothing in these articles which can satisfy my mind judicially that the £200 is to be paid in one case and not in the other. The clause is general and contains no exception. If that be so, the case of *Fletcher v. Dyche* is an authority strongly in point. It therefore does appear to me that the true effect of this agreement is to give the plaintiff his option either to proceed upon the covenants *toties quoties*, or upon the first breach to proceed at once for the £200, out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches."

The next case in order of time is *Reilly v. Jones* (1823), 1 Bing. 302. There on the contract for the sale of a lease, fixtures, &c., it was agreed that the possession should be given by the 29th of September, and that the plaintiff should by that time assign licenses, repair, clear rent, taxes, and outgoings to the day of quitting the premises. A party breaking the agreement was to pay to the other £500 "settled and fixed as liquidated damages." The defendant having refused to accept an assignment of the lease or to take possession according to the agreement, the plaintiff sued on the agreement and claimed the liquidated sum of £500. He was held entitled to the whole sum, although a jury had assessed the damages at a much smaller amount. PARK, J., appears to have thought it enough that the parties had employed the expression "liquidated damages" in their agreement, but this is clearly inconsistent with the current of authority; and the decision seems to be really based on the ground — as was argued by Wilde in the subsequent case of *Kemble v. Farren*, 6 Bing. 146 — that the parties had one paramount object in the agreement, and that the defendant had violated the agreement in respect of that object.

In the case last mentioned (*Kemble v. Farren* (1829), 6 Bing. 141) the defendant had engaged himself to act as the principal comedian at Covent Garden Theatre for four seasons commencing with October,

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1828, and in all things to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant £3 6s. 8d. every night on which the theatre should be open for theatrical performances during the ensuing four seasons, and that the defendant should be allowed one benefit night during each season on certain terms therein specified. The agreement contained a clause that if either of the parties should neglect or refuse to fulfil the said agreement, "or any part thereof or any stipulation therein contained," such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." The defendant refused to act in the second season, and at the trial the jury gave a verdict for the plaintiff for £750 damages, subject to a motion for increasing them to £1000 if the Court should be of opinion that the plaintiff was upon the agreement entitled to the whole sum claimed as liquidated damages. The plaintiff obtained a rule *nisi* accordingly; but the Court, on the authority of *Astley v. Weldon*, discharged the rule.

In *Galsworthy v. Strutt* (1848), 1 Ex. 159, 17 L. J. Ex. 226, on a dissolution of partnership between solicitors, one of them covenanted that he would not for seven years carry on business as a solicitor within fifty miles, and if he should infringe the covenant he would pay £1000 as liquidated damages, and not as penalty. It was held that the intention of the parties was to consider the £1000 as liquidated damages.

In *Betts v. Burch* (1859), 4 H. & N. 506, 28 L. J. Ex. 267, there was a contract for the sale by plaintiff to defendant of furniture and stock in trade at a valuation, and in the event of either of the parties not complying with every particular set forth in the agreement the defaulter should forfeit and pay to the other the sum of £50 and all expenses attending the same. The defendant having refused to carry out the agreement the plaintiff sued upon the contract. The defendant paid into Court £5 and pleaded payment into Court. The jury found a verdict for the defendant, the Judge at the trial reserving leave to the plaintiff to move to enter a verdict for £45. A rule *nisi* having been obtained, the Court discharged it, being of opinion that the stipulation was in the nature of a penalty. BRAMWELL, B., laid down the rule as follows: "If the whole agreement is such that the Court can see that the sum is a penal sum, it must be so treated. On the other hand, if it is not a penal sum it would be incorrect to treat it as a penalty merely because it is so called in the agreement."

In *Hinton v. Spurkes* (1868), L. R., 3 C. P. 161, 37 L. J. C. P. 81, 17 L. T. 600, there was an agreement for the sale of a public-house

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containing these terms: "As earnest of this agreement, the said purchaser has paid into the hands of the said vendor the sum of £50, which is to be allowed in part of payment at the completion of this agreement; but if the said vendor should not fulfil the same on his part, he shall return the deposit in addition to the damages hereinafter stated; and if the said purchaser should fail to fulfil his part of the agreement, then the deposit money shall become forfeited in part of the following damages; and if either of the said parties should neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them on demand the sum of £50, hereby mutually agreed upon to be the damages ascertained and fixed on breach thereof." The purchaser deposited an I O U instead of the £50. He refused to complete, and the house was sold for £10 less. In an action by the vendor for breach of the agreement and upon the I O U, it was held that the plaintiff was entitled to recover the £50, and was not limited to the amount of damages he had actually sustained.

In *Thompson v. Hudson* (1869), L. R., 4 H. L. 1. 38 L. J. Ch. 431, it was decided that where a certain sum of money is due, and the creditor enters into an arrangement with his debtor to take a less sum, provided that sum is secured in a certain way and paid on a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty. The same principle is contained in *Ex parte Burden, In re Neil* (1881), 16 Ch. D. 675, 44 L. T. 525, 29 W. R. 879.

In *Lea v. Whittaker* (1872), L. R., 8 C. P. 70, 27 L. T. 676, 21 W. R. 230, there was a contract for the sale of a public-house containing various stipulations with fixed payments as alternatives, and to make the agreement binding each party was to deposit £40 with a stranger, and it was agreed that "either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages." The deposits were made accordingly. It was held that the £40 was not a penalty.

In *Parfitt v. Chambre, Ex parte D'Alteyrac* (1872), L. R., 15 Eq. 36. 42 L. J. Ch. 6, 27 L. T. 750, 21 W. R. 50, an arbitrator ordered the defendant to pay an annuity of £1200 a year, and to secure this by purchasing and conveying to trustees a government annuity of £1200 a year; and further ordered the defendant to pay an additional £100 a month for each month that he should be in default in so securing the payment. The monthly payments were "to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." No annuity having been

purchased, but the £1200 a year and £100 having been regularly paid till the defendant's death, but not since, it was held that the £100 a month, though called a penalty, was not to be regarded strictly as such.

In *Magee v. Larell* (1874), L. R., 9 C. P. 107, 43 L. J. C. P. 131, 30 L. T. 169, 22 W. R. 334, there was a contract for the sale of a public-house containing various stipulations with regard to the transfer of the licenses, the payment of rates and taxes, and the purchase of fixtures, furniture, and stock at a valuation, and concluding: "If either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of £100 as damages." In the judgment, which discussed *Reilly v. Jones* and *Lea v. Whitaker, supra*, it was held that the sum was a penalty.

In *Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724, 46 L. J. Bank. 57, 35 L. T. 718, 25 W. R. 244, a contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit to the employer £10 per week for every week after that date during which the buildings should remain unfinished. There were various other stipulations, and a final provision that if the contract should not be in all things duly performed by the contractors they should pay £1000 as and for liquidated damages. It was held that the £1000 was in the nature of a penalty.

In *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, 50 L. J. Q. B. 49, 43 L. T. 258, 29 W. R. 81, it was decided that in a mortgage bond given to secure the due payment by instalments of a sum due, a provision making the total sum enforceable on any default is not to be considered a penalty. There was a similar decision given by the Court of Appeal a few days later (and apparently without the decision of the House of Lords in *Wallingford v. Mutual Society* having been cited) in *Protector Endowment Loan Co. v. Grice* (1880), 5 Q. B. D. 592, 49 L. J. Q. B. 812, 43 L. T. 564.

The difference between penalty and liquidated damages again arose in *Wallis v. Smith* (1882), 21 Ch. D. 243, 52 L. J. Ch. 145, and *Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332. In the former case it was laid down that where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the sum named is liquidated damages and not penalty. In the former of these cases the plaintiff had entered into a contract with the defendant, who was a builder, to sell him an estate for £70,000, which was to be expended by the defendant in

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building on the estate. The defendant was to pay a deposit of £5000. If the plaintiff could not make a good title he was to pay the defendant £5000 as liquidated damages. And if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works or in failing to perform any of the provisions of the contract, then and in either of these events, the deposit of £5000 should be forfeited, and if it had not been paid the defendant should forfeit and pay to the plaintiff £5000 by way of liquidated damages and the plaintiff should regain possession of the estate. The defendant did not pay his deposit, and altogether failed to carry out his contract. The Court of Appeal, affirming the judgment of FRY, J., held that the plaintiff was entitled to be paid £5000 as liquidated damages. In giving his decision in the Court of first instance FRY, J., observed (21 Ch. D. 250): "There is a numerous class of cases which show that where there are a number of things to be done, and one large sum is to be paid in respect of the non-performance of various matters of different degrees of importance, there the Court will construe the sum if it can do so as a penalty, and not as liquidated damages." But the judgments in the Court of Appeal (particularly that of The MASTER OF THE ROLLS (Sir G. JESSEL), where the cases are elaborately reviewed) deny that the cases establish any such rule, and maintain that if the sum is expressed in the contract to be liquidated damages it is not to be construed as a penalty merely because the stipulations are of varied importance, unless one or more of them is for payment of an ascertained or ascertainable sum of money, or (perhaps) is for a matter of obviously trivial importance.

In the case of *Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332, lessees who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (*inter alia*) to pay the lessor £100 per imperial acre for all land not restored at a particular date. The House of Lords, reversing the decision of the Scotch Court of Session, held that the sum, although described in one part of the agreement as "the penalty therein stipulated," was not a penalty, but estimated or stipulated damages. Lord HERSCHELL, L. C., observed (11 App. Cas. at p. 345): "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to show that the compensation is extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under

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such conditions as these is to be regarded as a penalty only, and I see no sound reason or principle for so holding."

Whether the sum mentioned as payable by one party to the other be a penalty or liquidated damages, payment of that sum will not relieve him from specific performance of the contract, or entitle him to break the contract. "The general rule of equity is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600 as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement." Per SUGDEN, L. C. (Lord St. LEONARDS), in *French v. Maculé* (1842), 2 Drury & Warren 269, at 274-5.

A good illustration of the principle is *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112, 58 L. J. Ch. 229, where the defendant on entering the service of the plaintiffs, a banking company, had executed a penal bond in the sum of £1000, the condition was that the bond should be void if he performed his duties as therein mentioned, and also if he should pay to the plaintiffs £1000 as liquidated damages in case he should at any time within two years after leaving the service of the plaintiffs accept any employment in any other bank within two miles of the plaintiffs' bank. The defendant resigned his employment in the plaintiffs' bank, and immediately entered into the service of a rival bank in the same town. He was willing and offered to pay the £1000. The Court of Appeal, affirming the judgment of BUTT, J., held that there was an implied agreement that the defendant should not enter the service of a rival bank, and that the plaintiffs were entitled to an injunction.

The obligee may in such a case have the option of obtaining specific performance of the contract in lieu of damages, but cannot have the advantage of both remedies. *Fox v. Scard* (1864), 33 Beav. 328.

AMERICAN NOTES.

The subject under consideration is very extensively treated by the two principal text writers in this country on Damages, Sedgwick and Sutherland. See notes, 30 Am. Rep. 28; 1 Am. Dec. 331.

The leading English case that will occur to all American readers of Warren's "Introduction to Law Studies," is one to which he refers as follows: "Suppose the question under consideration is one concerning the distinction between a *penalty* on (*sic*) *liquidated damages* — the experienced lawyer instantly thinks of *Kemble v. Farren* (6 Bingham), a comparatively recent decision, in which all the older ones are discussed, and on the margin of which

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perhaps he discovers his own MS. notes of several approximating and later cases."

The American Courts always construe such agreements in accordance with the intention of the parties, without regard to the expressions used. So in some cases the recovery will be restricted to the actual damages, although a sum is named as "liquidated damages." *Grand Tower Co. v. Phillips*, 23 Wallace (U. S. Supr. Ct.), 471; *Bagley v. Peddie*, 16 New York, 469; 69 Am. Dec. 713; *Shreve v. Brereton*, 51 Pennsylvania State, 175; *Dwinnel v. Brown*, 54 Maine, 468; *Houglund v. Segur*, 38 New Jersey Law, 236.

On the other hand a provision for a "penalty" may be construed as liquidated damages. *Duffy v. Shockey*, 11 Indiana, 70; 71 Am. Dec. 348; *Tode v. Gross*, 127 New York, 480; 13 Lawyers' Rep. Annotated, 652. In the latter case, it was held that the language, "The penalty of \$5000 which is hereby named as stipulated damages" for violation of a covenant made on the sale of a business, not to reveal a secret process nor use trade-marks belonging to the business, was to be regarded as stipulated damages notwithstanding the use of the word "penalty," for the reason that the actual damages would be "wholly uncertain and incapable of being ascertained except by conjecture." Precisely the same, and for the same reason, was held in the former case, on the breach of a covenant not to set up a rival business (upon the authority of *Sainter v. Ferguson*, 62 Eng. Com. Law 716). In this case the word "penalty" was used without any modification whatever.

The question is one of law to be decided upon a consideration of the whole instrument. *Chase v. Allen*, 13 Gray (Mass.), 42; *Kemp v. Knickerbocker Ice Co.*, 69 New York, 45; *Whitfield v. Lecy*, 35 New Jersey Law, 149. In the *Kemp* case, *supra*, EARL, J., said: "The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they have made for themselves. No form of words has been regarded as controlling. But the fundamental rule as often announced is, that the construction of these stipulations depends in each case upon the intent of the parties as evinced by the entire agreement construed in the light of the circumstances under which it was made."

If the intention to liquidate the damages is clearly and exclusively expressed, it will be effectual. *Williams v. Fance*, 9 South Carolina, 341; 30 Am. Rep. 26; *Brooks v. Hubbard*, 3 Connecticut, 58; 8 Am. Dec. 154; *Houghton v. Pattee*, 58 New Hampshire, 326; *Bagley v. Peddie*, *supra*; *Dwinnel v. Brown*, *supra*.

But if there is any doubt as to the intention, the clause will be construed a penalty. *Cobwell v. Lawrence*, 38 New York, 71; *Myer v. Hart*, 40 Michigan, 517; 29 Am. Rep. 553; *Seafeld v. Tompkins*, 95 Illinois, 190; 35 Am. Rep. 160; *Shute v. Taylor*, 5 Metcalf (Mass.), 67; *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *Taylor v. Sandiford*, 7 Wheaton (U. S. Supr. Ct.), 13; *Baird v. Tolliver*, 6 Humphreys (Tennessee), 186; 44 Am. Dec. 298; *Moore v. Colt*, 127 Pennsylvania State, 289; 14 Am. St. Rep. 845; *Carey v. Mackey*, 82 Maine, 516; 17 Am. St. Rep. 500; 9 Lawyers' Rep. Annotated, 113.

If the sum fixed exceeds the value of the subject-matter of the contract.

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the provision will be deemed a penalty. *Tagloe v. Sandiford, supra*; *Scogfield v. Tompkins, supra*; *Mason v. Callender*, 2 Minnesota, 350; 72 Am. Dec. 103.

If the subject-matter is of uncertain value the sum fixed is construed as liquidated damages. *Hamilton v. Overton*, 6 Blackford (Indiana), 206; 38 Am. Dec. 136; *Cothcal v. Talmage*, 9 New York, 554; *Pierce v. Fuller*, 8 Massachusetts, 223; 5 Am. Dec. 102; *Lange v. Werk*, 2 Ohio State, 519; *Bagley v. Peddie, supra*; *Duffy v. Shockey, supra*; *Holbrook v. Tobey*, 66 Maine, 410; 22 Am. Rep. 581; *Muse v. Swayne*, 2 Lea (Tennessee), 251; 31 Am. Rep. 607; *Morse v. Rathburn*, 12 Missouri, 594; 97 Am. Dec. 359; *Powell v. Burroughs*, 54 Pennsylvania State, 329; *Maxwell v. Allen*, 78 Maine, 32; 57 Am. Rep. 783, the Court observing: "The case belongs to a class of difficult, and often uncertain and shadowy questions, very few cases being much alike, and therefore an appeal to the authorities for support is not of much use further than to make an application of general principles." See *Kelso v. Reid*, 145 Pennsylvania State, 606; 27 Am. St. Rep. 716; *Tode v. Gross*, 127 New York, 480; 24 Am. St. Rep. 475; *Drew v. Pedlar*, 87 California, 143; 22 Am. St. Rep. 257; *Tennessee M. Co. v. James*, 91 Tennessee, 154; 30 Am. St. Rep. 865; 15 Lawyers' Rep. Annotated, 211.

But if it is unconscionably large, it will be deemed a penalty. *Bradstreet v. Baker*, 14 Rhode Island, 546. So of a stipulation in a mortgage for an attorney's fee for collection. *Daly v. Mailland*, 88 Pennsylvania State, 381; 32 Am. Rep. 457. *Contra*: *Dakin v. Williams*, 17 Wendell (New York), 117; *Bearden v. Smith*, 11 Richardson Law (So. Car.), 554; *Morse v. Rathburn*, 12 Missouri, 594; 97 Am. Dec. 359; *Ward v. Hudson R. B. Co.*, 125 New York, 230.

If the contract involves several distinct and various matters, one sum fixed to be paid for any breach of any kind is deemed a penalty. *Foley v. McKeegeo*, 4 Iowa, 1; 66 Am. Dec. 107; *Carpenter v. Lockhart*, 1 Indiana, 434; *Charlston Fruit Co. v. Bond*, 26 Fed. Rep. 18; *Wilhelm v. Eaves*, 21 Oregon, 191; 11 Lawyers' Rep. Annotated, 297.

Whether damages are recoverable beyond the amount of a penalty fixed in a bond or agreement is somewhat mooted. In *Graham v. Bickham*, 2 Yeates (Pennsylvania), 32; 4 Dallas, 143; 1 Am. Dec. 328, it was held that they could be recovered. And interest in addition is recoverable. *Lyon v. Clark*, 8 New York, 154; *Carter v. Thorn*, 18 B. Monroe (Kentucky), 613; *Harris v. Clap*, 1 Massachusetts, 308. But ordinarily no mere damages are recoverable beyond the expressed penalty. *Clark v. Bush*, 3 Cowen (New York), 151; *Farrar v. Christy*, 24 Missouri, 174.

In the late case of *Monmouth P. Ass'n v. Wallis Iron Works*, 55 New Jersey Law, 132; 39 Am. St. Rep. 626; 19 Lawyers' Rep. Annotated, 156 (A. D. 1892), the Court observed: "In determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If on such consideration it appears that they have provided for larger damages than the law permits, *e. g.*, more than the legal rate for the non-payment of

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money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award; under any of these conditions the sum designated is deemed a penalty. And if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty because the law favours mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages." This is a very admirable, correct, and comprehensive statement of the law on this point, and it practically corresponds with the rules adopted by the present writer as editor of the *American Reports*, in the note, vol. 30, *Am. Rep.* 28. Among other things it is there said: "The recent English and New York cases, and especially the latter, appear to have modified the earlier cases, and to have given to the phrase 'liquidated damages' its usual and proper signification, and more fully to recognize the right of parties to make their own contracts." "A review of the New York and English cases that have been cited shows that the only consideration which takes from the phrase 'liquidated damages' its force is, that a number of things of different degrees of importance was agreed to be done, and consequently the damages for each one could not have been intended to be the sum agreed upon by the parties."

In *Bagley v. Padde*, 16 New York, 469, a bond declared the obligors bound "in the sum of \$3000 as liquidated damages, and not by way of penalty or otherwise," for the performance of the covenants in a written agreement. None of the covenants were for the payment of money, or for the doing or omitting of any act the damages resulting from which could be computed from data furnished by the instrument itself, but the damages from any breach were uncertain, and required evidence outside the instrument to establish their amount. One of the covenants was not to reveal the secrets of a trade in which the principal obligor was to be employed, or any invention or improvement that might be made by his employer, the obligee. *Held* (two Judges dissenting), that a breach of this covenant involved damages so uncertain and difficult to be ascertained, as that the sum named in the bond should be deemed not a penalty but liquidated damages, recoverable upon a breach of any of the covenants, although the damages from an actual breach might be readily determined by a jury. The Court lay down the following rules: "The language of the agreement is not conclusive, and the effort of the Court is to learn the intent of the parties. Hence the term 'liquidated damages' is not sufficient to control the construction, if the Court can discover in the other parts of the instrument reason even to doubt as to the intention of the parties; Second, where the word 'penalty' is used it is generally conclusive against its being held liquidated damages, however strong the language

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of the other parts of the instrument in favour of such construction ; Third, if the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or as some Judges say, can be easily ascertained by a jury), and made payable by the same instrument, then it will be treated as a penalty ; Fourth, when the agreement is in the alternative to do an act or pay a given sum of money, the Court will hold the party failing to have had his election, and compel him to pay the money ; Fifth, if the sum be evidently fixed to evade the usury laws, or any other statutory laws, or to cloak oppression, the Court will relieve by treating it as a penalty ; Sixth, if independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument ; Seventh, if the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of a default of performance of some act agreed to be done, then the Court will enforce the contract, if legal in other respects."

SECTION VIII. — *Termination of Liability under the Contract.*

No. 50. — NOBLE v. WARD.

(1867.)

No. 51. — HEAD v. TATTERSALL.

(1871.)

RULE.

A CONTRACT is discharged by accord and satisfaction ; by a subsequent valid contract intended to supersede the former ; or by a condition of defeasance which is fulfilled.

Noble v. Ward and others.

36 L. J. Ex. 91-93 (s. c. L. R., 2 Ex. 135 ; 15 W. R. 520).

Contract. — Statute of Frauds. — Rescission by Parol.

A contract for the sale of goods exceeding £10 in value having been [91] reduced to writing, as required by the 17th section of the Statute of Frauds, and signed so as to be binding on the parties, it was subsequently agreed verbally between them that the times for commencing and concluding delivery should be respectively a fortnight later than the times for commencing and concluding delivery fixed in the written contract : — *Held*, that by the 17th section of the Statute of Frauds, this latter agreement, not being in writing, could not be "allowed to be good" for any purpose, and therefore that the previous contract remained unaffected by it, and could be enforced in all its terms.

This was an appeal from a decision of the Court of Exchequer making absolute a rule to set aside a nonsuit directed by BRAMWELL B., at the trial of this cause, at the Summer Assizes for Manchester, and for a new trial.

The facts of the case are shortly recapitulated in the judgment of the Court.

After hearing counsel for the appellant (defendant in the action), and without calling on counsel for the plaintiff, —

WILLES, J., delivered the judgment of the Court (WILLES, J., BLACKBURN, J., KEATING, J., MELLOR, J., MONTAGUE SMITH, [* 92] J., and LUSH, J.). — In this case the plaintiff * brought his action against the defendant for not accepting certain goods pursuant to a contract entered into on the 18th of August, 1864, by which the goods were to be delivered within a certain time mentioned. At the trial, the defendant, who had pleaded that the contract had been rescinded by mutual consent, established that, on the 27th of September, 1864, before any breach of the contract of the 18th of August, it was agreed between the defendant and the plaintiff to rescind a former contract of the 12th of August, and to extend for a fortnight the time for the performance of the contract of the 18th of August. There was a further provision that certain goods supplied under the contract of the 12th of August should be taken back, of which we need not take any notice in our judgment. The defendant, under these circumstances, insisted that the agreement to extend the time for the performance of the contract of the 18th of August for a fortnight had the effect of rescinding the contract of the 18th of August; and if the agreement of the 27th of September had been in legal form, so as to be binding on the parties, that contention might have been successful to the extent to which an agreement as to the mode of carrying a contract into effect, or as to an alteration of one of its terms, can properly be said to be a rescission of the contract. Acting upon that view, the learned Judge who tried the case directed a nonsuit, and the Court of Exchequer, in making the rule absolute for a new trial, dissented from that view. We are all of opinion that the judgment of the Court of Exchequer was right, because we cannot look upon what took place on the 27th of September as a valid contract. We must look at it as an entirety. The rescission of the former contract would result from it by implication, but we are forbidden by the statute to allow it to be good for the purpose of having that

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effect. It has been argued for the defendant, with as much force as could be brought to bear on the subject, that inasmuch as if this had been a valid contract, it would have had the effect, by implication, of rescinding the contract of the 18th of August, and inasmuch as the parties might have entered into a valid contract verbally to rescind the agreement of the 18th of August *simpliciter*, we are to say in point of law that the implication which would have resulted from the intended contract, if it had been valid, ought to be assumed, notwithstanding that the contract was void. It seems impossible to aver that as a matter of law. At the least it was a question for the jury whether, the transaction from which the rescission is said to have resulted not having operated as intended, the parties meant to rescind the contract of the 18th of August at all events. It would be a strong thing to decide this as a matter of fact, seeing that the parties, while they agreed to rescind the contract of the 12th, made an express provision to carry into effect the contract of the 18th, although not, in the matter of time, as was at first contemplated. Our decision is in accordance with a series of cases which will be found referred to in the second of the Egremont cases, *Doe d. Bidulph v. Poole*, 11 Q. B. 713; 17 L. J. Q. B. 143,¹ to the effect that where parties enter into a contract, which if valid would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it shall not have the effect, by implication, of affecting their rights in respect to the former transaction. If we want any authority to sustain the ground on which we proceed, it is to be found in the case of *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310, in which this very point was taken by Sir Hugh Hill, then at the Bar, and no doubt would have been made good by him if it could have been made good by any one. The plea there was, that the agreement had been mutually rescinded by the plaintiff and the defendant; and the circumstances were similar to these. PARKE, B., in delivering the judgment of the Court, said, that the plea was not proved, for the parties never intended to rescind the old agreement absolutely. With regard to the case in 9 East (*French v. Patton*, 9 East, 351, 1 Camp. 72, 9 R. R. 571), a deal too much importance has been attached to it. In that case there was a mere stamp objection to the contract of the parties;

¹ The previous case was *Doe d. The Earl of Egremont v. Courtney*, 11 Q. B. 702; 17 L. J. Q. B. 151.

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and the Court considered they were to construe the contract for the parties without regard * to the objection, and then consider how the Stamp Act operated on the contract. In other words, the statute affecting the revenue does not affect the construction to be put on the acts of parties. We think that the judgment of the Court of Exchequer ought to be affirmed.

Judgment affirmed.

Head v. Tattersall.

L. R. 7 Ex. 7-14 (s. c. 41 L. J. Ex. 4; 25 L. T. 631; 20 W. R. 115).

Contract. — Sale of a Horse. — Defeasance under condition of Contract.

[7] The plaintiff, on Monday, the 13th of March, 1871, bought a horse of the defendant, warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Before removing it from the defendant's premises he was told by the groom who had charge of it, but who was not in the defendant's employment, that it had not, nor had it in fact, been hunted with the Bicester hounds. The plaintiff, nevertheless, took the horse away. While it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, and brought an action to recover the price he had paid for it:—

Held, first, that the plaintiff's conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; and, secondly, that his right to return it was unaffected by an accident having happened to it while it was in his possession, without neglect or default on his part.

Declaration. 1st count: for breach of a warranty that a certain horse bought by the plaintiff of the defendant had been hunted with the Bicester and Duke of Grafton's hounds.

2nd count: that the defendant, by warranting that a certain horse had been hunted with the Bicester and Duke of Grafton's hounds, sold the same to the plaintiff for an agreed price paid to the defendant; that the warranty was upon the condition that the defendant should not be responsible unless the plaintiff returned the horse before 5 o'clock on the Wednesday evening next after the sale; yet the horse had not been hunted with the Bicester, &c., hounds, and was returned before the time specified.

3rd count: for money received to the plaintiff's use.

The defendant denied the warranties and breaches alleged in the 1st and 2nd counts, and further pleaded to the 2nd count,

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6thly, that it was a condition that the horse, if returned, should be returned in the same state as that in which it was delivered to the plaintiff, and without having been injured; and that it was returned in an injured and damaged state. To the 3rd count, he pleaded never indebted.

* Replications: 1st, joining issue on all the pleas; and [* 8] 2ndly, to the sixth plea, that it was a further condition that the plaintiff might return the horse, although injured and not in the same state as when it was delivered to the plaintiff, if such injury and alteration of condition were not caused by the plaintiff's neglect or default; and that the horse's not being in the same state, and being injured when returned, was not caused by any neglect or default of the plaintiff's. Issue.

The cause was tried before KELLY, C. B., at the Middlesex sittings after Trinity Term, 1871, when the following facts were proved: The plaintiff, on Monday, the 13th of March, 1871, bought of the defendant, who is an auctioneer, for £43 1s., a horse, described in the catalogue as having been hunted with the Bicester and Duke of Grafton's hounds. The contract of sale contained a condition that "horses not answering the description must be returned before 5 o'clock on Wednesday evening next; otherwise the purchaser shall be obliged to keep the lot with all faults."

After the sale the plaintiff learnt from the groom under whose charge the horse had been, but who was not a servant of the defendant, that it had not, in fact, been hunted with the Bicester and Duke of Grafton's hounds. This information was correct. As, however, he did not buy the animal for hunting purposes, he took it away for trial the same afternoon. On the road from the defendant's premises to the plaintiff's stables, and whilst under the care of the plaintiff's servant, it took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before 5 o'clock on the Wednesday evening as not corresponding to the description, and brought this action for the price he had paid. It was not disputed that the warranty or description was a mistake, but it was contended that under the circumstances the plaintiff had no right to return the horse.

The jury, in answer to questions left them by the learned judge, found that the plaintiff was induced by the warranty to buy the horse, and that the injury sustained by the horse was not caused through any negligence or default of the plaintiff's servant. A

verdict was thereupon entered for the plaintiff for £43 1s., with leave to move to enter a verdict for the defendant, or to reduce the damages to a nominal sum.

[* 9] * A rule was afterwards obtained to enter a verdict accordingly, on the ground that the sale of the horse was not under the warranty, and that it could not be returned in the same condition as at the time of the sale; or to reduce the verdict, or for a new trial, on the ground that the plaintiff was only entitled to nominal damages, and not to the price paid by him.

Nov. 17. Hon. G. Denman, Q. C., and Willoughby, showed cause. The plaintiff had a right under his contract to return the horse up to the Wednesday evening. Nothing occurred to deprive him of this right. He was not bound to rescind the contract immediately on receiving information from the groom. He was entitled to take the horse away, and keep it until the time specified had expired. *Bannerman v. White*, 10 C. B. (N. S.) 844; 31 L. J. C. P. 28. Secondly, with regard to the accident, that does not affect the question, as it was not owing to the plaintiff's default.

H. James, Q. C., and Henry Graham, in support of the rule. The plaintiff, by removing the horse after the conversation with the groom, elected to treat the contract as binding in spite of the mistake in the catalogue. But if this be not so, the plaintiff was deprived of his right of return by the fact of the horse being injured whilst in his possession. If returned at all, the horse should have been returned in the same condition as when sold. The injury might have caused the horse's death, when the plaintiff would certainly have been confined to an action on the warranty. A contract cannot be rescinded unless the parties to it can be replaced in *statu quo*. *Curtis v. Hannay*, 3 Esp. 82; *Beed v. Blandford*, 2 Y. & J. 278; *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; *Moss v. Sweet*, 16 Q. B. 493; 20 L. J. Q. B. 167. *Bannerman v. White*, is not in point. There the goods were repudiated before receipt.

KELLY, C. B. I think this rule should be discharged. The action is brought to recover back the price of a horse bought by the plaintiff on Monday, the 13th of March last, under a special contract. The horse was warranted to have been hunted with the

Bicester and Duke of Grafton's hounds; and the contract [* 10] also * contained a condition that in case it did not answer the description it was to be returned before five o'clock on

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the Wednesday following, "otherwise the purchaser shall be obliged to keep the lot with all faults." This clause clearly imposed on the buyer a liability to keep the horse altogether, however worthless it might be, if he should keep it beyond the time named; but, on the other hand, up to that time there was to be a power to return it if it proved not to be according to warranty. Now, it is admitted that the horse had never been hunted with the Bicester hounds, and also that it was returned before five o'clock on the Wednesday. But two objections are raised to the plaintiff's right of return. First, it is said that he had notice before he removed the horse from the defendant's premises that the warranty had not been complied with; and although the exact character of the communication made to the plaintiff is doubtful, there is evidence that he had learnt, before removing the animal, that it had never been hunted with the Bicester hounds. I do not think, however, that this bound the plaintiff to return it immediately. Under his contract he had till the Wednesday evening to consider whether he would keep it or not, to make further inquiries, if he thought fit, as to the truth of what he had heard, and to come to a final decision. Then, secondly, it is said that, assuming his right to return remained, he could only exercise it if the horse continued in the same condition as at the time of sale, and that inasmuch as the horse was injured between that time and the Wednesday, the right was lost. To support this proposition several cases were cited which establish the unquestionable proposition that, as a general rule, no contract can be rescinded unless the parties can be replaced exactly in their original position. But these cases do not apply to a contract expressly stipulating for a right of return for a certain time and on specified grounds. The case of *Curtis v. Hannay*, 3 Esp. 82, which was much relied on by the defendant, and which is the only one I will refer to, really has no application here. It only decides that, in a particular state of circumstances, a plaintiff may disentitle himself by his conduct from returning a specific chattel. There the plaintiff himself kept the horse which he had bought, and tried to cure it of the disease from which it was suffering, *and so lost the right of returning it. Indeed, the [* 11] injury to the horse which took place in that case may well have resulted from the course of treatment which was adopted. Now, in the present case it is true that the horse was injured whilst under the plaintiff's control, but not by his default, as the

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jury have expressly found. In my opinion, therefore, he did not thereby lose his right of returning it, any more than if it had been attacked in the stable with some complaint which greatly lessened its value, but for the existence of which the plaintiff was not responsible. Both objections, therefore, fail, and the verdict should accordingly remain undisturbed.

BRAMWELL, B. I am of the same opinion. It is admitted here that the horse did not correspond with the warranty, and that a return would have been competent to the plaintiff unless he had done something to deprive him of his right. The defendant contends that he has been so deprived on two grounds. First, he took the horse away, it is said, after notice that the warranty was inaccurate, and thereby waived his right to object. But he had no notice when he bought the animal, and so acquired a right to take it away and keep it until the time named in the special condition. This right was not, in my opinion, affected by the information he obtained from the gossip of the owner's groom. If there had been no express clause in the contract as to the time for return, and if, after the sale, the plaintiff had received distinct notice that the warranty was a mistake, then I agree that he must have returned the horse within a reasonable time; and I think a reasonable time would be as soon as he could after the notice. Here there is an express condition, and I cannot hold that the plaintiff lost the benefit of it by the mere act of removing the horse after the conversation with the groom. Suppose the horse had already been in the plaintiff's stable when he received the notice, he would undoubtedly still have had till the Wednesday evening to consider what he would do. The fact of the notice, such as it was, preceding the actual removal seems to me to make no difference.

But then it is said the right to return was lost, because the rule is that a buyer cannot return a specific chattel except it be [* 12] in the * same state as when it was bought. That is quite * true as a general proposition, but in such a case as the present the rule must, in my opinion, be qualified thus: The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable, either from its inherent nature or in the course of the exercise by the buyer of those rights over it which the contract gave. For example, suppose the horse, while standing in the stable, strained itself or injured a limb, that would not affect the right of return,

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although the horse would no longer be exactly in the same condition as before. So here, where, without the plaintiff's default but while he was doing with the horse what he had a right to do under his contract, the horse was injured. I do not think the right to return it was lost. A contrary rule would often produce singular results: for it must be applied to great and small accidents alike; so that a buyer might find himself deprived of his right to return a horse which was not according to warranty in consequence of any trifling hurt it might have suffered — perhaps not causing a difference of five shillings in its value — while in the buyer's possession. It appears to me, therefore, that the cases very properly cited by Mr. Graham as to the necessity, where a contract is rescinded, of the parties being capable of being replaced in their former position, must be taken with the qualification I have indicated.

No doubt some cases which may be put by way of illustration present difficulties, but they can all be explained if the condition is borne in mind that the right to return remains, in case of alteration of condition only where that alteration is attributable either to the horse's nature or to some inevitable accident, or to some incident to which the horse was liable, while the buyer was exercising his right over it under the contract. Thus, where a buyer, who has bought a horse not warranted to jump, tries it at jumping, and so injures it, it is clear his right of return would be gone, because the accident would be his own fault. He would not be trying the horse by virtue of any right given to him under his agreement. If, however, the injury were caused by reason of a trial necessary to test the warranty the horse was sold under, then the right would remain. The case of a horse dying was also put * to us. But there, if the death occurs through some [* 13] natural disease, or without the purchaser's default, is he to be without a remedy? It may be answered that he might have his action on the warranty. However that might be, I am disposed to think that even in such a case the contract might still be rescinded, just in the same way as I think it could be if the horse sold were to be left at the vendor's by his permission after the sale and were to die there. In this case, therefore, I am of opinion that the plaintiff is entitled to recover, and that the rule should be discharged.

CLEASBY, B. I am of the same opinion. The effect of the contract is to give the buyer an option of returning the horse in a

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particular event and within a specified time; and although it is clear that he might by his conduct have disintitled himself to exercise his option, he has not, in my judgment, done anything so to disintitle himself in the present case. By taking the horse away he did no more than, under his contract, he had a right to do. Had the facts been different, a question might perhaps arise as to the effect of this removal. Suppose, for example, the defendant had given the plaintiff explicit notice before the horse was removed that the warranty was a mistake, it might perhaps then be said that by taking it away the plaintiff elected to keep it, or at all events to keep it unless it could be returned in the same condition as at the time of sale. But here there was nothing proved but a loose statement by the groom who had charge of the horse; and I think the plaintiff was still at liberty to take the horse away and to return it if, upon further inquiry, it should turn out not to be in accordance with the warranty. This being so, the second question remains, whether the right given by the contract was limited, so as only to confer a right to return the horse, provided it remained in the same condition as it was in when sold. It is a sufficient answer to say, that as a time for returning the horse was expressly fixed by the contract, an accident occurring within the time from a cause beyond the plaintiff's control ought not to deprive him of his right, provided he can return the horse in some shape or other. The case of the death of the animal purchased is different, and need not be considered now. Moreover, the matter may be put thus: As a general rule, damage [* 14] * from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested, and he must therefore bear the loss. The cases cited seem to me to be beside the present question, for here there was an express condition in the contract itself giving to the purchaser an absolute right, under certain circumstances, to return the horse. I think, therefore, the plaintiff is entitled to recover.

Rule discharged.

ENGLISH NOTES.

The rule mentioned in the judgment of the principal case, *Noble v. Ward*, that the parties could have entered into a valid oral contract to rescind the contract *simpliciter* was laid down in *Goman v. Salisbury*, 1 Vern. 240; *Davis v. Symonds* (1787), 1 Cox, 402, 406; 1 R. R. 63, 67; *Hill v. Gomme* (1839), 1 Beav. 540; 8 L. J. (N. S.) Ch. 350. "But it has been laid down in all the cases that such a defence (*i. e.* parol waiver) must be established with the greatest clearness and precision; and the circumstance of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same position in which they stood before the agreement was entered into." Per MASTER OF THE ROLLS, in *Robinson v. Page* (1826), 3 Russ. 114, at p. 119. See also *Price v. Dyer* (1809), 17 Ves. at p. 364; 11 R. R. 102, 106, per Sir WILLIAM GRANT, M. R.

Waiver may be implied from conduct. *Rosse v. Sterling* (1816), 4 Dow. 442; *Carter v. Dean of Ely* (1835), 7 Sim. 211; *Nash v. Armstrong* (1861), 10 C. B. (N. S.) 259; *Lowther v. Heaver* (1889), 41 Ch. D. 248, 268; 58 L. J. Ch. 482; 60 L. T. 310; 37 W. R. 465.

Where on a sale of goods the mode of performance, *e. g.*, day of delivery, is altered by the vendor, and there is no evidence that the postponement took place at the request or with the consent of the vendee, the vendor cannot sue upon the contract, for he was not ready to deliver according to the agreement; and a subsequent verbal request of the vendee to deliver cannot be relied upon either as a new contract or as an arrangement for an altered time of delivery. *Plerins v. Downing* (1876), 1 C. P. D. 220, 45 L. J. C. P. 695; 35 L. T. 263. This case is difficult to reconcile with *The Leather Cloth Company v. Hieronimus* (1875), L. R., 10 Q. B. 140; 44 L. J. Q. B. 54; 32 L. T. 307; 23 W. R. 593, where the vendor altered the route of delivery of the goods, which were lost on the voyage. The purchaser did not reply to the letter acquainting him with the altered route by which the goods were sent, but gave further orders for goods, which were sent by this route. It was held that there was evidence from which the jury might find that the purchaser had assented to the substituted performance in the change of route, which assent need not be in writing.

If the purchaser forbears from taking delivery at the appointed time at the request of the vendor, the latter will be estopped from setting up the Statute of Frauds in exoneration of his liability on the original contract. *Ogle v. Fane* (1868), L. R., 3 Q. B. 272; 37 L. J. Q. B. 77; 16 W. R. 463. Where the seller forbears from pressing delivery and acceptance of the goods at the request of the buyer, the latter will not be allowed to set up the Statute of Frauds in defence. *Hickman v.*

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Haynes (1875), L. R., 10 C. P. 598; 44 L. J. C. P. 358; 32 L. T. 873; 23 W. R. 872. But the vendor remains liable to deliver the goods at some reasonable time. *Tyers v. Rosedale and Ferryhill Iron Co.* (1875), L. R., 10 Ex. 195; 44 L. J. Ex. 130; 33 L. T. 56; 23 W. R. 871.

If the original contract, although in writing, was not one required to be so by the Statute of Frauds, a substituted contract may be evidenced in any way which establishes it according to the principles of the Court. Thus provisions in the articles of partnership may be varied by conduct. *Const v. Harris* (1823), Turn. & Russ. 496; *England v. Curling* (1844), 8 Beav. 129. See *Hart v. Alexander* (1837), 2 M. & W. 484.

Another instance of the discharge of contracts by the operation of a condition subsequent occurs generally in the sale of lands, where the vendor often stipulates that if the purchase-money is not paid, or the contract not completed on a certain day, or that if he shall be unable or unwilling to remove any objection, he will be at liberty to rescind the contract. Such a condition will be given effect to according to its terms, provided that the option to rescind is not exercised capriciously or arbitrarily. See *Roberts v. Wyatt* (1810), 2 Taunt. 268; 11 R. R. 566; *Tanner v. Smith* (1840), 10 Sim. 410; *Morley v. Cook* (1842), 2 Hare, 106; *Duddell v. Simpson* (1866), L. R., 2 Ch. 102; 36 L. J. Ch. 70; 15 L. T. 305; 15 W. R. 115; *Gray v. Fowler* (1873), L. R., 8 Ex. 249; 42 L. J. Ex. 161; 29 L. T. 297; 21 W. R. 916; *Powell v. Powell* (1875), L. R., 19 Eq. 422; 44 L. J. Ch. 311; 32 L. T. 148; 23 W. R. 482; *In re Jackson and Oakshott* (1880), 14 Ch. D. 851; 49 L. J. Ch. 523; 41 L. T. 719; 28 W. R. 794; *In re Monckton and Gilzean* (1884), 27 Ch. D. 555; *Hardman v. Child* (1885), 28 Ch. D. 712; 54 L. J. Ch. 695; *In re Dames and Wood* (1885), 29 Ch. D. 626; 54 L. J. Ch. 771; *In re Starr Bowkett Society and Sibun* (1889), 42 Ch. D. 375; 58 L. J. Ch. 651.

In connection with this rule the cases and notes under "Accord and Satisfaction," 1 R. C. 368, *et seq.*, and Nos. 3 & 4 of "Accident," 1 R. C. 216, *et seq.*, may also be referred to.

AMERICAN NOTES.

As to accord and satisfaction, see *ante*, vol. 1, pp. 391, 402.

The doctrine of discharge by a substituted agreement is declared in *Ten. v. Bilby*, 123 United States, 572; *Stewart v. Keteltas*, 36 New York, 388; *Rogers v. Rogers*, 139 Massachusetts, 440; *Macrell v. Graves*, 59 Iowa, 613; *Farrar v. Taliver*, 88 Illinois, 408; *Reed v. McGrew*, 5 Ohio, 375; *Church v. Florence Iron Works*, 45 New Jersey Law, 129; *Chrisman v. Hodges*, 75 Missouri, 413; *Norton v. Browne*, 89 Indiana, 333; *Baum v. Corert*, 62 Mississippi, 113.

Even a contract under seal may be discharged by the performance of a subsequent parol agreement. *McCreery v. Day*, 119 New York, 1; 16 Am.

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St. Rep. 793; *Worrell v. Forsyth*, 22 Illinois, 141; *Canal Co. v. Ray*, 101 United States, 522; and cases cited in Lawson on Contracts, § 396, note 3. And so a contract within the Statute of Frauds. *Long v. Hartwell*, 34 New Jersey Law, 116; *Stevens v. Cooper*, 1 Johnson Chancery (New York), 425; 7 Am. Dec. 502; *Phelps v. Seely*, 22 Grattan (Virginia), 573; *Lauer v. Lee*, 42 Pennsylvania State, 165.

In *Chapman v. McGrew*, 20 Illinois, 101, it was held that an executory parol agreement to vary a contract under seal cannot be pleaded in a Court of law, to relieve a surety. It is there conceded that the rule is otherwise in some Courts. This decision was pronounced wrong, in *Fisher v. Deering*, 60 *ibid.* 117; but it was re-asserted in *Barnett v. Barnes*, 73 *Ibid.* 216, on the ground that it merely decided that "a sealed executory contract cannot be modified or in part changed by parol agreement so as to authorize either party to sue upon it."

In case of a sale on trial, the title and risk remain in the seller until the lapse of the time fixed, or of a reasonable time for election. *Hunt v. Wyman*, 100 Massachusetts, 198 (cited in Benjamin on Sales, § 599 a), where a horse, purchased on trial, ran away and injured himself before a reasonable time for trial had elapsed. *Mowbray v. Cady*, 10 Iowa, 604. See *Kimball v. Froman*, 35 Michigan, 327; *Dearborn v. Turner*, 16 Maine, 17. But after the lapse of such time the sale becomes absolute. *Waters Heater Co. v. Mansfield*, 48 Vermont, 378; *Kahn v. Klabunde*, 50 Wisconsin, 235; *Dewry v. Erie*, 14 Pennsylvania State, 211; 53 Am. Dec. 533; *Spickler v. Marsh*, 36 Maryland, 222; *Prairie Farm Co. v. Taylor*, 69 Illinois, 440; 18 Am. Rep. 621; *Aultman v. Theimer*, 34 Iowa, 272. The burden of proof is on the bailee to show himself free from negligence in case of injury while the article is in his possession. *Nichols v. Balch*, 28 New York Supplement, 667; 8 Miscellaneous Rep. (N. Y.) 452.

There is a distinction between a sale on trial and a sale with a privilege of return. In the latter case title passes at once, and the risk is on him. *House v. Beak*, 141 Illinois, 290; 33 Am. St. Rep. 307; *Hotchkiss v. Higgins*, 52 Connecticut, 205; 52 Am. Rep. 582; *McKinney v. Bradlee*, 117 Massachusetts, 321. "An option to purchase, if the party to whom the goods are transferred should like, is very different from an option to return the goods if he should not like them. In the first case the title will not pass until the transferee determines the option, if seasonably exercised; in the other, title passes, subject to the right to rescind and return, which is in effect a right to resell to his vendor." *Foley v. Felrath*, 98 Alabama, 176; 39 Am. St. Rep. 39.

If he does not return within a reasonable time the right is forfeited. *Rae v. Thompson*, 12 Cushing (Mass.), 281; 59 Am. Dec. 187; *Jones v. Wright*, 71 Illinois, 61; *Childs v. O'Donnell*, 84 Michigan, 533.

And if he exercises any act evincing ownership his right of return is lost, as for example, if he mortgages the property. *Lynch v. Wilford* (Minnesota), 59 Northwestern Reporter, 311; or after notifying the seller that he rejects it, subjects a substantial portion of it to a practical test of its fitness. *Cream City Glass Co. v. Friedlander*, 84 Wisconsin, 53; 21 Lawyers' Rep. Annotated, 135.

Mr. Lawson cites the second principal case and quotes from it in his text (Contracts, § 401).

No. 52. — *Hochster v. De La Tour*, 22 L. J. Q. B. 455. — Rule.

No. 52 — *HOCHSTER v. DE LA TOUR*.

(1853.)

RULE.

REFUSAL or inability of one party to perform his part of the contract discharges the other from further responsibility, and entitles him to sue for damages at once.

Hochster v. De La Tour.

22 L. J. Q. B. 455–460 (s. c. 2 El. & Bl. 678 ; 17 Jur. 972).

Contract. — Breach before Time for Performance. — Immediate Right of Action.

[455] Declaration, that in consideration that the plaintiff would agree to enter the service of the defendant as a courier, on the 1st of June, 1852, and to serve the defendant in that capacity, and travel with him as a courier, for three months certain, from the said 1st of June, for certain monthly wages, the defendant agreed to employ the plaintiff as courier on and from the said 1st of June for three months certain, to travel with him on the Continent, and to start with the plaintiff on such travels on the said day, and to pay the plaintiff during such employment the said monthly wages. Averment of an agreement to the said terms on the part of the plaintiff, and of his readiness and willingness to enter upon the said employment and to perform the said agreement. Breach, that the defendant, before the said 1st of June, wholly refused to employ the plaintiff in the capacity and for the purpose aforesaid, on or from the said 1st of June or any other time, and wholly discharged the plaintiff from his said agreement and from the performance of the same, and from being ready and willing to perform the same; and the defendant wholly broke and put an end to his promise and engagement: — *Held*, in arrest of judgment, that, after the refusal by the defendant to employ, the plaintiff was entitled to bring an action immediately and was not bound to wait until after the day agreed upon for the commencement of performance had arrived.

In assessing damages in such a case the jury are justified in looking at all that had happened or was likely to happen down to the day of trial, to increase or mitigate the plaintiff's loss.

The action in this case was commenced on the 22nd of May, 1852. The declaration stated that heretofore, to wit, on the 12th of April, 1852, in consideration that the plaintiff, at the request of the defendant, would agree with the defendant to enter into the service and employ of the defendant, in the capacity of a courier, on a certain day then to come, to wit, on the 1st of June, 1852, and to serve the defendant in that capacity, and travel with him

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on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit, at and after the rate of £10 for each and every month of such service, to be therefor paid by the defendant to the plaintiff, the defendant then agreed with the plaintiff and then promised him that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st of June, 1852, for three months from the day and year last aforesaid, to travel with the defendant on the continent of Europe as a courier, and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay to the plaintiff, during the continuance of such service and employment, for the same, the said wages or salary of £10 for each and every month of such service; and the plaintiff avers that he, confiding in the said agreement and promise of the defendant, did then, to wit, on the day and year last aforesaid, agree with the defendant to enter into the service and employ of the defendant in the capacity aforesaid on the 1st of June, 1852, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid,* and to be ready to start with the de- [* 456] fendant on such travels on the day and year last aforesaid, at and for the wages and salary last aforesaid. That from the time of the making of the aforesaid agreement and of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement, as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant in the capacity aforesaid, on the day aforesaid, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier, for three months certain from the day and year last aforesaid, and to start with the defendant on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said day, have entered into the said service and employ of the defendant in the capacity, upon the terms, and for the time aforesaid: of all which said several premises the defendant had notice and knowledge; yet

the defendant, not regarding the said agreement and promise, afterwards, and before the 1st of June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the 1st of June, 1852, for three months, or on, from, or for any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his, the plaintiff's part, and from being ready and willing to perform the same on his, the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined his said promise and engagement, whereby, &c., to the plaintiff's damage of £100.

On the trial before ERLE, J., at the sittings in London in Easter term last, a verdict was found for the plaintiff, damages £20. In the same term a rule was obtained to arrest the judgment, on the ground that the plaintiff could not treat the contract as broken before the 1st of June, 1852, and therefore that the present action was not maintainable.

HANNEN (June 10) showed cause. — The question is, whether or not a contract, the performance of which is to commence from a future day, can before that day be put an end to by the conduct of one party so as to give an immediate cause of action for the breach of it to the other party. The cases of *Leigh v. Paterson*, 2 J. B. Moore, 588, and *Phillpotts v. Evans*, 5 M. & W. 475; 9 L. J. (N. S.) Ex. 33, cited in moving for the rule, were all commented on by this Court in *Cort v. The Ambergate, &c. Railway Co.*, 20 L. J. Q. B. 460, and are met by the observations in that case. In *Ripley v. M'Clure*, 4 Ex. 345; 18 L. J. Ex. 419, PARKE, B., in giving judgment, says, "if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect;" but that must be taken with the qualification that there may be a final determination before the day for performance arrives. It cannot be taken generally. In the case of a contract to marry on a certain day, if the man marries another woman before the day, an action may be maintained against him before the arrival of the day fixed for the performance of the contract. *Short v. Stone*, 8 Q. B. 358; 15 L. J. Q. B. 143. So if a man contracts to sell an estate on a certain day, and he conveys the estate to another before the day. *Lovelock v. Franklyn*, 8 Q. B. 371; 15 L. J. Q. B. 146

[Lord CAMPBELL, C. J. It may be admitted that if a man disable himself from performing his contract at the day, that amounts to an immediate breach. In such a case there is no *locus penitentiae*; but what is there here to disable the defendant from performing his contract?]

Where the contract is such as to require preparation for its performance, and the conduct of one party before the day is such as reasonably to lead the other party * to think there [*457] is no use making such preparation, such conduct must be considered the same in effect as if the party had disabled himself from performance. There should be readiness and willingness to perform down to the time of actual performance; and if before that there is such retractation as to warrant the other party in acting upon it, that is sufficient to support an action. The plain expressed intention to break a contract ought to have the same effect as the failure to perform. He referred also to *Planché v. Colburn*, 8 Bing. 14; 1 L. J. (N. S.) C. P. 7; No. 61, p. 634; *Cutter v. Powell*, 6 T. R. 320; 3 R. R. 185; No. 60, p. 627, and *Wild v. Harris*, 18 L. J. C. P. 297.

H. Hill and Deighton, *contra*. In *Cort v. The Ambergate Railway Company* the question arose on the averment of readiness and willingness, and the action was not brought until after the time for the delivery of the goods. Here the time for performance had not arrived when the action was brought. What is alleged in the declaration in this case is not equivalent to legal incapacity on the part of the defendant, as in *Short v. Stone* and *Lovelock v. Franklyn*. Where a party refuses to perform, and does not withdraw such refusal, that is evidence of a continuing refusal; but still the other party must wait until the day for performance arrives before he can sue for a breach of the contract; without legal incapacity there can be no breach before. Wherever time is of the essence of a contract, no cause of action can arise until the arrival of that time. The effect of the contract here is, that the defendant would on the 1st of June employ the plaintiff or put him in the same situation as regards wages. The breach of a contract means the neglect to do something which, under the contract, the party was bound to do at the time. The defendant was not to be called upon to do anything under the contract until the 1st of June; and how are the damages to be fairly ascertained in an action like the present? Suppose the defendant had made up his mind at the

end of May not to employ the plaintiff, he would be in a worse situation than by a refusal made earlier. *Cur. adv. vult.*

The judgment of the Court¹ was delivered by —

LORD CAMPBELL, C. J. On this motion in arrest of judgment the question arises whether, if there be an agreement between A. and B., whereby B. engages to employ A. on and from a future day, for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A., before the day, to commence an action against B. to recover damages for breach of the agreement : A. having been ready and willing to perform it till it was broken and renounced by B. The defendant's counsel very powerfully contended that if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short v. Stone*. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford v. Tiley*, 6 B. & C. 325; 5 L. J. K. B. 169. So if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first con-
[* 458] tracted to sell and deliver * them. *Bowdell v. Parsons*, 10 East, 359. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow, for prior to the day fixed for doing the act, the first wife

¹ LORD CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

may have died; a surrender of the lease executed might be obtained; and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that when there is a contract to do an act on a future day, there is a relation constituted between the parties in the mean time by the contract, and that they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation. As an example: a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Emmens v. Elderton*, 6 C. B. 160,¹ which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st of June, 1852, it follows that till then he must enter into no employment which will interfere with his promise "to start on such travels with the plaintiff on that day," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational and more for the benefit of both parties that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that

¹ Affirmed in H. L. 4 H. L. Cas. 624.

faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852, according to decided cases the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts to be given in evidence which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

An argument against the action before the 1st of June [* 459] is urged, from the difficulty of calculating the * damages;

but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial.

We do not find any decision contrary to the view we are taking of this case. *Leigh v. Paterson* only shows that upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to *Bowdell v. Parsons*, might have been brought before that time, as soon as the vendor had sold and delivered them to another. *Phillpotts v. Evans* was a similar case, and the only question there was as to

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the mode of calculating the damages on a breach of contract for the sale and delivery of wheat, the Court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered, the Court professing to proceed upon the rule laid down in *Startup v. Cortazzi*, 2 Cr. M. & R. 165; 4 L. J. (N. S.) Ex. 218, where no question arose as to the right to bring an action before the stipulated day of delivery, on a renunciation of the contract. PARKE, B., whose *dicta* are entitled to very great weight, certainly does say in *Phillpotts v. Evans*, with reference to the notice by the defendants that they would not accept the corn, "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it." But the learned Judge might suppose that the notice did not amount to a renunciation of the contract; and if he thought that after such a renunciation the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In *Ripley v. M'Clure* it is said, that under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered, was not necessarily a breach of the contract, but the Court intimated no opinion upon the question whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other, therefore, has a remedy for the breach of the contract; and they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to and inclusive of the time when the act was to be done. The only other case cited in the argument which we think it necessary to notice, is *Planché v. Colburn*, which appears to be an authority for the plaintiff. There the defendant had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise, but before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed,

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tendered, and delivered the treatise according to the contract. TINDAL, C. J., said, "The fact was that the defendants not only suspended but actually put an end to *The Juvenile Library*; they had broken the contract with the plaintiff." The declaration contained counts for work and labour; but the plaintiff appears to have retained his verdict on the counts framed on the special contract, thus showing that, in the opinion of the Court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. If it should be held that upon a contract to do an act upon a future

day, renunciation of the contract by one party dispenses [* 460] with a *condition to be performed in the mean time by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action; and the only ground on which the condition can be dispensed with seems to be the renunciation, which may be treated as a breach of the contract. Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a court of error. In the mean time we must give

Judgment for the plaintiff.

ENGLISH NOTES.

The rule in the principal case is further exemplified in *The Danube and Black Sea Railway, &c. Co. v. Xenos* (1862), 11 C. B. (N. S.) 152, 31 L. J. C. P. 84, 5 L. T. 527 (affirmed on appeal in Exchequer Chamber, 13 C. B. (N. S.) 825, 31 L. J. C. P. 284, 10 W. R. 320). There a contract was made on the 9th of July by the agents of A. and B. for the carriage of A.'s goods by B.'s vessels from London to Kustendjie; the shipment of such goods was to commence on the 1st of August. On the 21st July, B. denied the authority of his agent to make the contract, whereupon A.'s attorney gave B. a written formal notice that A. was ready to perform his part of the contract, and that he would hold B. responsible if he refused to perform his part. In reply to this, B. wrote denying the existence of such contract, and tendering another contract for the acceptance of A. This was rejected on the 24th of July. On the 1st of August, B. informed A. that he was ready to receive the goods on board his vessel; but A., who had in the mean time negotiated with C. for the reception of the goods on board C.'s

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vessel, declined to ship the goods with B. It was held, that there had been an express renunciation of the contract by B.; and that upon the above facts A. was entitled to sue B. for breach of contract.

In *Burton v. Pinkerton* (1867), L. R., 2 Ex. 340, 36 L. J. Ex. 137, 17 L. T. 15, the defendant, captain of a ship called *The Thames*, engaged the plaintiff as one of the crew for a voyage. In the course of the voyage, it was disclosed that the ship was employed in the service of the Peruvian Government who were at war with Spain. It was held that this was a different service from that contracted for; and that the plaintiff on discovering the true nature of the service was entitled to renounce the service, and sue the captain for damages as for breach of contract. The same principle was acted on in a very similar case of *O'Neil v. Armstrong* (Q. B. D. 23 May, 1895), 64 L. J. Q. B. 552, 99 L. T. 113, an action by an Englishman who was engaged for the service of the Japanese Government, not knowing (though his employer did) that war had broken out between Japan and China, and that his engaging in the service was a breach of the Foreign Enlistment Act.

So where the defendant contracted to deliver to the plaintiff a certain quantity of iron, and before the time of delivery repudiated the contract, the plaintiff was held entitled to recover. *Brown v. Muller* (1872), L. R., 7 Ex. 319, 41 L. J. Ex. 214, 27 L. T. 272, 21 W. R. 18. In *Frost v. Knight* (1872), L. R., 7 Ex. 711, 41 L. J. Ex. 78, the defendant promised to marry the plaintiff after his father's death, and married another while the father was alive. The plaintiff was held entitled, although the father still lived, to succeed in an action for breach of promise. The principal case was also followed in *Synge v. Synge* (1894), 1894, 1 Q. B. 466, 63 L. J. Q. B. 202, 70 L. T. 221, 42 W. R. 309.

The rule in the principal case is subject to two restrictions.

First, that the plaintiff must have treated the defendant's refusal to perform his part as breach of the contract. If he persisted in seeking performance of it, and the contract is rendered impossible of performance before the appointed day, his action must fail. *Arvery v. Bowden* (1857), 6 El. & Bl. 953, 26 L. J. Q. B. 3. There a charter-party between two British subjects stated that it was agreed that the plaintiff's (a British) ship should proceed to and load a cargo from the defendant at Odessa, forty-five running days being allowed for loading and unloading. The ship arrived at Odessa on the 11th of March, but the defendant's agent refused to load a cargo. The master, however, persisted in asking for a cargo until, on the 1st of April, it became known that a war had been declared between Russia and England. It was held that the plaintiff was not entitled to recover damages as for breach of the contract. A similar case was *Reid v. Hoskins* (1857), 6 El. & Bl.

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953, 26 L. J. Q. B. 5. *Avery v. Bourden* was confirmed in *Barwick v. Baba* (1857), 2 C. B. (N. S.) 563, 26 L. J. C. P. 280. There by a charter-party the ship of the plaintiffs (British subjects) was to proceed to Odessa, and after the discharge of her outward cargo was to load from the factors of the defendants, Russian subjects, a full cargo, and forty running days were to be allowed. The vessel arrived at Odessa on the 11th of February, and discharged her cargo, and on the 20th the master gave notice to the defendants that the ship was ready to receive the cargo. Before that time, and in answer to the notice and subsequently, the defendants said that they had ceded the charter-party to K., who would provide a cargo. K., however, refused to deliver a cargo. War broke out between Russia and England and rendered the performance of the contract impossible. It was held on the above facts that the plaintiff could not recover.

Secondly. The refusal to perform must be of the whole contract or of a covenant going to the whole consideration. For instance, a tenant is not entitled to throw up the lease because the landlord refuses to rebuild the premises at the end of four years according to a covenant in the lease. *Johnstone v. Milling* (1886), 16 Q. B. D. 460, 55 L. J. Q. B. 162, 54 L. T. 629, 34 W. R. 238.

AMERICAN NOTES.

The principal case is cited with approval by Lawson on Contracts, § 440, and supported by citations from several States, including *Howard v. Daly*, 61 New York, 362; 19 Am. Rep. 285 (*obiter*); *Ferris v. Spooner*, 102 New York, 10; *James v. Adams*, 16 West Virginia, 267; the last two citing the principal case; *Mc'ormick v. Basal*, 46 Iowa, 235; *Chamber of Commerce v. Sollitt*, 43 Illinois, 519; citing the principal case; *Platt v. Brand*, 26 Michigan, 175; and see *Holloway v. Griffith*, 32 Iowa, 409; 7 Am. Rep. 208 (breach of promise of marriage); *Dugan v. Anderson*, 36 Maryland, 567; 11 Am. Rep. 509; *Kadish v. Young*, 108 Illinois, 170, the last two citing the principal case.

In *Burtis v. Thompson*, 42 New York, 246; 1 Am. Rep. 516, the parties had contracted to intermarry "in the fall;" in October the defendant expressly refused to marry the plaintiff at any time; an action for the breach brought on the 25th of October was sustained. One Judge put the decision on the ground that the contract to marry "in the fall" was already broken. Another put it on the broader ground that the express refusal excused the plaintiff from waiting through the fall, and on the ground that the damage had already occurred, citing *Hochster v. De La Tour*, and remarking: "While not fully prepared to concur in this case without further consideration, yet the reasoning of the learned Judge, when applied to the facts of the present case, clearly shows the correctness of the charge upon the point under consideration."

In *Holloway v. Griffith*, *supra*, the Court said: "Strictly and technically speaking, there can be no breach of contract until the time for performance has arrived, and yet this Court has recognized it as 'a well-settled rule of law, that

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if before the time of performing the contract arrives the promisor expressly renounces the contract, the promisee may treat this *as* a breach of said contract, and may maintain an action in respect thereof.² *Chaltrie v. Messer-smith*, 19 Iowa, 179, and cases cited." The Court disapprove *Frost v. Knight*, L. R., 5 Ex. 322, and conclude that this rule is "sound and just, and too well settled to be now called in question."

In *Dugan v. Anderson*, *supra*, the decision was that where one entered service as a clerk for a specified time, and was wrongfully discharged before the expiration of that time, he might sue for the breach at once. The Court cite the principal case and *Frost v. Knight*, and observes: "It may be doubted whether the controversy is yet ended, and the law of England in respect thereto finally settled." They distinguish the principal case on the ground that in it the performance of the act contracted for was not to begin until a future time, while in the case at bar the performance was already begun and further performance was refused. On the doctrine of the principal case they observed:

"The principle of this decision in cases to which it has been held applicable, is, that there is a breach of the contract when the promisor repudiates it and declares that he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract: and the eventual non-performance may therefore by anticipation be treated as a cause of action, and damages be assessed and recovered in respect to it, though the time for the performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, yet they tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events materially lessen the injurious effects which would otherwise flow from the non-fulfilment of the contract: and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man, ought by reason to have done, whereby his loss has been, or would have been, diminished."

In *Dingley v. Oler*, 11 Federal Reporter, 372, where the defendant had

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refused to perform a contract to deliver ice at a certain price "while the river is open," it was held that the plaintiff might sue before the closing of the river, and the principal case and *Frost v. Knight*, were cited and approved: **LOWELL**, Circuit Judge, observing: "These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." "An able argument has been made against this doctrine by a jurist whose comparatively early death was a great loss to the cause of jurisprudence. *Daniels v. Newton*, 114 Mass. 530. I appreciate Judge **WELLS'** argument, but he makes an admission which very much impairs its force;" referring to his admission that the promisor's renunciation would excuse the other party from performance on his part, and estop the promisor from subsequently seeking to compel performance, although it would not authorize the other party to sue until the expiration of the specified time.

Parsons (2 Contracts, bottom p. 781) says: "It might however seem more reasonable to permit such an action only where the capacity of the promisor could not be restored before the day, or the promisee had received a present injury from the act of the promisor." Quoting at great length from the principal case he concludes: "The doctrine generally prevails, though the reasoning on which it is based is not wholly satisfactory, that upon an absolute repudiation of the contract, a party may sue though the time for his performance under the contract has not yet arrived."

The doctrine in question has been denied in *Daniels v. Newton*, 114 Massachusetts, 530; 19 Am. Rep. 384, a case of an agreement to purchase land within a specified time, and an absolute refusal ever to purchase. The Court disapproved (or at least denied the applicability of) the principal case and *Frost v. Knight*. The Court observe: "Until the time comes when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right nor loss upon which to found an action. The true rule seems to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when and under conditions such that he is or might be entitled to require performance. Such undoubtedly was the interpretation of the common law in all the earlier" (English) "decisions." Then follows a very extensive and learned review of the English cases, and the Court conclude: "We have no occasion now to determine what may be the rule where the contract may be fairly interpreted as establishing between the parties a present relation of mutual obligations" (as "a promise to marry, or to employ in a special capacity, at a future time"), "because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase-money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfil their agreement."

The refusal to perform, in order to justify action before the expiration of the appointed time, must be distinct, unequivocal, and absolute. *Smoot's case*,

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15 Wallace (U. S. Supr. Ct.), 36; *Dingley v. Oler*, 117 United States, 503. In the latter case the Court said the doctrine of the principal case "has never been applied in this Court."

In *New England M. F. Ins. Co. v. Butler*, 34 Maine, 451, it was held that the plaintiff's vote that if the assessments made upon its premium notes should not be punctually paid, the insurances previously made should be suspended, will not absolve the insured from liability on such notes, unless when first apprised of it he notify the company of his assent. The Court said: "A mere declaration by a party that he will not do a future act, which it has not and may not become his duty to perform, or a mere denial, that upon a future contingency the other party shall not (*sic*) have any benefit from the contract, is not such a violation of it, as will, without the assent of the other, destroy its efficacy. The defendants might, as the argument for them alleges, have a right to 'take them at their word,' if they had notified them that they consented that the policy should terminate upon the conditions named in their votes."

No. 53. — DOUGLAS v. PATRICK.

(1790.)

No. 54. — FINCH v. BROOK.

(1834.)

RULE.

TENDER of payment determines the legal liability of the person making it, and entitles him on pleading the tender (and on payment of the sum into Court) to have judgment in an action subsequently brought against him for payment. Tender is an unconditional offer of payment, consisting in the actual production, in current coin of the realm, of a sum not less than the amount due.

Douglas, and Phillis, his Wife, and two others v. Patrick.

3 T. R. 683-685 (s. c. 1 R. R. 793).

Tender. — Plea to Action on Contract.

If A., B., and C. have a joint demand, and C. has a separate de- [683] mand on D., and D. offers A. to pay him both the debts: which A. refuses without objecting to the form of the tender on account of his being entitled only to the joint demand; D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B., and C.

The plaintiffs declared for goods sold by Douglas's wife, and the two other plaintiffs, to the amount of £40, before the marriage of Douglas.

Plea. Non-assumpsit as to all but £7 12s. 10*d.*, and as to that sum that the defendant offered to pay it to one of the plaintiffs on account of himself and the others, but he refused to receive it, and discharged the defendant from making a tender.

Replication stated, by way of inducement, that the defendant was also indebted £1 5s. to another of the plaintiffs on a separate account, and that he offered £8 6s. 6*d.* in discharge of the [* 684] sums * mentioned in the declaration, and of the said

£1 5s. 0*d.* which the plaintiff to whom the offer was made refused to accept, and traversed the offer of £7 12s. 10*d.* in manner and form, &c. Defendant tendered an issue on the traverse, in which the plaintiff joined.

With respect to the offer to pay, on which the question arose, it appeared at the trial that the defendant went the first time to one of the plaintiffs, and offered £8 6s. 6*d.* for both debts, which the other refused to take unless the defendant would pay the whole sum due on both accounts. The defendant went a second time to the plaintiff Knowles, and said that he had eight guineas and an half in his pocket, which he had brought for the purpose of satisfying both the demands, but Knowles then told him that he need not give himself the trouble of offering it, for he would not take it, as the matter was then in the hands of his attorney. It was objected at the trial that, as the offer of £7 12s. 10*d.* was never specifically made, the plaintiffs were entitled to recover; and they accordingly obtained a verdict. A motion having been made by Mingay to set aside that verdict, and to grant a new trial,

Erskine and Manley now showed cause; contending that the evidence did not support the tender which was pleaded; for the tender proved was never specifically made on this account, but mixed with another matter not included in the present demand. Notwithstanding the matter stated in the replication, the traverse, on which the issue was taken, was only on the offer of the £7 12s. 10*d.*

Mingay and Walton, *contra*, were stopped by the Court.

Lord KENYON, C. J. It struck me on a sudden at the trial that, as the use of pleading is to reduce the matters in litigation to a single point, the tender made should have been properly

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pleaded; and that as the tender of the sum pleaded-in this action was accompanied with another sum, it could not be supported; but on consideration I am clearly of opinion that it was a good and legal tender. Though still there is an informality in pleading it; it should have been pleaded as a tender to *all* the plaintiffs, and not to one only. It is no objection to this tender that the money was not actually produced, because what was said by one of the plaintiffs superseded the necessity of it.

ASHHURST, J. In order to constitute a legal tender, the money should be actually shown to the person to whom it is tendered; but it may be dispensed with by the party himself, as in * this case. And as to the other point, there is no doubt [* 685] but that a tender of the greater includes the smaller sum.

BULLER, J. (after observing on the informality of the replication, and that the plaintiffs ought to have taken issue immediately on the tender pleaded by the defendant) said, that the only question on the pleadings was, whether or not the defendant had tendered the £7 12s. 10*d.*; and that was clearly proved, for it was included in the larger sum.

GROSE, J. The only question is whether the sum mentioned in the plea were or were not tendered at all; and not whether it was tendered, mixed with any other sum; and of this there is no doubt. *Rule absolute.*

Finch v. Brook.

1 Bing. N. C. 253-258 (s. c. 1 Scott, 70; 2 Scott, 511; 2 Hodges, 97).

Tender. — Actual Production of Money necessary, if not dispensed with.

On a plea of tender of £1 12s. 5*d.* the jury found specially, that defendant's attorney called on plaintiff and said, "I come to pay you £1 12s. 5*d.* which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that plaintiff said, "I can't take it, the matter is now in the hands of my attorney;" — *Held*, upon writ of false judgment, that such finding did not warrant a judgment for defendant.

This was a writ of false judgment from the county Court of Cambridgeshire, where, to debt for goods sold, the defendant pleaded *nil debet*, except as to £1 12s. 5*d.*, parcel of the demand; and as to that sum, that, after the time when the said sum of £1 12s. 5*d.*, * parcel, &c., became due and payable, [* 254] and before the exhibiting of the bill of the plaintiff in that behalf, to wit, on, &c., at, &c., and within the jurisdiction aforesaid,

the defendant was ready and willing, and then and there tendered and offered to the plaintiff, to pay the plaintiff the said sum of £1 12s. 5*d.*, parcel, &c., to receive which of the defendant the plaintiff then and there wholly refused. Upon which, issue being joined, the jury found,

That the defendant did not owe any part of the money demanded, except as to the said sum of £1 12s. 5*d.*, parcel, &c.: and as to the said sum of £1 12s. 5*d.*, parcel, &c., that Richard Tabram, the attorney of the defendant, by the direction and on the behalf of the defendant, on the 25th of May, 1833, and before the levying of the said plaint by the plaintiff, called at the plaintiff's shop in Cambridge, to pay the said sum of £1 12s. 5*d.*, parcel, &c., and had the money in his pocket for that purpose. That Tabram then and there saw the plaintiff in his shop, and addressed him, and said that he, Tabram, had called on the plaintiff to pay him a debt of £1 12s. 5*d.*, which the defendant owed to him; that Tabram mentioned that precise sum to the plaintiff; and that Tabram, at the same time, put his hand in his pocket for the purpose of taking out the said money, but did not actually produce the same: whereupon the plaintiff, in answer, said, "I can't take it (meaning the said £1 12s. 5*d.*), the matter is now in the hands of Mr. Cooper;" who, the plaintiff stated, was the clerk of Mr. Cannon, his attorney. That Tabram promised to see Cooper, and went away for that purpose; but having met and conversed with another person, he forgot to do so, and did not see Cooper. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the defendant did tender and offer to [*255] pay to the plaintiff the said sum of *£1 12s. 5*d.*, parcel, &c., in manner and form as the defendant had above in his plea alleged, the jurors were altogether ignorant, and therefore prayed the advice of the Court.

The Court below gave judgment for the defendant.

Stephen, Serjt., for the plaintiff. The finding of the jury does not support the plea of tender; and the judgment below must be reversed. The money should have been actually produced, or it should have been found that the plaintiff dispensed with its actual production; and, in that case, such dispensation should have been specially pleaded. *Dickinson v. Shce*, 4 Esp. 68, is in point. There, to prove the tender, the defendant gave in evidence, that he and a friend had gone to the chambers of the attorney for the

plaintiff, and said, that he was come to settle with him the account of the plaintiff: that he produced a paper containing a statement of the account, in which he made the balance £5 5s., which he said he was ready to pay; but he produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was above £8. And Lord KENYON said, "That when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the *quantum*, might dispense with the tender of the actual, or of any specific sum: there should, however, be an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it." To the same effect are *Leatherdale v. Sweepstone*, 3 Carr. & P. 342; *Thomas v. Evans*, 10 East, 101; 10 R. R. 229; *Firth v. Purris*, 5 T. R. 432; 2 R. R. 637; *Suckling v. *Concy*, Noy, 74, and Com. [*256] Dig. *Pleader*, 2 W. 28. In *Douglas v. Patrick*, 3 T. R. 683; 1 R. R. 793; p. 589, *ante*, the defendant pleaded, and established, that he was discharged by one of the plaintiffs from making the tender. In *Read v. Goldring*, 2 M. & S. 86; 14 R. R. 594, the defendant's agent pulled out his pocket-book, but the plaintiff refused to adjourn to a neighbouring house to receive the money. In *Kraus v. Arnold*, 7 Moore, 59, there was nothing that approached a legal tender.

Butt, *contra*. The facts found by the jury establish a dispensation of the production of the money. The rigour of the old cases has led to great injustice, and is relaxed by later decisions. In *Read v. Goldring*, the plaintiff's refusal to adjourn when the agent pulled out his pocket-book, was held to constitute a dispensation of the actual exhibition of the money, and to make the tender sufficient. That case is not, in substance, distinguishable from the present. Proof of tender of £20 9s. 6d. has been held to support a plea of tender of £20; *Dean v. James*, 4 B. & Adol. 546; and in *Polglass v. Oliver*, 2 Cr. & Jer. 17, BAYLEY, B., said, "The party to whom a tender is made may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced. *Lockyer v. Jones*, Peake, N. P. 239 n.; 3 R. R. 682 n.

There is reason and good faith in this decision; for if you objected expressly on the ground of the quality of the tender, it would have given the party an opportunity of getting other money, and making a good and valid tender."

TINDAL, C. J. The ground on which I put my judgment [*257] is very short. All the cases agree that, in order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the defendant; for, according to Comyn's Digest, s. 8, "The jury may find a general verdict for the plaintiff, where the special matter found would be against him: as, in trover, on proof of a demand and refusal, they may find for the plaintiff; but if it be found specially, it will be adjudged no conversion: *vide* Action upon the Case upon Trover, (E). On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c.; but if it be found specially, it will not be judged so." But, here, they have stated the special matter without finding any actual or implied dispensation. The judgment of the Court below, therefore, must be reversed.

GASELEE, J. I am of the same opinion. The jury, upon these facts, might have found for the defendant on the ground of a dispensation, as in trover they may find a conversion from the circumstances of demand and refusal; and had they found a dispensation, the Court would not have interfered. But no such fact being found, and no money having been produced, the judgment must be reversed.

VAUGHAN, J. I regret that I feel myself bound to come to the same conclusion. The cases cited for the plaintiff were nearly all considered in *Lockyer v. Jones*; and it was said by MANSFIELD,

C. J., in a later case, that great importance was attached [*258] to the production of the money, as the sight of it might tempt the creditor to yield.

BOSANQUET, J. I agree with the rest of the Court, on the ground that this objection arises on the finding in the special verdict, although I am not prepared to say the circumstances might not have warranted the jury in finding for the defendant.

Judgment reversed.

ENGLISH NOTES.

Legal tender is a shilling in bronze; forty shillings in silver; gold, and Bank of England notes, to any amount. Country notes are good tender if their quality be not objected to. *Polyglass v. Oliver* (1831), 2 Cr. & Jer. 17 (cited in the principal case of *Finch v. Brook*).

Tender must be unconditional. Whether demand for a receipt is conditional, see *Cole v. Blake* (1793), 1 Peake, N. P. 238; 3 R. R. 681; *Richardson v. Jackson* (1841), 8 M. & W. 298; *Hastings v. Thorley* (1838), 8 Car. & P. 573.

Tender may be of a larger sum, but must not be accompanied with a demand for change. *Betterbee v. Davis* (1811), 3 Camp. 70; 13 R. R. 755.

A full collection of the cases relating to tender will be found in Benjamin on Sales, 4th ed., pp. 716-732. It may be observed that a question of tender has not often recently come before the Courts; and perhaps the reason is that the question must resolve itself into a question of costs, which are now in the discretion of the Court.

AMERICAN NOTES.

The principles of tender accepted in this country substantially correspond with those in England. The tender must be in gold or silver coin, or United States treasury notes; at least the amount of the debt; actually produced; unconditional; kept good; pleaded and paid into Court. Lawson on Contracts, § 417; Browne on Sales, 171, &c.

1. It must be in lawful currency. *Knoc v. Lee*, 12 Wallace (U. S. Supr. Ct.), 457. A certified check will not answer. *Barboer v. Hickey*, 2 App. Cases, District Columbia, 207. But this may be waived by absence of objections. *Ward v. Smith*, 7 Wallace (U. S. Supr. Ct.), 447; *Warren v. Mains*, 7 Johnson (New York), 476; *Snow v. Perry*, 9 Pickering (Mass.), 542. Or where the objection is only to the amount. *Ball v. Stanley*, 5 Yerger (Tennessee), 599; 26 Am. Dec. 263.

2. It must not be less than the debt. *Wright v. Behrens*, 39 New Jersey Law, 413; *Nelson v. Robson*, 17 Minnesota, 284. But insufficiency is waived by non-objection. *Oakland Bank v. Applegarth*, 67 California, 86.

3. The money must be present, ready, produced, in sight and offered, unless production is waived. Mere words or offers alone, or statements as to willingness or ability to pay, are not sufficient, although indicative of present possession of the money and intention to proffer it. *Breed v. Hurd*, 6 Pickering (Mass.), 356; *Fuller v. Little*, 7 New Hampshire, 735; *Potts v. Plaisted*, 30 Michigan, 139; *Harmon v. Magee*, 57 Mississippi, 710; *Bakeman v. Pooler*, 15 Wendell (New York), 637. The amount must be stated, in addition to the production in sight and the offer. *Knight v. Abbott*, 30 Vermont, 577; *Mathewson v. Kelly*, 24 U. Can. C. P. 598. But it need not be counted. *Behaving v. Hatch*, Walker (Mississippi), 369; 12 Am. Dec. 570. The creditor may waive pro-

 Nos. 53. 54. — Douglas v. Patrick ; Finch v. Brook. — Notes.

duction by explicit words to that effect, or by an unqualified declaration that he will not accept if produced. *Sellick v. Tallman*, 87 New York, 106; *Hazard v. Loring*, 10 Cushing (Mass.), 267; *Sands v. Lyon*, 18 Connecticut, 18; *Berry v. Nall*, 54 Alabama, 451; *Wheeler v. Knaggs*, 8 Ohio, 172; *Berthold v. Reynolds*, 37 Missouri, 595; *Guthman v. Keane*, 8 Nebraska, 507. Or by objection on some other ground alone. *Thorne v. Mosher*, 20 New Jersey Equity, 257. But waiver is not operative unless the other party had the ability to produce the money presently. *Eddy v. Davis*, 116 New York, 247; unless there is an explicit waiver of the necessity of present possession. *Hall v. Norwalk F. Ins. Co.*, 57 Connecticut, 105. In case of a tender of goods time and opportunity must be given to examine them. *Wyman v. Winslow*, 11 Maine, 398; 26 Am. Dec. 542; *Hawley v. Mason*, 9 Dana (Kentucky), 32; 33 Am. Dec. 522.

4. It may not be conditioned on the giving of a receipt in full, or discharge, or the surrender of anything. *Brooklyn Bank v. DeGrauw*, 23 Wendell (New York), 342; 35 Am. Dec. 569; *Wood v. Hitchcock*, 20 Wendell (New York), 17; *Hepburn v. Auld*, 1 Cranch (U. S. Supr. Ct.), 321; *Forest Oil Co.'s Appeal*, 118 Pennsylvania State, 138; 4 Am. St. Rep. 584; *Richardson v. Boston C. Laboratory*, 9 Metcalf (Mass.), 43; *Storey v. Kreuson*, 55 Indiana, 397; 23 Am. Rep. 668; *Thompson v. Battie*, 11 Nebraska, 147; 38 Am. Rep. 361; *Draper v. Hitt*, 43 Vermont, 439; 5 Am. Rep. 292; *Moore v. Norman*, 52 Minnesota, 83; 38 Am. St. Rep. 526.

5. It must be kept good and ready for payment on demand. *Town v. Trow*, 24 Pickering (Mass.), 138; *Crain v. McGoon*, 86 Illinois, 431; 29 Am. Rep. 37. But it is not necessary to keep on hand the identical money. *McCalley v. Otey*, 90 Alabama, 302; *Saulders v. Bryer*, 152 Massachusetts, 141; 9 Lawyers' Rep. Annotated, 255; *Aulger v. Clay*, 109 Illinois, 493; *Shields v. Lozeau*, 22 New Jersey Equity, 447. See note 53, Browne on Sales, p. 173.

6. It must be pleaded and paid into Court. *Sidenberg v. Ely*, 90 New York, 257; 43 Am. Rep. 163; *Wheeler v. Woodward*, 63 Pennsylvania State, 158; *Allen v. Cheever*, 61 New Hampshire, 62; *Gilpatrick v. Ricker*, 82 Maine, 185. It then belongs to the plaintiff. *Taylor v. Brooklyn El. R. Co.*, 119 New York, 561. This pleading and payment into court may constitute the first tender. *Weaver v. Nugent*, 72 Texas, 272; 13 Am. St. Rep. 792.

Tender is not necessary when the creditor absents himself or avoids the debtor, in order to defeat it. *Gilmore v. Holt*, 4 Pickering (Mass.), 257; *Noyes v. Clark*, 7 Paige Ch. (New York), 179; 32 Am. Dec. 620; *Hall v. Whittier*, 10 Rhode Island, 530. Or refuses to perform on his part. *Newcomb v. Brackett*, 16 Massachusetts, 161. Or says nothing is due and that he will take nothing. *Sharp v. Todd*, 38 New Jersey Equity, 324.

No. 55. — **Brown and others v. Royal Ins. Co.**, 28 L. J. Q. B. 275. — Rule.

No. 55. — **BROWN v. ROYAL INSURANCE COMPANY.**
(1859.)

No. 56. — **TAYLOR v. CALDWELL.**
(1863.)

RULE.

IMPOSSIBILITY arising subsequently to the contract does not excuse performance, unless created by law ; or unless continued possibility of performance is an implied term of the contract.

Brown and others v. Royal Insurance Company.

28 L. J. Q. B. 275–278 (s. c. 1 El. & El. 853 ; 5 Jur. N. S. 1255).

Contract. — Impossibility supervening. — No Excuse.

If one of the parties to a contract stipulates for the option of perform- [275]
ing his part in one of two lawful ways, he is, after having once made his
election, bound by such election ; and if the performance be impossible, and not
illegal, he is liable to damages for not being able to perform it.

In an action on a policy of insurance against fire, which contained a condition
by which the society reserved to itself the right of reinstatement in preference to
the payment of claims, the defendants pleaded that, having elected to reinstate
the insured premises, they were proceeding with the reinstatement thereof when,
by order of the Commissioners of Sewers lawfully acting in that behalf, the
premises were taken down as being in a dangerous condition, such condition not
being caused by the fire ; and that if the said premises had not been so taken
down, they would have proceeded with the reinstatement, and would have re-
stored them to the condition they were in before the fire, — *Held*, on demurrer,
per Lord CAMPBELL, C. J., CROMPTON, J., and HILL, J., that such plea was
bad ; ERLE, J., *dissentiente*.

The declaration was on a policy of insurance, by which the de-
fendants insured from loss or damage by fire, a house, No. 27
Aldgate Street, in the city of London, then in the occupation of the
plaintiff Brown, from the 24th of June, 1853, to the 24th of June,
1854, subject to certain conditions which were set out in the decla-
ration, the material condition being the twelfth, which was in these
words: “ Persons insured by this company, and who may suffer
loss, will receive their indemnity without deduction or discount ;
but in every case of loss the company will reserve to itself the right

of reinstatement in preference to the payment of claims, if it shall judge the former course to be most expedient." It was then averred that after the making of the policy the said insured premises were partly burnt down and consumed and destroyed by fire, and the residue of the said insured premises was damaged by fire and rendered unsafe and dangerous, and by reason thereof the same were obliged to be and were pulled down. Breach by the defendants, in not having paid the amount of the damage and loss, nor reinstated the said premises. The second count was on the same policy, and alleged that, after the plaintiffs had become entitled to be paid by the defendants the amount of the said loss and damage, or to have the said premises reinstated by the said defendants, the defendants, having notice of the premises, elected to reinstate the said insured premises under the said policy, in preference to the payment of the plaintiffs' claim for the loss and damage aforesaid, and gave notice of such election to the plaintiffs; and the said defendants thereupon began and proceeded to reinstate and restore the said insured premises; yet the said defendants did not complete or finish the reinstatement of the said premises, or proceed with due care, skill, despatch, or diligence in such reinstatement, although a reasonable time for such purposes had long since elapsed, but therein failed and made default, and by reason thereof the remains of the said premises not so destroyed by fire as aforesaid afterwards settled, sank, cracked, and gave way, and became dangerous and ruinous, and were thereby afterwards obliged to be, and were taken and pulled down, and have never been reinstated by the defendants. The count then went on to allege special damage incurred by the plaintiff Brown, in and about certain proceedings taken [* 276] * by the Commissioners of Sewers of London for the pulling down the said premises, whereby the said plaintiff was deprived of the use and occupation of the said premises, and hindered from carrying on his business, &c.

Pleas: Secondly, as to so much of the first count as alleges that the said insured premises were partly burnt down and consumed and destroyed by fire, and the residue of the said premises was damaged by fire, whereby the plaintiffs sustained loss and damage, the defendants say that within a reasonable time after the happening of the loss and damage in the introductory part of this plea mentioned, the defendants, in pursuance of the said condition on the said policy indorsed, judged it expedient, and elected to reinstate the said in-

sured premises, in preference to the payment of the plaintiffs' claim for the said loss and damage, of which the plaintiffs then had notice. And the defendants further say that within a reasonable time after the happening of the said loss and damage, they proceeded to reinstate the said insured premises as aforesaid, and did proceed, and were proceeding, with all reasonable despatch, in the reinstating of the same as aforesaid, until the Commissioners of Sewers of the City of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down, as a structure in a dangerous condition, whereby the defendants were prevented from further proceeding with or completing the reinstatement of the said insured premises as aforesaid. And the defendants further say that the dangerous condition of the said insured premises, at the same time of their being so caused to be taken down, and for which they were so caused to be taken down as aforesaid, was not caused by the burning down, consuming, destruction, or damaging by fire of the said insured premises in the said first count mentioned respectively; and that if the said Commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, and could and would have reinstated the said premises in and restored them to the same state and condition as they were in before and at the time of the happening of the said loss and damage by fire. And for a third plea, as to the second count of the declaration, the defendants say that after the happening of the loss and damage by fire in that count mentioned, they did proceed and were proceeding with due care, skill, despatch, and diligence in the said reinstatement of the said insured premises, until the Commissioners of Sewers of the City of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down, as a structure in a dangerous condition, and which is the taking and pulling down in the said second count mentioned, whereby the defendants were prevented from further proceeding with, or completing, or finishing the reinstatement of the said insured premises. And the defendants further say that the dangerous condition of the said insured premises at the time of their being so caused to be taken down, and for which they were so

caused to be taken down as aforesaid, was not caused by the burning, consuming, destruction, or damaging by fire of the said insured premises, in the said second count mentioned respectively, or by any want of due care, skill, despatch, or diligence of the defendants in proceeding in, or the reinstatement of, the said insured premises as aforesaid; and that if the said Commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, could, and would have reinstated the said premises in, and restored them to, the same state and condition as they were in before and at the time of the happening of the said loss and damage by fire.

To these pleas the plaintiffs demurred. Joinder therein.

Joseph Brown, in support of the demurrers: The question turns on the twelfth condition of the policy, which is set out in the first count of the declaration. Here the defendants have made their election to reinstate, and they now say they are excused from so doing because the Commissioners of Sewers have pulled [* 277] down the premises. LAWRENCE, J., in giving * judgment in *Hadley v. Clarke*, 8 T. R. 267; 4 R. R. 649, citing *Paradine v. Jane*, Aleyn, 27, states the laws applicable to this case: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Bullock v. Dommitt*, 6 T. R. 650, 3 R. R. 300; and *The Brecknock Canal Navigation Company v. Pritchard*, 6 T. R. 750, 3 R. R. 335, are to the like effect. It is impossible to distinguish the present case from a simple covenant to repair demised premises.

[Lord CAMPBELL, C. J., referred to *Wright v. Hall*, 27 L. J. Q. B. 345. CROMPTON, J. Is not this really a question of damages?]

Lush (Kingdon with him), in support of the pleas. — The first thing to be considered is, what have the parties contracted to do? The defendants have contracted to indemnify the plaintiffs against loss by fire, reserving to themselves the option of the mode in which they will do so. This is very different from an absolute covenant to repair. They are not in the position of lessees who have covenanted to keep a house in repair, and who are liable under all circumstances. The law has interposed and rendered it impossible for them to reinstate the premises. The Commissioners of Sewers

interposed while the defendants were going on with the reinstatement, and in consequence of the decrepit state of the premises ordered them to be pulled down. The defendants are willing to perform their contract as soon as the premises are in a condition for them to do so.

[Lord CAMPBELL, C. J. As soon as they had elected to reinstate, were they not bound to perform their undertaking?]

No; they have a right to waive their election now that it has become impossible to perform it.

[ERLE, J. If our judgment is against the defendants, its effect will be to render them liable to rebuild the premises. Lord CAMPBELL, C. J. I doubt that. I think the damages may be assessed.]

If that be so, and the defendants are only liable to such damages as would reinstate the premises in the condition they were in before the fire, they are willing to agree to that. But supposing the election cannot be waived, the contract is to reinstate the premises, — that is, to place them in the condition they were in before the fire, and if that has become impossible by the act of the law, then they come within the well-established law laid down in *Co. Lit.* 206.

Joseph Brown, in reply. — *Com. Dig.* tit. *Condition* (D, 2), shows the distinction between impossible and improbable conditions. Here the defendants contend that, if we should never be able to rebuild, they should never be called upon to reinstate. They had an alternative by which they might have performed their contract, but they elect the other in the face of the possibility of its becoming impossible according to their argument, and so seek to get rid of their liability altogether.

Lord CAMPBELL, C. J. I am of opinion that our judgment ought to be for the plaintiffs. I think we are in the same situation as if the policy had been absolutely to reinstate the insured premises in case of fire. Where there is an election given by a contract, and the election is made, it is the same as if there had been no election; and the party making the election is absolutely bound to do that which he has elected to do. If this policy had been to reinstate the premises without any alternative as to making pecuniary compensation in case of loss, the society would have been bound to reinstate. The question here is, the premises having suffered damage by fire, and the society not having made any compensation, whether it is a defence to this action to plead these pleas. I think

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it is not. The society undertook to do what is lawful, and what continued to be lawful, and whether they can or cannot do what they undertook to do is quite immaterial; they must either do it or pay damages for not doing it. That was the doctrine laid down in *Paradine v. Jane*, and adopted by me in *Hall v. [* 278] * Wright*, which case is now before the Exchequer Chamber, and to which doctrine I still adhere. If a party undertake to do what is lawful, and does not do it, it is no defence for him to say that he cannot do it, if the law has not rendered it unlawful for him to do it. Now, in this case there is nothing unlawful; if it has become impossible, damages must be paid. It was a lawful contract when entered into, and the defendants are liable in damages for a breach of their contract. As to the principle on which the damages are to be assessed, I give no opinion.

ERLE, J. I cannot concur in the judgment which has just been given, because it appears to me to follow as a consequence that the plaintiffs would be entitled to damages unless the defendants build an entirely new house. I take the facts disclosed in this case to be that the premises were old, that the interior was destroyed by fire, and that the defendants were willing to reinstate them in the state they were in before the fire; but that before they could do so the outer walls were removed by order of the Commissioners of Sewers, and that it became impossible for the defendants to perform their contract. It is said that a contract to reinstate premises is the same as a covenant by a tenant to repair demised premises. I think not. It seems to me that the excuse put by the pleas is, either that the law rendered the performance of the contract by the defendants unlawful, or that it was the fault of the plaintiffs themselves that the contract was not performed, inasmuch as they allowed their premises to get into a dangerous condition. It was the duty of the plaintiffs not to have allowed their walls to get into so dangerous a condition. Both parties profess, one to be willing to pay and the other to receive a fair amount of damages. Our judgment for the plaintiffs would, in my opinion, give them the right to a new house.

CROMPTON, J. We have nothing now to do with the question of damages. I think these pleas are no bar to the action. According to the doctrine in Co. Lit. 146, "Quod semel placuit in electionibus, amplius displicere non potest." The defendants are bound by their election. There is nothing illegal disclosed by the plea. The de-

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fendants had their choice, they made it, and it turned out more expensive than they expected. If it could have been made out illegal, that would have been another thing. This case comes rather under the class of cases where a man has promised to do that which he cannot do; he must then pay damages for not being able to do it. What the amount of those damages may be is another matter, which is not now before us.

HILL, J. I am of the same opinion. The pleas are no answer to the action. If we held them proved, the consequence would be that the society would not be liable for anything. According to the doctrine already referred to in Co. Lit., an election once made is obligatory. It will be admitted that the society is bound to do something, but the plea would show that they are bound to do nothing. There is nothing shown to exonerate the society from their liability to reinstate, and if they cannot reinstate, they must pay damages.

Judgment for the plaintiffs.

Taylor v. Caldwell.

32 L. J. Q. B. 164-168 (S. C. 3 B. & S. 826; 8 L. T. 356; 11 W. R. 726).

Contract. — Implied Condition. — Performance Impossible. — Excuse.

The defendants agreed to let certain gardens and music-hall to the [164] plaintiffs on four specified days to come, for the purpose of giving a series of concerts, at and for a specified rent for each of the said days. The defendants were to provide a band of music and certain specified entertainments, and to issue advertisements of the entertainments. The plaintiffs were to pay £100 in the evening of each of the said days, to receive and take all the money paid by persons entering the gardens, and to provide the necessary artistes for the entertainments. After the agreement was entered into, and before the day arrived for the first concert, the music-hall was accidentally destroyed by fire:—

Held, that as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect of its non-performance, and that no action would lie against them.

The declaration was upon an agreement, bearing date the 27th of May, 1861, whereby the defendants agreed to let and the plaintiffs agreed to take the Surrey Gardens and Music-Hall on the following days, viz., the 17th of June, the 15th of July, the 5th of August and the 19th of August, for the purpose of giving a series of four grand concerts and day and night fêtes on those days respectively. Breach — That the defendants did not nor would

allow the plaintiffs to have the use of the said music-hall and gardens, according to the said agreement, whereby, &c.

Pleas — First, that the defendants did not agree as alleged; [*165] secondly, that they did *allow the plaintiffs to have the use of the said Surrey Music-Hall and Gardens, &c.; thirdly, that the plaintiffs were not ready to take the said music-hall and gardens as alleged; fourthly, that after the making of the said agreement and before breach the plaintiffs wholly exonerated and discharged the defendants from the said agreement and the performance thereof; fifthly, that at the time of the said agreement there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the said agreement was made, known to the plaintiffs and the defendants, with reference to which they agreed and which was part of the said agreement, that in the event of the said gardens and music-hall being destroyed or so damaged by accidental fire as to prevent the said entertainments being given according to the intent of the said agreement, between the time of making the said agreement and the time appointed for the performance of the same, the said agreement should be rescinded and at an end; and that the said gardens and music-hall were destroyed and so far damaged by accidental fire as to prevent the said entertainments or any of them being given according to the tenor of the said agreement, between the time of making the said agreement and the first of the times appointed for the performance of the same, and continued so destroyed and damaged until after the said times appointed for the performance of the said agreement had elapsed, without the default of the defendants or either of them.

Issues joined upon these pleas.

At the trial, which took place before BLACKBURN, J., at the Sittings in London, after Michaelmas Term, 1861, it appeared that the plaintiffs were in the habit of getting up musical entertainments, and that the defendants were the lessees of the Surrey Gardens and Music-Hall. The agreement mentioned in the declaration was entered into, and, as is there alleged, the hall and gardens were to be let for the days mentioned at the rent or sum of £100 for each of those days. The defendants were to provide a band of music and different kinds of specified entertainments at each of the said concerts, and to advertise the performances in their usual bills; the plaintiffs were to be at liberty to take and

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receive the money paid for entrance to the gardens, &c.; and they were to pay the £100 agreed upon in the evening of each of the days mentioned, and to provide all the necessary artists for the entertainments.

On the 11th of June the music-hall was destroyed by fire, without, as far as appeared, either party being in fault, and it became impossible to give the concerts.

The action was brought to recover damages for the injury suffered by the plaintiffs, and a verdict was entered for them, leave being reserved to the defendants to move to set that verdict aside, and enter one for the defendants instead thereof.

A rule having been obtained accordingly, —

Tindal Atkinson showed cause (Jan. 28). He referred to *Paradine v. Jane*, Aleyn, 27, and to *Christie v. Lewis*, 2 Brod. & Bing. 410.

Pearce supported the rule.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court. — In this case the plaintiffs and the defendants had, on the 27th of May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of the Surrey Gardens and Music-Hall on four days then to come, viz., the 17th of June, 15th of July, 5th of August and 19th of August, for the purpose of giving a series of four grand concerts and day and night fêtes at the gardens and hall on those days respectively; and the plaintiff agreed to take the gardens and hall on those days, and pay £100 for each day. The parties inaccurately call this a “letting,” and the money to be paid a “rent”; but the whole agreement is such as to show that the defendants were to retain possession of the hall and gardens; so that there was to be no demise of them, and that the contract was merely to give the plaintiff the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show * that the existence of [* 166] the music-hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract; such entertainments as the parties contemplated in their agreement could not be given without it. After the making of the agreement, and before the first day on which a concert was to be given, the hall

was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended; and the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract. There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 Roll. Abr. tit. *Condition* (G.), and in the notes to *Walton v. Waterhouse*, 2 Wms. Saund. 420, and is recognized as the general rule by all the Judges in the much-discussed case of *Hall v. Wright*, 1 El. Bl. & El. 746; 27 L. J. Q. B. 345. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men, in making such contracts, in general would, if it were brought to their minds, say that there should be such a condition. Accordingly, in the civil law such an exception is implied in every obligation of the class which they call *obligatio de certo*

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corpore. The rule is laid down in the Digest, lib. xlv. tit. 1. *De Verborum Obligationibus*, Article 33: "Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor." The principle is more fully developed in Article 23: "Si ex legati causa, aut ex stipulatu, hominem certum mihi debeas, non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might also say necessity, of the implied condition, is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as, in the present case, a theatre), the existence of which is not so obviously precarious as that of the live animal; but the principle is adopted in the civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who, in his *Traité des Obligations*, partie 3, chap. 6, states the result to be, that the debtor *corporis certi* is freed from his obligation when the thing has perished, neither by his act nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred. Though the civil law is not of itself authority in an English Court, it affords great assistance in investigating * the principles on which [*167] the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law. There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, *e. g.*, promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore, in such cases, the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that if the performance is personal, the executors are not liable, *Hyde v. the Dean of Windsor*, Cro. Eliz. 552; see 2 Williams on Executors, 1560, where a very apt illustration is given, "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking

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is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a *dictum* of Lord LYNCHURST in *Marshall v. Broadhurst*, 1 Tyrw. 349, and a case mentioned by PATTESON, J., in *Wentworth v. Cook*, 10 Ad. & E. 45; 8 L. J. (N. S.) Q. B. 230. In *Hall v. Wright*, CROMPTON, J., in his judgment, puts another case: "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused." It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is that from the nature of the contract, there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter of his eyesight. In the instance just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor; but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example: In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to serve until the full end and term of seven years to be fully complete and ended, during which term it is covenanted that the apprentice his master faithfully shall serve; and the father of the apprentice, in equally unqualified terms, binds himself for the performance by the apprentice of all and every covenant on his part (see the form, 2 Chitty on Pleadings, 342). It is undeniable that if the apprentice dies within the seven years the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled; yet, surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death. These are instances where the implied condition is of the life of a human being; but there are others in which the same implication is made as to continued existence of a thing. For example, where a contract of sale is made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this

is the rule of English law is established by the case of *Rugg v. Minett*, 11 East, 210; 10 R. R. 475, where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed, but was entitled to retain, without deduction, the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided, that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment. This *also [*168] is the rule in civil law, and it is worth noticing that Pothier, in his celebrated *Traité du Contrat de Vente*, treats this as merely an example of the more general rule that every obligation *de certo corpore* is extinguished when the thing ceases to exist — see Blackburn on the Contract of Sale, 137. The same principle seems to be involved in the decision of *Sparrow v. Sourgate*, W. Jones, 29, where, to an action for debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him, the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to *Williams v. Lloyd*, W. Jones, 179. In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to re-deliver him on request. Breach, that though requested to re-deliver the horse, he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. “Let it be admitted,” says Sir William Jones, “that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God; so the party shall be discharged as much as if an obligation were made conditional to deliver a horse on request, and he died before it.” And he cited 22 Assize, 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry, was held chargeable for the drowning of the animal, only because he had over-

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loaded the boat, and it was agreed that notwithstanding the promise, no action would have lain had there been no neglect or default on his part. It may, I think, be safely asserted to be now English law that in all contracts of loans of chattels, or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible, because it has perished, this impossibility, if not arising from the fault of the bailee, or from some risk which he has taken upon himself, excuses the borrower or bailee from the performance of his promise to redeliver the chattel. The great case of *Coggs v. Barnard*, 1 Smith's Lead. Cas. 81; 5 R. C. 247, is now the leading case on the law of bailments, and Lord HOLT, in that case, referred so much to the civil law, that it might perhaps be thought that this principle was there derived direct from the Civilians, and was not generally applicable in English law, except in cases of bailment; but the case of *Williams v. Lloyd*, above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. In none of the cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance, but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music-hall at the time when the concerts were to be given, that being essential to their performance. We think, therefore, that the music-hall having ceased to exist, without fault of either party, both parties are excused; the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things. Consequently, the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

ENGLISH NOTES.

Impossibility of performance, *e. g.* by reason of non-existence of the subject-matter intended to be dealt with, at the date of the contract prevents any obligation from ever arising. See *Contourier v. Hastie*, No. 20, p. 204, *ante* (and notes to Nos. 19, 20, and 21, p. 223 *et seq.*, *ante*).

Impossibility of performance arising after the contract is as a rule no defence to an action for damages. A contract for the sale of an annuity is not avoided by the death of the annuitant, even before any payment, *Mortimer v. Copper* (1782), 1 Bro. C. C. 156; nor is a contract for the sale of a house burnt down before completion of the purchase. *Paine v. Meller* (1801), 6 Ves. 349; 5 R. R. 327. So where A. and B. each agreed to pay a sum of money by instalments to C. as consideration for his taking them into partnership for eighteen years, and C. became bankrupt before the lapse of that time, his assignees were held entitled to the remaining instalments. *Akhurst v. Jackson* (1818), 1 Swanst. 85. So a contract for the purchase of shares remains valid in spite of a winding-up petition before the day of settlement. *Chapman v. Shepherd* (1867), L. R., 2 C. P. 228, 36 L. J. C. P. 113, 15 L. T. 477, 15 W. R. 314; *Coles v. Bristow* (1868), L. R., 6 Eq. 149. (This case was reversed on a different ground. L. R., 4 Ch. 3, 38 L. J. Ch. 81.)

There are three exceptions to the above rule, viz.: First, where a subsequent impossibility is imposed by law; secondly, where the continued existence of something essential to the performance is an implied condition of the contract, — as in the latter of the principal cases; thirdly, in contracts for personal service, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness.

The first class of exceptions is illustrated by the case of *Esposito v. Bourden* (1857), 7 El. & Bl. 763, 27 L. J. Q. B. 17. There the charterer of a vessel, a British subject, engaged to proceed to Odessa and to load a cargo there. Declaration of war between England and Russia was held to have ended the contract. In *Baily v. De Crespigny* (1869), L. R., 4 Q. B. 180, 38 L. J. Q. B. 98, 19 L. T. 681, 17 W. R. 491, the lessor for himself and his assigns covenanted with the lessee not to build on a particular piece of land during the term. A railway company acquired that piece of land under their statutory powers and built a station there. It was held that the lessor was not liable for breach of the covenant.

An impossibility created by a foreign law, such as an embargo or quarantine regulations, will not necessarily discharge a contract. *Atkinson v. Ritchie* (1809), 10 East. 530, 10 R. R. 372; *Barker v. Hurlson* (1814), 3 M. & S. 267, 15 R. R. 485. Nor is a contractor

excused where, by reason of the disturbed condition of the country where the contract is to be performed, he is in fact unable to perform it. *Jacob v. Crédit Lyonnais*, No. 10 of "Accident," 1 R. C. 338.

The second exception is illustrated by the principal case of *Taylor v. Caldwell*. This case was followed in *Howell v. Coupland* (1876), 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. 832, 24 W. R. 470. There the defendant in March agreed to sell to the plaintiff 200 tons of regent potatoes grown on land belonging to the defendant in W., at £3 10s. per ton, to be delivered in September and October, and paid for as taken away. In March the defendant had 68 acres ready for potatoes, which were afterwards sown, and were amply sufficient to grow more than 200 tons in an ordinary season; but in August, without any default in the defendant, the crop was destroyed by a disease. Held, that the contract was for a part of a specific crop, and was within the exception. See also *Appleby v. Myers* (1867), L. R., 2 C. P. 651, 36 L. J. C. P. 331, 16 L. T. 669.

The third exception is illustrated by the case of *Robinson v. Davison* (1871), L. R., 6 Ex. 269, 40 L. J. Ex. 172, 24 L. T. 755, 19 W. R. 1036. There the plaintiff contracted with defendant's wife (as her husband's agent) that she should play the piano at a concert to be given by the plaintiff on a specified day. She was on the day in question unable to perform through illness. It was held that this excused the defendant.

The last two exceptions have no application if the contractor expressly engages to do a thing in any event. *Paradine v. Jane*, Ayleyn, 26; *Thorn v. Mayor of London* (1876), 5 R. C. 223; *Jones v. St. John's College, Oxford* (1870), L. R., 6 Q. B. 115, 40 L. J. Q. B. 80, 23 L. T. 803, 19 W. R. 276.

Where a contract is alternative, *i. e.* mentions two modes of performance, the following cases arise: —

Where one alternative is impossible at the date of the contract, the other must be performed. *Da Costa v. Davis* (1798), 1 Bos. & P. 242, 4 R. R. 795; *Simmmonds v. Swaine* (1809), 1 Taunt. 549.

Where one alternative is before election rendered impossible by the act of the person to whom the performance is due, or by the act of God, the other alternative is discharged. *Basket v. Basket*, 2 Mod. 200; *Laughter's Case*, 5 Co. Rep. 21 b; *Jones v. How* (1848), 7 Hare, 267.

If before election one alternative becomes impossible by the act of a third party, the other must be performed. This was decided in a case in the time of Henry VII., where it was held that if one be obliged to enfeoff another of certain lands, or to marry A. before such a day, and a stranger marry A. before the day, he must make a feoffment of the land. The same is the case if one alternative is rendered impossible by the act of

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the person who is bound to the performance. Thus where A. agreed to give £1000 or to transfer to B. fully paid up shares of £1000 in a company to be formed with a capital of £12,000, and A. formed a company with preferred and deferred shares and transferred some of the latter to B., it was held that, as the shares intended to be transferred were to be in a company in which all shares were to be of equal value, A. must pay the £1000. *McIlquham v. Taylor* (1895), 1 Ch. 53, 64 L. J. Ch. 296.

AMERICAN NOTES.

This subject has been to a considerable degree considered *ante*, vol. I. p. 317, under "Accident."

The second principal case is emphasized in Mr. Lawson's text (Contracts, § 425), where he calls it "the leading case" upon the particular point, namely, that where the contract relates to the use, or possession of, or dealing with a specific thing, whose existence is necessary to the performance of the undertaking, the perishing or destruction of that thing, without fault of the party, excuses the performance, because it is apparent that both parties contracted in view of its continuance. As in case of a contract to sell specific articles. *Dexter v. Norton*, 47 New York, 62; 7 Am. Rep. 415; citing *Taylor v. Caldwell* (two Judges dissenting). So in *Wells v. Calnan*, 107 Massachusetts, 514; 9 Am. Rep. 65, and *Gould v. Murch*, 70 Maine, 288; 35 Am. Rep. 325, where one agreed to buy a farm, with buildings on it, the destruction of the buildings by fire released him; citing the principal case. So in *Livingston v. Graves*, 32 Missouri, 479, where one agreed to keep a bridge in repair for three years, and it was burned up, he was not bound to rebuild it. (Mr. Lawson thinks this "is perhaps an extreme case," but it seems clearly within the rule.) So where milk, in possession of one who had agreed to manufacture cheese from it, was burned up without his fault. *Stewart v. Stone*, 127 New York, 500; 14 Lawyers' Rep. Annotated, 215, citing *Taylor v. Caldwell*. The destruction of a building discharges a contract for a lease of rooms therein. *Wamock v. McQuarry*, 28 Indiana, 103; 92 Am. Dec. 306; *Kerr v. Merch. Ex. Co.*, 3 Edwards Ch. (New York), 315; *Stockwell v. Hunter*, 11 Metcalf (Mass.), 118; 45 Am. Dec. 220. The falling of the walls of a brick building releases one from his contract to do the wood work thereon. *Schwarz v. Saunders*, 16 Illinois, 18. Exhaustion of a coal mine excuses a lessee from his contract to work it. *Walker v. Tucker*, 70 Illinois, 527. See especially *Butterfield v. Byron*, 153 Massachusetts, 517; 25 Am. St. Rep. 651; 12 Lawyers' Rep. Annotated, 571; and consult *Powell v. R. Co.*, 12 Oregon, 188; *The Toronto*, 108 United States, 342; *Brunby v. Smith*, 3 Alabama, 123. In *Hawes v. Baptist Church*, 88 Missouri, 285; 57 Am. Rep. 413, where one contracted to make and place fixtures in a church, to be paid for on completion, and the church burned down before the completion of his work, he was allowed to recover *quantum meruit*. In *Yerrington v. Green*, 7 Rhode Island, 589; 81 Am. Dec. 578, where a clerk had been hired for three years, at a stipulated salary, the death of the employer before that time was held to terminate the

contract, and no action was maintainable upon it. The Court cited *Taylor v. Caldwell*, pronouncing it "the latest and most instructive case upon this subject, so far as the discussion of the principle of decision is concerned." In *Huguenin v. Courtenay*, 21 South Carolina, 403; 53 Am. Rep. 688, the washing away by an ocean storm of part of land agreed to be conveyed released the vendee.

In respect to impossibility brought about by act of the law, see *Macon, &c. R. Co. v. Gibson*, 85 Georgia, 1; 21 Am. St. Rep. 135, and cases cited. In *Lorillard v. Clyde*, 142 New York, 456; 24 Lawyers' Rep. Annotated, 113, it was held that a guaranty of corporate dividends was excused by dissolution of the corporation, citing *Taylor v. Caldwell*.

In *Pengra v. Wheeler*, 24 Oregon, 532; 21 Lawyers' Reports Annotated, 726, the Court observed: "The theory that when a party by his own contract creates a charge or duty upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, had its origin in the *dictum* of the Court in *Paradine v. Jane*, Alexn. 26, and this rule is not infrequently applied where the impediment comes from the act of God. But the actual adjudications, while discordant, come far short of this; so that as a whole this *dictum* is not sustained by them. Bishop on Contracts, § 590. 'It is,' says Mr. Justice SWAYNE, 'a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.' *Dermott v. Jones*, 2 Wallace (U. S. Supr. Ct.), 1. 'The act of God will dispense with the performance of a contract, but to bring the case within the rule of dispensation it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible.' *Beebe v. Johnson*, 19 Wendell (New York), 500; 32 Am. Dec. 518. The plaintiff having agreed to make the repairs" (to a dam) "within ten days from the time the water had fallen to an average winter stage, cannot justify the failure to comply with this requirement, if the water continued at or below that stage, by saying that the work could not profitably have been done within the agreed time, since by the employment of more labour the repairs might have been completed within the time. This would have been within the power of the plaintiff, and therefore not impossible; but if after the water had fallen to the required stage it immediately rose, and continued high for some time, this would have been such a dispensation as would have rendered the performance of the contract impossible. If one engages to make repairs before a particular day, and it becomes impossible by the act of God to make them by that day, he will not be liable for a breach of the covenant, if he repairs as soon as possible thereafter."

In *Beebe v. Johnson*, cited *supra*, it was held that a covenant to perfect a patent right in England, and to secure to the patentee the entire control of the provinces of Upper and Lower Canada, is not necessarily impossible, for this control might be secured by an Act of Parliament, and the covenantor is therefore answerable for a breach of the covenant.

No. 57. — *Master v. Miller*, 4 T. R. 320. — Notes.No. 57. — MASTER *v.* MILLER.

(1791.)

RULE.

LIABILITY under a contract may be discharged by intentional alteration of the written instrument which is the primary and only evidence of the liability.

Master v. Miller.

4 T. R. 320; 2 H. Bl. 140 (s. c. 1 Sm. L. C.; 2 R. R. 399).

This case is fully reported and annotated as a ruling case under the title "Alteration," 2 R. C. 669 *et seq.*

AMERICAN NOTES.

In *Page v. Krekey*, 137 New York, 307; 21 Lawyers' Reports Annotated, 409, it was held that an alteration, whether material or not, discharges a prior guarantor.

An alteration which is made to conform the writing to the intention of all the parties, and in a manner clearly negating the idea of fraud, will not avoid the instrument. *Footte v. Hambrick*, 70 Mississippi, 157; 35 Am. St. Rep. 631. This case contains an elaborate review of authorities, English and American, and conceding that very many cases hold alteration fatal without regard to the intention, the Court observe: "When we come to carefully examine the authorities holding to this harsh and unjust rule, we shall find in their inharmonious and inconsistent utterances, that while professing adherence to the principle, the application of it is constantly avoided by endless exceptions and limitations. The sturdy adherence of Courts in England and America to the rule in theory is in bewildering contrast to the practical nullification of it in concrete application to innocent but mistaken offenders, by the same Courts." "In many of the American cases professing to stand by that part of the inequitable old rule which renders void an instrument altered, without regard to the motives of the person making the alteration, we find like evidence of the practical abandonment of the doctrine in cases of mere mistake, where fraud cannot be affirmed." "It must be conceded however that nearly all text-writers, and the majority of the Courts of last resort in the United States, yet assert the correctness, in a general way, of the harsh rule we have been considering. But we find excellent authority for the juster and more equitable rule, which we have foreshadowed, — that an alteration innocently made, without improper motive, to conform the instrument to the intention of the parties at the time of its execution will not avoid it. In *Bowers v. Jewell*, 2 New Hampshire, 513, the Court says: 'Although then it may not be too vigorous to hold that any alteration affecting the evidence to be offered on trial is material, yet it is reasonable and just to permit a party to show that the alteration was by consent of those interested, was by acci-

No. 57. — *Master v. Miller.* — Notes.

dent, or under circumstances rebutting every presumption of improper motives. . . . So the intent must be fraudulent; or in other words, the act done with an eye to gaining an advantage.' And in the very recent case of *Croswell v. Labrec*, 81 Me. 44; 10 Am. St. Rep. 238, it is said by the Court: 'The defence at the trial was an alleged unauthorized alteration of the note by inserting in it the words "or bearer." The Judge at the trial ruled that if the alteration, though unauthorized, was innocently made, without any fraudulent or improper motive, it would not avoid the note. That was correct, and is well borne out by the principle established in *Milberg v. Storer*, 75 Me. 69; 46 Am. Rep. 361. . . . The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence.' And to the like effect are other causes determined in the Supreme Court of Maine, beginning as early as 1839, in *Hervey v. Harrey*, 15 Me. 357. In *Russell v. Reed*, 36 Minnesota, 376, we find this satisfactory statement of the rule of law: 'But the unauthorized and material alteration of a mortgage by the mortgagee, or with his privity, after execution, unexplained, is presumptively fraudulent and vitiates the contract.' The like enlightened ruling was made by the Supreme Court of Massachusetts in the case of *Adams v. Frye*, 3 Metcalf, 103. 'The Court are of opinion that the rule of law applicable to the case before us may be properly stated as follows: 1. That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently, and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name as an attesting witness, such act will avoid the bond and discharge the obligor from all liability on the same; and 2. That the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be *prima facie* sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference, and, if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration.' In harmony with this general view is the opinion of the Court in *Vogle v. Ripper*, 34 Illinois, 100; 85 Am. Dec. 298."

In *Wolferman v. Bell*, 6 Washington, 84; 36 Am. St. Rep. 126, it was held that alteration of time of payment of a note, in absence of proof of fraud, does not prevent recovery on it in its original form. So where the date of a note was changed to conform it to the intention and correct a mistake, it did not invalidate the note. *Duker v. Franz*, 7 Bush (Kentucky), 273; 3 Am. Rep. 314; *Williamson v. Smith*, 1 Coldwell (Tennessee), 1; 78 Am. Dec. 478; *Murray v. Graham*, 29 Iowa, 520.

As to the effect of alteration and subsequent restoration:—

In *Horst v. Wagner*, 43 Iowa, 373; 22 Am. Rep. 255, the payee of a note, desiring to transfer it, and being ignorant of the correct way, erased his own name and inserted that of the transferee, but subsequently and before delivery restored the note to its original form and transferred it by indorsement. Held, an immaterial alteration. See to the same effect *Rogers v. Shaw*, 59 California, 260; *Kowitz v. Kennedy*, 63 Pennsylvania State, 187.

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Where an alteration is made under an honest mistake of right, and not fraudulently and with a view to gain an improper advantage, a recovery may be had upon the original consideration of the note. *State Sav. Bk. v. Shaffer*, 9 Nebraska, 1; 31 Am. Rep. 394; *Merrick v. Boury*, 4 Ohio State, 60; *Matteson v. Ellsworth*, 33 Wisconsin, 488; 14 Am. Rep. 766; *Hunt v. Gray*, 35 New Jersey Law, 227; 10 Am. Rep. 232, citing the principal case.

SECTION IX. — *Compensation for Breach of Contract.*

No. 58. — **HADLEY v. BAXENDALE.**

(1854.)

No. 59. — **HORNE v. MIDLAND RAILWAY COMPANY.**

(EX. CH. 1873.)

RULE.

DAMAGES recoverable on a breach of contract are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may under the circumstances be presumed to have been in the contemplation of both parties as the probable result of a breach.

Hadley v. Baxendale.

9 Exch. 341-356 (s. c. 23 L. J. Ex. 179; 1 Jur. N. S. 358).

This case is fully reported as No. 16 of "Carrier," 5 R. C. p. 502.

Horne v. Midland Railway Company.

L. R., 8 C. P. 131-148 (s. c. 42 L. J. C. P. 59; 28 L. T. 312; 21 W. R. 481).

This case is fully reported as No. 17 of "Carrier," 5 R. C. p. 506.

ENGLISH NOTES.

The principal cases have already, under the title "Carrier," Nos. 16 and 17, been sufficiently annotated so far as relates to contracts for carriage. The following notes relate to the more general application of the rule.

Fletcher v. Tayleur (1855), 17 C. B. 21, 25 L. J. C. P. 65, was an action for non-delivery of a ship at the stipulated time. The rate of freight was high then, and had fallen when the ship was delivered. It

was held that the plaintiff could recover the difference in amount between what he would have earned had the ship been delivered at the proper time and what he would earn at the lower rate. In *Portman v. Middleton* (1858), 4 C. B. (N. S.) 322, 27 L. J. C. P. 231, the plaintiff contracted with S. to repair a machine, employed the defendant to make part of the machinery, — a fire-box, — but did not inform him of his contract with S. The defendant failed to complete his contract within the time specified; but the interval between that time and the time fixed for the completion of the plaintiff's contract with S. was sufficient to have enabled the plaintiff to have got a fire-box made elsewhere. The plaintiff, for want of the fire-box, failed to complete his contract with S., and in an action by S. damages were recovered against him. It was held that such damages could not be recovered from the defendant within the rule in *Hadley v. Baxendale*. Compare with this *Hydraulic Engineering Company v. McHaffie* (1879), 4 Q. B. D. 670, 27 W. R. 221. There the plaintiffs, in July, 1877, contracted with J. to make for him a machine to be delivered at the end of August. The defendants contracted with the plaintiffs to make, "as soon as possible," part of the machine called a "gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish their part till the latter part of September. J. then refused to accept the machine from the plaintiffs. It was held that the defendants had broken their contract, and were liable to pay as damages the loss of profits to the plaintiffs upon their contract with J., as well as the amount spent by them uselessly in making other parts of the machine.

In *Smeed v. Ford* (1859), 1 El. & El. 602, 28 L. J. Q. B. 178, 32 L. T. (O. S.) 314, 7 W. R. 266, the defendants contracted to supply a threshing-machine to the plaintiff within three weeks from the 24th of July. The defendants, at the time of the contract, knew that the plaintiff was in the habit of threshing the corn in the field, and sending it to market at once. The machine was not forthcoming in time, and the plaintiff was obliged to carry away and stack the corn. The corn was damaged by exposure to weather, so that it was necessary to dry it in a kiln: the quality was much deteriorated; and before the corn could be sold the price had fallen. It was held, applying the rule in *Hadley v. Baxendale*, that the plaintiff was entitled to recover damages (1) in respect of the deterioration of the quality of the wheat, (2) in respect of the expense of carrying and stacking it, and (3) in respect of the expense of the kiln-drying; but not in respect of the fall in prices.

In *Knowles v. Nunn* (1866), 14 L. T. (N. S.) 592, the plaintiff, who was the purchaser of two oxen, said to the defendant (vendor) at

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the time of effecting the purchase, that if there were the least fear of disease he would not have them, as he wanted to put them with his other stock. The defendant had answered that "they were quite sound and free from disease." It turned out that they were at the time of the sale affected with rinderpest, and when placed with the plaintiff's other cattle infected them so that nine of them died. In an action upon the warranty, BLACKBURN, J., held, on the authority of *Hadley v. Baxendale*, that the whole of this loss was recoverable.

In *Smith v. Green* (1875), 1 C. P. D. 92, 45 L. J. C. P. 28, 33 L. T. 572, 24 W. R. 142, where a cow was sold with warranty that she was free from foot and mouth disease, and the plaintiff placed this cow with other cows of his, and some of them became infected with the disease:—it was held that the defendant was liable in damages for the entire loss if, when he sold the cow, he knew that the plaintiff was a farmer, and that he would or probably might place the infected cow with other cows.

In *Wilson v. General Iron Screw Colliery Co.* (1877), 47 L. J. Q. B. 239, 37 L. T. 789, — an action for breach of contract for improperly repairing a sea-going steam vessel, — it was held that the loss incurred by detention until the repairs were done properly was recoverable within the rule of *Hadley v. Baxendale*.

Where a stable-keeper contracted to receive horses for a horse-dealer during a fair at which they were to be sold, and, in breach of his contract, let the stable to another person, who turned out the plaintiff's horses; — the horses having in consequence of this caught cold, — it was held that the plaintiff was entitled to damages for depreciation at the subsequent sale. *McMahon v. Field* (C. A. 1881), 7 Q. B. D. 591, 50 L. J. Q. B. 552, 45 L. T. 381.

In *Rodocanachi v. Milburn* (C. A. 1886), 18 Q. B. D. 67, 56 L. J. Q. B. 202, 56 L. T. 594, 35 W. R. 241, — an action by the vendor of goods sold "to arrive" against the shipowner for the loss of the goods, — it was held by the Court of Appeal that the measure of damages is the market-value of the goods at the place where and at the time when they ought to have been delivered, independently of any circumstances peculiar to the plaintiff (that is to say, independently of the price for which he had contracted to sell the goods), less the accruing freight which the plaintiff would have had to pay to obtain delivery.

Where, in breach of a covenant against sub-letting, the tenant let the premises for the express purpose of their being used as a turpentine store, and the store caught fire and was burnt down, — it was held by HAWKINS, J., that the landlord could recover against the original tenant the whole loss as damages for the breach of covenant. *Lepel v. Rogers* (1892), 1893, 1 Q. B. 31, 68 L. T. 584.

Where goods are bought, and the vendor makes default in delivery, the ordinary measure of damages is the difference between the market and the contract prices at the time of delivery. *Chinery v. Viall* (1860), 5 H. & N. 288, 29 L. J. Ex. 180, 2 L. T. 466, 8 W. R. 629. But if the vendor was aware that the goods were bought to be resold, either generally or in fulfilment of an existing contract between the purchaser and a third party, the measure of damages is the loss of profit and the expenses incurred by the purchaser in fulfilling his contract. Thus in *Borries v. Hutchinson* (1865), 18 C. B. (N. S.) 445, 34 L. J. C. P. 169, 11 L. T. 771, 13 W. R. 386, the plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July, and the rest in August. The defendant knew at the time of the sale that the plaintiffs bought to sell again on the Continent, and that it was to be shipped from Hull, but not that it was for Russia, although he learnt this also before the end of August. The defendant failed to deliver soda during the time contracted for, but he delivered a portion in September and October. There was no market for caustic soda, and the plaintiffs who had contracted for the resale of the soda to H., a Russian merchant, lost the profit of such resale in respect of the soda which was not delivered at all, and, by reason of the approach of winter in the Baltic, were obliged to pay an increased rate of freight and insurance on the shipment of the soda delivered. Held, that the measure of damages was the loss of profits and the cost of increased freight and insurance, but not the damages paid by the plaintiffs in respect of a sub-sale made by H. to a consumer of the article.

Where on the sale of a chattel the buyer intends it for a special purpose, and the seller is not informed of that purpose, but reasonably supposes the chattel is required for another and the more obvious purpose; the amount of damage which on default in delivery would have resulted from the failure of the latter purpose may, if less than that which actually resulted to the seller from the failure of his purpose, be considered to be the measure of damage in the common contemplation of the parties within the principle of *Hadley v. Baxendale*. *Cory v. Thames Ironworks and Ship-building Co.* (1868), L. R., 3 Q. B. 181, 37 L. J. Q. B. 68, 17 L. T. 495, 16 W. R. 457.

In *France v. Gaudet* (1871), L. R., 6 Q. B. 199, 40 L. J. Q. B. 121, 19 W. R. 622, the plaintiff purchased champagne lying at the defendant's wharf at 14s. per dozen, and resold it to a ship's captain about to sail at 24s. The defendant refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. Although the defendant had no knowledge of the sale or of the purpose for which the plaintiff required delivery of the champagne, it was held that the plaintiff was

entitled as damages to the price at which he sold the champagne. In another case, *Elbinger Actien-Gesellschaft, &c. v. Armstrong* (1874), L. R., 9 Q. B. 473, 43 L. J. Q. B. 211, 30 L. T. 871, 23 W. R. 127, the defendant, in January, 1872, agreed to furnish the plaintiff with a quantity of sets of wheels and axles according to tracings, to be delivered on certain specified days, free on board at Hull. The plaintiffs were under a contract with a Russian railway company to deliver them 1000 covered wagons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873, under a penalty of two roubles per waggon for each day's delay in delivery. In the course of the negotiations between the plaintiffs and the defendant, the latter was informed of the plaintiffs' contract with the railway company. The defendant failed to complete, and the plaintiffs had to pay a penalty of one rouble a day, amounting to about £100. It was held that the jury might reasonably assess the damages at the amount actually paid by the plaintiff for penalties.

In *Hinde v. Liddell* (1875), L. R., 10 Q. B. 265, 44 L. J. Q. B. 105, 32 L. T. 449, 23 W. R. 650, the defendants contracted to deliver on a specified day certain goods of a particular quality, and at an agreed price, but failed to do so. The plaintiff, who was under a contract to ship the goods, endeavoured to procure goods of a similar quality, but was unable to do so, as there was no market for them. He therefore bought at an advanced price goods of a superior quality, and passed them on to his sub-vendee, from whom he did not receive any extra payment on account of the extra quality; and it was admitted that this was a reasonable course and the best he could have taken under the circumstances. It was held that the measure of damages was the difference between the contract price and the cost to the plaintiff of the goods purchased by him in substitution. **Borries v. Hutchinson, supra*, was expressly followed.

In *Grèbert-Borignis v. Nugent* (1885), 15 Q. B. D. 85, 54 L. J. Q. B. 511, the defendant contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. The defendant knew that, except as to price, the contract corresponded with one the plaintiff had made with a French customer of his, and that it was made to fulfil the last contract. The defendant broke the contract, and there being no market for the goods, the plaintiff was ordered to pay £28 to his sub-vendee by the French Court. It was held that the plaintiff was entitled to recover loss of profits on sub-sale, and damages in respect of his liability to his customer; and in estimating the latter, the £28 awarded by the French Court was a reasonable sum at which to assess the damages. *Elbinger Actien-Gesellschaft, &c. v. Armstrong, supra*, was approved of.

In *Hammond v. Bussey* (1887), 20 Q. B. D. 79, 57 L. J. Q. B. 58, the defendant made a contract for sale of coal of a particular descrip-

tion to the plaintiffs, knowing that the plaintiffs bought for the purpose of selling it as coal of that description. The Court of Appeal, affirming the decision of FIELD, J., held that the plaintiffs were entitled to recover as damages the costs to which they had been put in an action brought against them by sub-vendees, in which it was found that the coal was not of the description specified.

In contracts of sales by instalments, the measure of damages is the sum of the differences between the contract and the market-prices at the various times when the goods ought to have been delivered. *Brown v. Muller* (1872), L. R., 7 Ex. 319, 41 L. J. Ex. 214, 27 L. T. 272, 21 W. R. 18; *Roper v. Johnson* (1873), L. R., 8 C. P. 167, 42 L. J. C. P. 65, 28 L. T. 296, 21 W. R. 384; *In re Voss* (1873), L. R., 16 Eq. 155.

In the case of sales of land, where the purchaser is, without fraud, unable to make a title, but is willing to convey for such title as he has, a different rule has been established. It has been decided by the House of Lords, in *Bain v. Fothergill* (1874), L. R., 7 H. L. 158, 43 L. J. Ex. 243, 31 L. T. 387, confirming the rule laid down about one hundred years previously in *Flureau v. Thornhill*, 2 W. Bl. 1078, that the purchaser in such a case is only entitled to recover the expenses to which he has been put, but not damages in respect of the loss of his bargain. In this case of *Bain v. Fothergill*, DENMAN, J., in his opinion in answer to the question of the House (L. R., 7 H. L. 177), contrasted the rule with that laid down in *Hadley v. Baxendale* as to ordinary breaches of contract. He says: "It has from time to time, as fresh cases have arisen, been found necessary to lay down rules for the guidance of juries in the assessment of damages. *Hadley v. Baxendale* is a notable instance of such a rule laid down a few years ago, and now recognised as part of the common law. The very fact that the rule laid down in *Flureau v. Thornhill* has been for nearly a century recognised and acted upon as a known limitation in respect of the damages upon breach of a contract for the sale of real estate, seems almost sufficient to answer the argument founded upon the anomalous character of the rule."

The principle of *Hadley v. Baxendale* has been applied to actions of tort as well as to actions on contracts. So it has been held in an action by an owner of goods for damage by a collision, that loss of market is not a ground for claim of special damage any more than it is, generally, in an action upon the contract to carry the goods. *The Notting Hill* (1884), 9 P. D. 105, 53 L. J. P. D. & A. 56, 51 L. T. 66, 32 W. R. 764; citing *The Parana* (1877), 2 P. D. 118, 45 L. J. P. D. & A. 108, 36 L. T. 388, 25 W. R. 596. And a similar principle is applied in *The Argentino* (1888), 13 P. D. 191, 58 L. J. P. D. & A. 1, 59 L. T. 914, 37

W. R. 210, affirmed in House of Lords (1889), 14 App. Cas. 519. In *The City of Lincoln* (1889), 15 P. D. 15, 59 L. J. P. D. & A. 1, 62 L. T. 49, 38 W. R. 345, it was held that the grounding of a vessel owing to loss of the compass and charts in a collision was not too remote a cause for claiming damages against the colliding vessel. In *Victorian Railway Commissioners v. Coultas* (Privy Council, 1888), 13 App. Cas. 222, 57 L. J. P. C. 69, 58 L. T. 390, 37 W. R. 129, it was held that a nervous shock, caused by trains coming into imminent danger of a collision, — but no actual collision having taken place, — was too remote a consequence for damages to be recovered. Compare *Bell v. Great Northern Railway Co. of Ireland* (1890), 26 L. R., Ireland, 428, and Irish cases there referred to, where the contrary has been decided.

AMERICAN NOTES.

The first principal case has been cited in nearly every decision concerning the measure of damages in this country since its decision, and its doctrine has been universally followed. Both principal cases are repeatedly referred to by Sedgwick and by Sutherland in their treatises on Damages. Mr. Lawson cites the first case as “the leading case,” and says it “has been followed in all the Courts of the United States.”

It is uniformly held here that the damages recoverable must be the proximate result and the “natural consequences” of the breach of the contract, and not merely connected with it through a series of intervening causes, nor speculative nor contingent.

So it has been held, for example, on a learned review of authorities, that on a warranty of a safe as burglar proof, the value of articles stolen therefrom by burglars was not a proper item of damages; *Herring v. Skaggs*, 62 Alabama, 180; 34 Am. Rep. 4; and on a breach of contract to build and finish an opera house, whereby one of the singers took cold, the loss of receipts thereby could not enter into the recovery. *Academy of Music v. Hackett*, 2 Hilton (N. Y. Com. Pl.), 217. So the printer of a newspaper, erroneously printing an advertisement of sale of lands on execution, in consequence of which the levy failed and the sheriff was made responsible, was held not responsible to the sheriff for that amount. *Jackson v. Adams*, 9 Massachusetts, 484; 6 Am. Dec. 94. So of conjectural profits of a mill from which the purchaser has been ejected by a paramount title. *Bond v. Quattlebaum*, 1 McCord (So. Car.), 584; 10 Am. Dec. 702. So of the value of rice which the defendant had contracted to transport at a stated time, and which was burned after that time and before transportation. *Ashe v. DeRossett*, 5 Jones Law (Nor. Car.), 299; 72 Am. Dec. 552. So in an action for defective construction of a steamboat damages for loss of profits and delays in voyages are not recoverable. *Blanchard v. Ely*, 21 Wendell (New York), 342; 34 Am. Dec. 250. So on breach of a contract for towing boats of coal the loss thereof by a raft drifted against them by a sudden rise of the water may not be considered. *McGovern v. Lewis*, 56 Pennsylvania State, 231; 94 Am. Dec. 60. So on a breach of contract to adjust a raker to a reaping machine, the loss of the crop is not a

proper element of damages. *Fuller v. Curtis*, 100 Indiana, 237; 50 Am. Rep. 786. In an action by an agent for wrongful dismissal by an insurance company, he may recover the value of probable renewals of policies obtained by him. *Etna L. Ins. Co. v. Nexsen*, 81 Indiana, 317; 43 Am. Rep. 91. On breach of contract for building a flume, loss of profits of the mill is not recoverable. *Bridges v. Lanham*, 11 Nebraska, 369; 45 Am. Rep. 121. On breach of a contract to furnish water for the purpose of extinguishing fires, the destruction of a building by fire in consequence is within the proper allowance of damages. *Paducah L. Co. v. Paducah W. S. Co.*, 89 Kentucky, 340; 25 Am. St. Rep. 536. On breach of a contract to move a hotel there can be no recovery for loss of profits in future. *Sherman, &c. Co. v. Leonard*, 46 Kansas, 354; 26 Am. St. Rep. 101. So on breach of contract to sell goods. *Trigg v. Clay*, 88 Virginia, 330; 29 Am. St. Rep. 723; *Austrian, &c. Co. v. Springer*, 94 Michigan, 343; 34 Am. St. Rep. 350. So on breach of contract to furnish machinery and repair a mill. *Hutchinson Man. Co. v. Pinch*, 91 Michigan, 156; 30 Am. St. Rep. 463.

On a tenant's breach of covenant to pay taxes, the recovery can embrace only the unpaid taxes with interest. *Fontaine v. Schulenburg, &c. Co.*, 109 Missouri, 55; 32 Am. St. Rep. 648.

On a breach of warranty that an animal sold is free from disease, damages may be awarded for contagion to other animals. *Joy v. Bitzer*, 77 Iowa, 73; 3 Lawyers' Rep. Annotated, 184.

Damages suffered by individuals in their property by reason of failure to furnish water to a town may not be considered in determining the damage to the town. *Wiley v. Athol*, 150 Massachusetts, 426; 6 Lawyers' Rep. Annotated, 342.

See *Masterson v. Mayor*, 7 Hill (New York), 61; 42 Am. Dec. 38; *Cates v. Sparkman*, 73 Texas, 619; 15 Am. St. Rep. 806; *Mihills Man. Co. v. Day*, 50 Iowa, 250; *Mackey v. Olssen*, 12 Oregon, 429; *Billmeyer v. Wagner*, 91 Pennsylvania State, 92; *Furstenburg v. Fairsett*, 61 Maryland, 184; *Osborne v. Pokett*, 33 Minnesota, 10; *McGrath v. Gegner*, 71 Maryland, 331; 39 Am. St. Rep. 415.

The second rule in *Hadley v. Baxendale*, that the damages may include such matters as both parties, in making the contract, might reasonably have expected to be the consequences of a breach, and therefore intended to embrace, is supported by a large body of American cases. As where a landlord agreed in a lease to repair the fences so as to secure a crop, and failing to do so, cattle broke in and injured the crops, he was held for their value. *Culver v. Hill*, 68 Alabama, 66; 44 Am. Rep. 134. This rule was applied in the leading case of *Griffin v. Colver*, 16 New York, 489; 69 Am. Dec. 718; *U. S. v. Behan*, 110 United States, 344; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.), 385; *Hurd v. Dunsmore*, 63 New Hampshire, 171; *Buffalo Barb Wire Co. v. Phillips*, 64 Wisconsin, 338; *Houston R. Co. v. Hill*, 63 Texas, 385; *Fleming v. Beck*, 48 Pennsylvania State, 312; *True v. International Tel. Co.*, 60 Maine, 9; 11 Am. Rep. 156. So on breach of a contract to sell and deliver furniture for a hotel by a fixed time, the loss of profits from renting the rooms to guests may be considered in the recovery. *Berkey, &c. Co. v. Hascall*, 123 Indiana, 502;

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8 Lawyers' Rep. Annotated, 65. And so on breach of contract to furnish machinery which is not otherwise procurable, to enable a business to be formed, loss suffered from consequent inability to set up the business may be considered. *Abbott v. Hapgood*, 150 Massachusetts, 248; 5 Lawyers' Rep. Annotated, 586. On breach of a contract to build a motor railway from a city to land which the plaintiff has bought with a view to selling it out for residences, the measure of damages is the difference between the value of the land with and without the railway completed. *Blagen v. Thompson*, 23 Oregon, 239; 18 Lawyers' Rep. Annotated, 313.

Where one agreed not to engage in business as a member of a rival firm, and did not so engage, but caused it to be supposed among the plaintiff's prospective customers that he had so engaged, the damages could not embrace any loss caused by the competing business independent of that belief. *Daniel's v. Brodie*, 54 Arkansas, 216; 11 Lawyers' Rep. Annotated, 81.

In Texas it has been held by a long course of decisions that where a telegraph company fails to deliver a message announcing an illness or death, the person addressed may recover for mental anguish experienced in not being able to be present at the bedside or the funeral. *Stuart v. West. U. Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623. But this has been dissented from everywhere else except North Carolina, Kentucky, Tennessee, Iowa, and Alabama. See notes, 34 Am. St. Rep. 831; 10 *ibid.* 778; also 38 *ibid.* 575, and 28 Lawyers' Rep. Annotated, 72.

And even in Texas it has been conceded that the damages may not embrace the expense of exhuming the body because of improper burial. *Western U. Tel. Co. v. Carter*, 85 Texas, 580; 34 Am. St. Rep. 826.

Upon a breach of an express warranty, in regard to special or consequential damages, it has been held, for example, that a manufacturer of carriage-springs was liable for the expense of taking them out and supplying them with others. *Thoms v. Dingley*, 70 Maine, 100; 35 Am. Rep. 310; and see *Cassidy v. Le Ferre*, 45 New York, 562 (engine and boilers); *Parks v. Morris & Tool Co.*, 54 *ibid.* 586 (steel). So where a steam boiler in a mill was warranted, the buyer recovered rent while the mill was lying idle on account of its explosion. *Sinker v. Kidder*, 123 Indiana, 528. So where a refrigerator was expressly warranted to keep chickens sound until the next spring, the buyer recovered profits which he would have made if the warranty had not been broken. *Beeman v. Banta*, 118 New York, 538; 16 Am. St. Rep. 779, citing *Reed v. McConnell*, 101 New York, 270; *Wakeman v. Wheeler & W. M. Co.*, 101 New York, 205; 54 Am. Rep. 676.

The same rule has been applied on breach of an implied warranty, where the article was sold under a recognized name and for a special use, as in the case of seeds, in which the difference in value between the crop raised and that which should have been raised was allowed. *Passinger v. Thorburn*, 34 New York, 634; 90 Am. Dec. 753; *White v. Miller*, 71 New York, 118; 27 Am. Rep. 13; *Wolcott v. Mount*, 36 New Jersey Law, 262; 13 Am. Rep. 438; and so of an article sold as "Paris Green," for destroying worms, *Jones v. George*, 61 Texas, 345; 48 Am. Rep. 280; and so of a fertilizer, *Bell v. Reynolds*, 78 Alabama, 511. In the last case interest was allowed on the amount

expended. But interest on the damages was disallowed in *White v. Miller*, 78 New York, 393; 31 Am. Rep. 544. See *Shaw v. Smith*, 45 Kansas, 334; 11 Lawyers' Rep. Annotated, 681.

In some of the seed cases however possible profits have been disallowed, and the recovery has been limited to the purchase price and interest, and the cost of labour in preparing the ground, less any benefit to the land thereby. *Ferris v. Comstock*, 33 Connecticut, 513; *Butler v. Moore*, 68 Georgia, 780; 45 Am. Rep. 508. In *Kingsbury v. Taylor*, 29 Maine, 508; 50 Am. Dec. 607, on a sale of seed, in the absence of express warranty or fraud, no recovery whatever was allowed. The present writer (Browne on Sales, p. 201) says: "The latter rule seems the more just and reasonable. In the absence of an express warranty, it is a very onerous and impolitic measure of damages, and one under which it would be impossible to conduct the seed business, to mulct the seller in thousands of dollars for contingent profits, without regard to weather or cultivation, on the sale of a few dollars' worth of seeds." "It is reasonable that gains prevented, as well as losses actually sustained, are recoverable where the gains are certain: thus where tobacco packing cases are the subject of sale, the seller impliedly warrants that he will make good any damage done to the tobacco by moulding, *Gerst v. Jones*, 32 Grattan (Virginia), 518; 34 Am. Rep. 773; but to hold a seller on an implied warranty as against wind and frost and bugs and worms, seems to the writer very near the apex of absurdity."

In *Spencer v. Hamilton*, 113 North Carolina, 49; 37 Am. St. Rep. 611, it was held that on breach of a lessor's contract to clean out ditches on the land, the lessee might recover the amount of the consequent diminution in value of the crops.

On breach of a contract to furnish boilers and machinery for a boat to be used at a summer pleasure resort, the recovery may embrace the rental value of the boat, and the value of the owner's services and the wages of employees during the period of idleness entailed by the breach. *Brownell v. Chapman*, 84 Iowa, 504; 35 Am. St. Rep. 326.

For special loss, not natural and obvious, there can be no recovery: it is essential that both parties should have known the circumstances from which it may be implied that it was had in contemplation. All the cases imply or declare this: "A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts." *Leonard v. N. Y., &c. Tel. Co.*, 41 New York, 544; 1 Am. Rep. 446.

No. 60. — CUTTER v. POWELL, 6 T. R. 320. — Rule.

No. 60. — CUTTER v. POWELL.

(1795.)

No. 61. — PLANCHÉ v. COLBURN.

(1831.)

RULE.

WHERE a contract is made for an entire service to be rendered by A. to B., and after part of the service is performed A. is, without default of B., rendered incapable of further performance. A. cannot recover anything under the contract, nor can he sue upon a *quantum meruit*. But where B. has broken the contract so that further services become useless, A. may recover upon a *quantum meruit* for the work done.

Cutter, Administratrix of Cutter v. Powell.

6 T. R. 320-327 (s. c. 3 R. R. 185; 2 Sm. L. Cas. 1).

Contract. — Entire Promise. — Incomplete Performance.

If a sailor hired for a voyage take a promissory note from his employer [320] for a certain sum provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*.

To assumpsit for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for £31 10s., subject to the opinion of this Court on the following case.

The defendant being at Jamaica subscribed and delivered to T. Cutter the intestate a note, whereof the following is a copy: "Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the Port of Liverpool. Kingston, July 31st, 1793." The ship *Governor Parry* sailed from Kingston on the 2nd of August, 1793, and arrived in the Port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on

the 2nd day of August, and proceeded, continued and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the Port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is four pounds per month; but when seamen are shipped by the run from Jamaica to England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by J. Haywood for the plaintiff; but the Court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage one way or the other; but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

Chambre for the plaintiff, and Wood for the defendant.

Arguments for the plaintiff. — The plaintiff is entitled to recover a proportionable part of the wages on a *quantum meruit* for work and labour done by the intestate during that part of the [* 321] * voyage that he lived and served the defendant; as in the ordinary case of a contract of hiring for a year, if the servant die during the year, his representatives are entitled to a proportionable part of his wages. If any defence can be set up against the present claim, it must arise either from some known general rule of law respecting marine service, or from the particular terms of the contract between these parties. But there is no such rule applicable to marine service in general as will prevent the plaintiff's recovering, neither will it be found, on consideration, that there is anything in the terms of this contract to defeat the present claim. It is indeed a general rule that freight is the mother of wages; and therefore if the voyage be not performed, and the owners receive no freight, the sailors lose their wages; though that has some exceptions where the voyage is lost by the fault of the owners, as if the ship be seized for a debt of the owners, or on account of having contraband goods on board; in either of which cases the sailors are entitled to their wages, though the voyage be not performed. Vin. Abr. "Mariners," 235. But here the rule

No. 60. — *Cutter v. Powell*, 6 T. R. 321, 322.

itself does not apply, the voyage having been performed, and the owners having earned their freight. There is also another general rule, that if a sailor desert, he shall lose his wages; but that is founded upon public policy, and was introduced as a means of preserving the ship. But that rule cannot apply to this case; for there the sailor forfeits his wages by his own wrongful act, whereas here the seaman was prevented completing his contract by the act of God.* So if a mariner be impressed, he does not forfeit his wages; for in *Wiggins v. Ingleton*, 2 Lord Raym. 1214, Lord Holt held that a seaman, who was impressed before the ship returned to the port of delivery, might recover wages *pro tanto*. Neither is there anything in the terms of this contract to prevent the plaintiff's recovering on a *quantum meruit*. The note is a security, and not an agreement; it is in the form of a promissory note, and was given by the master of the ship to the intestate to secure the payment of a gross sum of money, on condition that the intestate should be able to, and should actually, perform a given duty. The condition was inserted to prevent the desertion of the intestate, and to ensure his good conduct during the voyage. And in cases of this kind, the contract is to be construed liberally. In *Edwards v. Child*, 2 Vern. 727, where the mariners had given bonds to the East India *Company not to demand their wages [*322] unless the ship returned to the Port of London, it was held that as the ship had sailed to India and had there delivered her outward bound cargo, the mariners were entitled to their wages on the outward bound voyage, though the ship was taken on her return to England. This note cannot be construed literally, for then the intestate would not have been entitled to anything though he had lived and continued on board during the whole voyage, if he had been disabled by sickness from performing his duty. But even if this is to be considered as a contract between the parties, and the words of it are to be construed strictly, still the plaintiff is entitled to recover on a *quantum meruit*, because that contract does not apply to this case. The note was given for a specific sum to be paid in a given event; but that event has not happened, and the action is not brought on the note. The parties provided for one particular case: but there was no express contract for the case that has happened; and therefore the plaintiff may resort to an undertaking which the law implies, on a *quantum meruit* for work and labour done by the intestate. For though, as the condition in the note,

which may be taken to be a condition precedent, was not complied with, the plaintiff cannot recover the sum which was to have been paid if the condition had been performed by the intestate, there is no reason why the representative of the seaman, who performed certain services for the defendant, should not recover something for the work and labour of the intestate in a case to which the express contract does not apply.

Arguments on behalf of the defendant. — Nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was that the law implies what they would have agreed to do had they entered into a precise treaty : but when once they have expressed what their agreement was, the law will not imply any agreement at all. In this case the intestate and the defendant reduced their agreement into writing, by the terms of which they must now be bound. This is an entire and indivisible contract ; the defendant engaged to pay a certain sum of money, provided the intestate *continued* to perform his duty during the whole voyage ; that proviso is a condition precedent to the intestate or his representative claiming the money from the defendant, and that condition [* 323] not having been performed, the plaintiff cannot * now recover anything. If the parties had entered into no agreement and the intestate had chosen to trust to the wages that he would have earned and might have recovered on a *quantum meruit*, he would only have been entitled to £8 ; instead of which he expressly stipulated that he should receive thirty guineas if he continued to perform his duty for the whole voyage. He preferred taking the chance of earning a large sum in the event of his continuing on board during the whole voyage, to receiving a certain, but smaller, rate of wages for the time he should actually serve on board ; and having made that election, his representative must be bound by it. In the common case of service, if a servant who is hired for a year die in the middle of it, his executor may recover part of his wages in proportion to the time of service ;¹ but if the servant agreed to receive a larger sum than the ordinary rate of wages on the express condition of his serving the whole year, his executor would not be entitled to any part of such wages in the

¹ The old law was otherwise : *Vid.* Bro. Abr. "Apportionment," pl. 13 ; *ib.* "Labourers," pl. 48 ; *ib.* "Contract," pl. 31, and *Worth v. Finer*, 3 Vin. Abr. 8 and 9.

event of the servant dying before the expiration of the year. The title to marine wages by no means depends on the owners being entitled to freight; for if the sailors desert, or do not perform their duty, they are not entitled to wages though the owners earn the freight. Nor is it conclusive against the defendant that the intestate was prevented fulfilling his contract by the act of God: for the same reason would apply to the loss of a ship, which may equally happen by the act of God, and without any default in the sailors; and yet in that case the sailors lose their wages. But there are other cases that bear equally hard upon contracting parties, and in which an innocent person must suffer if the terms of his contract require it; *e.g.*, the tenant of a house who covenants to pay rent and who is bound to continue paying the rent, though the house be burned down. *Belfour v. Weston*, 1 T. R. 310; 1 R. R. 210. [Lord KENYON, C. J. But that must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, Lord Ch. NORTHINGTON said that if the tenant would give up his lease, he should not be bound to pay the rent. *Brown v. Quilter*, Ambl. 619.] With regard to the case cited from 2 Lord Raym., the case of a mariner impressed is an excepted * case, and the reason of that decision was founded on [* 324] principles of public policy.

Lord KENYON C. J. I should be extremely sorry that in the decision of this case we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued, and did his duty as second mate in the ship from Jamaica to Liverpool;

and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHMURST, J. We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore [* 325] we have nothing to guide us but the terms of the *contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued however that the plaintiff may now recover on a *quantum meruit*; but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

GROSE, J. In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much

relied upon. I have looked into the laws of Oleron; and I have seen a late case on this subject in the Court of Common Pleas. *Chandler v. Greaves*, Hil. 32 Geo. III. C. B. I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favourable to the seamen; so much so that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages after deducting what has been laid out for him. In the case of *Chandler v. Greaves*, where the jury gave a verdict for the whole wages to the plaintiff who was put on shore on account of a broken leg, the Court refused to grant a new trial, though I do not know the precise grounds on which the Court proceeded. However, in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was *the [* 326] contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything. I believe however that in point of fact these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

LAWRENCE, J. If we are to determine this case according to the terms of the instrument alone the plaintiff is not entitled to recover, because it is an entire contract. In Salk. 65 there is a strong case to that effect; there debt was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents and promised to pay him £100 per

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annum for his service; the plaintiff showed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded £75 for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt it could not be divided; and this Court were of that opinion; and reversed the judgment. With regard to the common case of an hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, — that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the [* 327] impressed man, perhaps it is an excepted * case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owner of the ship. *Postea to the Defendant,*

Unless some other information relative to the usage in cases of this kind should be laid before the Court before the end of this term; but the case was not mentioned again.

Planché v. Colburn and another.

8 Bing. 14–16 (s. c. 1 M. & Scott, 51; 5 C. & P. 58).

Contract. — *Complete Performance prevented by act of Promisee.* — *Quantum meruit.*

[14] Defendants engaged plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication: —

Held, that plaintiff might sue for compensation, without tendering or delivering the treatise.

The defendants had commenced a periodical publication, under the name of "The Juvenile Library," and had engaged the plaintiff

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to write for it a volume upon Costume and Ancient Armour. The declaration stated, that the defendant had engaged the plaintiff for £100 to write this work for publication in "The Juvenile Library;" and alleged for breach, that though the author wrote a part, and was ready and willing to complete and deliver the whole for insertion in that publication, yet that the defendants would not publish it there, and refused to pay the plaintiff the sum of £100, which they had previously agreed he should receive. There were then the common counts for work and labour.

At the trial before TINDAL, C. J., Middlesex sittings after last term, it appeared that the plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work; performed a journey to inspect a collection of ancient armour, and made drawings therefrom; but never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," upon the ill success of the early numbers of the work. An attempt was made * to show that the plaintiff [*15] had entered into a new contract.

The CHIEF JUSTICE left it to the jury to say, whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new contract; and a verdict having been found for him, with £50 damages, --

Spankie, Serjt., moved to set it aside, on the ground that the plaintiff could not recover on the special contract, for want of having tendered or delivered the work pursuant to the contract; and he could not resort to the common counts for work and labour, when he was bound by the special contract to deliver the work. If the plaintiff had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the defendants might have turned it to account in some other way.

TINDAL, C. J. In this case a contract had been entered into for the publication of a work on Costume and Ancient Armour in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings

published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The fact was, that the defendants not only suspended, but actually put an end to "The Juvenile Library;" they had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to show that the plaintiff * had afterwards entered into a new contract to allow them to publish his book as a separate work.

I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour; and there is no ground for the application which has been made.

GASELEE, J., concurred.

BOSANQUET, J. The plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned; but it is said that the plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape; and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the plaintiff's reputation, or not at all.

ALDERSON, J., concurred, and the learned Serjeant

Took nothing.

ENGLISH NOTES.

The principle of *Cutter v. Powell* was applied in *Ellis v. Hamlen* (1810), 3 Taunt. 52, 12 R. R. 595, where it was decided that if a builder undertakes a work of specified dimensions and materials and omits to put into the building joists and other materials of the specified description, he cannot recover upon a *quantum calcabant* for the work, labour, and materials. A similar principle was followed in *Sinclair v. Bowles* (1829), 9 B. & C. 92, 4 M. & R. 1, where the contract was for repairing and making perfect a chandelier. In *Read v. Rann* (1830), 10 B. & C. 438, a shipbroker sued to recover for work and labour in respect of the negotiations for a charter-party which had gone off. It

was proved that the custom was that the broker was entitled to receive from the shipowner a certain commission provided a complete contract was made. PARKE, J., in giving judgment, said: "The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit*; *ex. gr.*, where a special contract has been made for goods, and goods sent not according to the contract are retained by the party, there a claim for the value on a *quantum valebant* may be supported, but then, from the circumstances, a new contract may be implied." A somewhat similar case is that of *Simpson v. Lamb* (1856), 17 C. B. 584, 25 L. J. C. P. 113, where an agent employed to sell an advowson on commission, sought to recover on a *quantum meruit* when the authority had been revoked. It was held that he could not recover, on the ground that the power to revoke without compensation was implied, in the original contract. In giving judgment, JERVIS, C. J., said: "I take it that in ordinary cases such an authority cannot be revoked without reimbursing the party to whom it is given for the labour he has bestowed or the expense he has been put to. As, for instance, in the case where an artist has been employed to paint a picture, and the employer revokes the order before the completion of the picture. . . . Yet it is perfectly possible that there may be a contract of employment of a qualified nature, to the effect that if the work be not completed there is not to be any payment. I think that in this case the evidence shows a contract of that qualified nature. It is like the case of house-agents and shipbrokers, who if they do not effect a contract receive nothing."

The rule in *Cutter v. Powell* is subject to various exceptions, namely: (1) Where the defendant is the cause of the plaintiff's failure or incapacity to complete his part, he can sue on *quantum meruit*. *Planché v. Colburn*, No. 61 (*supra*); *Inchbald v. Western Neilygherry Coffee, &c. Co.* (1864), 17 C. B. (N. S.) 733; 34 L. J. C. P. 15. In the last-mentioned case, the directors of the defendant company undertook to give a shareholder a fixed sum at once, and further sums when all the shares were allotted. Before the allotment took place, the company was wound up. It was held that the plaintiff could recover not only the fixed sum but also a reasonable amount for his work and labour. See also *Green v. Lucas* (1875), 33 L. T. 584. (2) Where the defendant has elected to retain some benefit from the part performance, he must pay a reasonable sum for work and labour. *Read v. Rann*, *per* PARKE, B., *supra*. In *Munro v. Butt* (1858), 8 El. & Bl. 738, the plaintiff undertook to complete certain buildings for a fixed sum and

failed to do so. He then sued for the amount of work done. On the refusal of the plaintiff to complete the buildings, the defendant had resumed possession of the house, and so far was enjoying the fruits of the plaintiff's labour. It was held that the suit was not maintainable, as the benefit to the defendant was not separable from the exercise of his rights of property. A new contract cannot be implied merely from his possession of his own land on which somebody has built a house contrary to his orders.

Where the special contract is deviated from with the consent of both parties, the special contract will furnish the rule of payment so far as it can be traced, and the rest can be recovered upon a *quantum meruit*. *Robson v. Godfrey*, (1816), Holt N. P. 236, 17 R. R. 629.

AMERICAN NOTES.

Cutter v. Powell is pronounced the leading case and is set forth in the text in Lawson on Contracts, § 469.

In connection with this case, consult notes, vol. 1, p. 347, under "Accident," and *ante*, Nos. 54, 55, p. See notes, 19 Am. Dec. 276; 31 *ibid.* 518; 31 Am. Rep. 100.

The tendency of modern American decisions is toward a more lenient doctrine. As in *Jennings v. Lyons*, 39 Wisconsin, 553; 20 Am. Rep. 57, it was said: "And where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it. *Wolfe v. Howes*, 20 New York, 197; 75 Am. Dec. 388; *Ryan v. Dayton*, 25 Connecticut, 188; 65 Am. Dec. 560; *Fuller v. Brown*, 11 Metcalf (Mass.), 410; *Knight v. Bean*, 22 Maine, 531; *Lateman v. Pollard*, 43 *ibid.* 463; *Green v. Gilbert*, 21 Wisconsin, 395. In other words, sickness or death is generally regarded as an act of God in such a sense that it excuses the performance, and a recovery is allowed upon a *quantum meruit*." (But in that case, as the contract was for the service of a man and his wife for a year for a gross sum, the sickness of the wife was held not to enable the husband to recover *quantum meruit* after his discharge.) This doctrine is supported by *Coe v. Smith*, 4 Indiana, 79; 58 Am. Dec. 618, the case of an attorney who had agreed to defend a suit for a certain sum, but died before completing the defence. The Court said, after citing *Cutter v. Powell*, and laying down the general rule: "In some Courts however this doctrine seems to have been doubted if not denied. Kent to the observation above quoted, adds: 'The old rule is now held to be relaxed, and wages it is understood may be apportioned, upon the principle that such is the reasonable construction of the contract of hiring. LAWRENCE, J., in *Cutter v. Powell supra*; *McClure v. Pyatt*, 4 McCord, 26; *Bacot v. Parnell*, 2 Bailey, 424.' And Judge STORY, in *Brooks v. Byam*, 2 Story, 525, decided in 1843, seems to think the maritime law should have been applied to give a different decision in *Cutter v. Powell*. He says: 'The case of *Cutter v. Powell* is directly in point, although I entertain considerable doubt whether by the maritime law the contract in that case was not divisible.'" Such is the doctrine of *Fenton v. Clark*,

Nos. 60, 61. — *Cutter v. Powell*: *Planchè v. Colburn*. — Notes.

11 Vermont, 557; *Greene v. Linton*, 7 Porter (Alabama), 133; 31 Am. Dec. 707; *Johnson v. Walker*, 155 Massachusetts, 253; *Parker v. Macomber*, 17 Rhode Island, 674; 16 Lawyers' Rep. Annotated, 858, citing *Cutter v. Powell*, observing that "in this country it has not been followed."

Some of the Courts have made an even wider departure, and hold that although the person contracting to perform an entire service wilfully abandons it, he may still recover *quantum meruit*, less any damages, not exceeding the amount of the services, which the other has suffered in consequence. *Britton v. Turner*, 6 New Hampshire, 481; 26 Am. Dec. 713; *Lee v. Ashbrook*, 11 Missouri, 378; 55 Am. Dec. 110; *Purcell v. McComber*, 11 Nebraska, 209; 38 Am. Rep. 363; *Duncan v. Barker*, 21 Kansas, 99.

In *Steeple v. Newton*, 7 Oregon, 110; 33 Am. Rep. 705, it was held that where one fails fully to perform a contract for labour for any reason except voluntary abandonment, and the labour rendered is valuable, he may recover the value of the labour performed less any damage sustained by the other party by the breach. The Court said: "To adopt the rule that in all cases the party shall be held to a literal compliance with his special contract before he can recover anything for labour, is too harsh and would often be unjust; and on the other hand, to hold the rule as stated in the case of *Britton v. Turner*, 6 N. H. 481, that a party may voluntarily abandon his special contract and lose nothing thereby, would have a tendency to encourage bad faith and lessen the sacredness of solemn obligations, which it is the duty of the Courts to uphold and enforce so far as the same can be done without doing manifest injustice. It would be unjust to require a total performance in cases where the party in default has bestowed his labour for the benefit of his employer, and fails fully to comply with the terms of his contract from some accident or misfortune which does not involve wilful neglect or abandonment on his part." This was an action for ditching, and the excuse for non-completion was the defendant's changing the route to ground where the digging would have been more expensive. This seems to be clearly a case of breach by the defendant.

The doctrine of *Planchè v. Colburn* is fully supported here. See *Chicago v. Tilley*, 103 United States, 146; *Woolner v. Hill*, 93 New York, 581; *Derby v. Johnson*, 21 Vermont, 17; *Rankin v. Darnell*, 11 B. Monroe (Kentucky), 30; 52 Am. Dec. 557; *Moulton v. Trask*, 9 Metcalf (Mass.), 577; *Kerr v. Little*, 12 New Jersey Equity, 528; *Durkee v. Gunn*, 11 Kansas, 496; 13 Am. St. Rep. 300.

This was applied in *Bright v. Taylor*, 4 Sneed (Tennessee), 159, where an attorney agreed to defend one against a criminal charge for a certain sum, but the client fled from justice; and in *Patterson v. Gage*, 23 Vermont, 558; 56 Am. Dec. 96, where a servant maid left her employer on account of rudeness of members of his family toward her.

No. 62. — *Cuddee v. Rutter*, 5 Viner Abr. 538. — Rule.

SECTION X. — *Specific Performance.*

No. 62. — CUDDEE *v.* RUTTER.

(1719.)

RULE.

SPECIFIC Performance will not be ordered where the actual carrying out of the agreement as distinguished from compensation in money for the breach cannot be of importance to the plaintiff.

Cuddee v. Rutter.

Viner Abr. vol. 5, pp. 538-540 (s. c. 1 White & Tudor L. C.; 1 P. Wms. 570).

Contract. — Personalty. — Specific Performance.

A bill in equity will not lie for specific performance of an agreement to transfer South Sea Stock.

[538] Bill for a specific performance of an agreement to transfer stock. The case was, the defendant agreed with the plaintiff to transfer to him £1000, South Sea Stock upon the 20th of November then next following, at the rate of £104 per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration money; but the defendant in drawing the note had put in the usual words (or pay the difference) which the plaintiff struck out, and would not agree to, and then the defendant signed the note. After the bargain made, and before the time of delivering the stock, the South Sea Stock did rise considerably in value, and the defendant did not deliver the stock at the day, but a few days after offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c.

Sir Robert Raymond and Mr. Vernon for the defendant insisted that buying of stock in this manner, to be delivered at a future time, at a certain price, was in the nature of a wager upon the rise and fall of stock, and therefore paying the difference is a sufficient performance of the contract; that a contract for the sale of stock

differs from other contracts for sale of an house, lands, &c., for in such things there may be a particular conveniency or benefit to the buyer in this individual house, &c., but it is not so in stock; for one £1000 is as good as another £1000 stock, and is to be purchased daily in Exchange Alley; that the plaintiff has his remedy at law for the damages, viz. the difference, and that is the justice of the case between the parties; that it is discretionary in the Court to decree a specific performance of an agreement, and that in many cases the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir JOSEPH JEKILL, the MASTER OF THE ROLLS said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff at the making the agreement; that he should not be obliged to take the difference, but would have the stock actually delivered to him, and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage; and decreed that the defendant do transfer the stock and pay the dividends since 20th November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

On an appeal from this decree, PARKER, C., upon opening the cause asked if the plaintiff was at the South Sea House upon the day appointed for transferring the stock to demand it, and tender the money, and seemed strongly against the plain- [539] tiff, and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law for breach of the agreement, to recover damages, (*id est*) the difference between the price agreed on by the parties, and the price of corn upon the market day.

It was said it was the common justice of this Court, to compel the party to a specific performance of his agreement, if the same was just and reasonable, and fairly obtained; that this was a just, reasonable, and fair agreement in all the circumstances; it was the current price of the stock at that time, and no imposition upon the defendant; that the subsequent rise could not alter the case,

for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance; they compared it to the case of a contract for so many bales of silk, or any other merchandise to be delivered at a future day, at a certain price; if the value of the silk or other goods doth rise before the day, that is no excuse for non-performance of the contract. So in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement. They said, that from the time of the contract to the time appointed for the delivery, the stock did not rise above £12 per cent.; that it was not more at the time of filing the bill, which was in January, 1718; nay, it was not more at the time of the decree pronounced by the MASTER OF THE ROLLS in Michaelmas Term last; and though the stock has risen since to a vast price, between £900 and £1000 per cent., if the plaintiff suffers by that, it is his own fault in not performing his contract sooner, when he was demanded so to do, and in not obeying the decree as he ought to have done; that whatever has happened since cannot alter the case; that the contract was reasonable at the time it was made, and so it was when the bill was filed, and the decree pronounced.

It was said for the defendant, that the rule was laid down too general for compelling the execution of agreements between the parties; that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law; that it was very unreasonable now to compel the defendant to transfer £1000 South Sea Stock to the plaintiff at £104 10s. per cent. when it was worth £1000 per cent.; that paying the difference at the day was a good performance of this contract: that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time, and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South Sea House upon the day to accept and pay for the stock. They cited the case of *Marquess of Normandy v. Lord Berkly*, tempore Lord SOMERS, C., who said in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case

as a jury may do, but must decree the whole contract to be performed.

It was replied, that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him, but the defendant said that he had not the stock, and therefore could not deliver it, and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South Sea House to accept the stock; that [540] this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it, and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

PARKER, C. There is no reason to bring this bill for a specific performance of this agreement, because there is no difference between this £1000 South Sea Stock, and another £1000 stock, which the plaintiff might have bought of any other person, upon the very day, and the plaintiff doth not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference; these sorts of contracts are commonly understood to mean no more than to transfer the stock or pay the difference; and this fully answers the intention of the parties, and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement: this differs very much from the case of a contract for lands, some lands being more valuable than others, at least more convenient than others to the purchaser, but there is no difference in stock, one man's stock is of equal benefit and conveniency as another's.

2dly. It appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement; if there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court will not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

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3rdly. In contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a Court of equity to carry into execution; the decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind, but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the master inquire what the difference was at the day, and the defendant pay it to the plaintiff with interest, but no costs.

ENGLISH NOTES.

It may be stated as a general rule that apart from statute, specific performance of a contract concerning personalty will not be decreed. For instance, an agreement to lend or borrow money with or without mortgage will not be so enforced. *Rogers v. Challis* (1859), 27 Beav. 175; 29 L. J. Ch. 240; *Sichel v. Mosenthal* (1862), 30 Beav. 371; 31 L. J. Ch. 386. Where the intended mortgagee has already advanced the money, the mortgagor will be compelled to execute a mortgage deed containing the usual power of sale, &c. *Ashton v. Corrigan* (1871), L. R., 13 Eq. 76; 41 L. J. Ch. 96; *Hermann v. Hodges* (1873), L. R., 16 Eq. 18; 43 L. J. Ch. 192. *Taylor v. Eckersley* (1876), 2 Ch. D. 302; 45 L. J. Ch. 527, 24 W. R. 450, was an action for specific performance of a parol agreement to execute a bill of sale of personal chattels. The money had been actually advanced; and, upon an *ex parte* motion by the creditor, — there being evidence of immediate danger of the chattel in question being disposed of, — the plaintiff was appointed interim receiver for fourteen days. A contract of mere agency will not be specifically enforced. *Chinnock v. Sainsbury* (1861), 30 L. J. Ch. 409.

A contract for building will not be specifically enforced, partly because damages are an adequate remedy, and partly because of the incapacity of the Court to superintend the performance. *Mosely v. Virgin* (1797), 3 Ves. 184; *South Wales Railway Co. v. Wythes* (1857), 5 De G. M. & G. 880.

A contract for a mere yearly tenancy is in the same predicament, *Clayton v. Illingworth* (1853), 10 Hare. 451; but if the parties intended to execute an instrument for a yearly tenancy, the execution of the instrument will be ordered. *Fenner v. Hepburn* (1843), 2 Y. & C. C. C. 159.

As to the sale of stocks, the principal case of *Cuddee v. Rutter* is followed in *Nutbrown v. Thornton* (1804), 10 Ves. 161. The Court has,

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however, ordered delivery by the vendor of the certificates, the possession of which would constitute the plaintiff owner of a certain quantity of a certain foreign government stock. *Doloret v. Rothschild* (1821), 1 Sim. & St. 590, 2 L. J. Ch. 125. It may be observed that, in accordance with the reason given by PARKER, L. C., in the principal case, this would not be applied to a case where the party has not the thing to deliver. This was acted on in *Columbine v. Chichester* (1847), 2 Ph. 27.

It has been held that a contract for the sale of shares may be specifically enforced, for the shares are always limited in number, and it has been said, by way of distinction, that they are not always procurable. *Duncuft v. Albrecht* (1841), 12 Sim. 189. It is not easy to see the distinction.

A Court of equity will order specific delivery of a chattel, where it is of peculiar and unique value. *Pusey v. Pusey* (1684), 1 Vern. 273 (specific delivery of an heirloom); *Duke of Somerset v. Cookson* (1735), 3 P. Wms. 390 (specific delivery of an ancient silver altar-piece, remarkable for a Greek inscription and dedication to Hercules); *Fells v. Read* (1797), 3 Ves. 70, 3 R. R. 47 (peculiar tobacco box); *Fulcher v. Gray* (1859), 4 Drew. 651, 29 L. J. Ch. 28 (contract for the sale of two china jars); *Thorn v. Commissioner of Public Works* (1863), 32 Beav. 490 (contract for the sale of an arch stone, the spandril stone, and the Bramley Fall stone contained in the Old Westminster Bridge which had been pulled down). Should the parties have placed a price upon the peculiar or valuable chattel, this will bar the remedy by specific performance. *Dowling v. Betjeman* (1863), 2 J. & H. 544.

AMERICAN NOTES.

"The doctrine is well settled, that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of the like kind and quality," 3 Pomeroy on Equity Jurisprudence, p. 442; citing the principal case, and *Pierce v. Plumb*, 71 Illinois, 323; *Collier v. Karatopsky*, 36 Arkansas, 316; *Babier v. Babier*, 24 Maine, 12; *Cow's v. Whitman*, 10 Connecticut, 121; 25 Am. Dec. 60 (*obiter*); *Gram v. Stubbs*, 6 Paige Chancery (New York), 124; *Scott v. Bilgerry*, 10 Mississippi, 119; *McLaughlin v. Piatti*, 27 California, 451; *Ashe v. Johnson's Adm'r*, 2 Jones Equity (No. Car.), 149; *Eckstein v. Downing*, 64 New Hampshire, 218; 10 Am. St. Rep. 404, citing *Cuddee v. Rutter*; *Acery v. Ryan*, 74 Wisconsin, 591.

In *Robbins v. McKnight*, 1 Halstead Chancery (New Jersey), 612; 15 Am. Dec. 406, A. agreed to furnish B. with trees to plant on B.'s land, the latter to cultivate them at his own expense, the fruit to be picked and marketed at their joint expense, and B. to account to A. for half the net proceeds. The Court held this a contract concerning chattels alone, and that A. having performed, B. should be decreed to perform.

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As to contracts concerning chattels, exceptions are recognized in the case of unique or rare articles and such as have a sentimental value, like heirlooms, and in cases where compensation in damages does not form an adequate remedy. *Clark v. Flint*, 22 Pickering (Massachusetts), 231; 33 Am. Dec. 733 (vessel); *McGowin v. Remington*, 12 Pennsylvania State, 56; 51 Am. Dec. 581 (valuable private maps and charts); muniments of title, *Pattison v. Skillman*, 34 New Jersey Equity, 341; as to stocks, query, *Folls' Appeal*, 91 Pennsylvania State, 434; 36 Am. Rep. 671. In *Cushman v. Thayer Manuf. J. Co.*, 76 New York, 365; 32 Am. Rep. 315, it was held that such an action was maintainable concerning stocks of small or no present market value, but which the purchaser desires to hold for a rise. See *Rollholz v. Schwartz*, 46 New Jersey Equity, 477; 19 Am. St. Rep. 409; *Leach v. Fobes*, 11 Gray, 506; 71 Am. Dec. 732; *Adams v. Messinger*, 147 Massachusetts, 185; 9 Am. St. Rep. 679 (letters-patent); *Dilburn v. Youghlood*, 85 Alabama, 449; *Bumgardner v. Leavitt*, 35 West Virginia, 194; 12 Lawyers' Rep. Annotated, 776 (stocks); *Gloucester Isinglass & G. Co. v. Russia C. Co.*, 154 Massachusetts, 92; 26 Am. St. Rep. 214; 12 Lawyers' Rep. Annotated, 563 (fish skins for glue); *Woody v. Old D. Ins. Co.*, 31 Grattan (Virginia), 362; 31 Am. Rep. 732; *Howe v. Nickerson*, 14 Allen (Mass.), 400; *Tarbell v. Tarbell*, 10 Allen (Mass.), 278 (ante-nuptial agreement); and see cases cited by Pomeroy (Eq. Jur. § 1402, note).

In *Living v. Geddes*, 1 McCord Chancery (So. Car.), 304; 16 Am. Dec. 606, the Court observed, *obiter*, after citing the old English cases of the Pusey horn, the silver altar-piece, the silver tobacco box, the family pictures and the carved cherry-stone: "These are cases which have their foundation in the refinement of society, and those affections of the heart which it would be a reproach to the country not to indulge. But still they depend on the plain tangible principle, that there is no adequate remedy at law, and the principle must not be extended to cases founded in weakness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favourite spaniel or a lady's lap-dog." Perhaps his Honour might have admitted an exception in the case of the learned pig.

Commenting on *McGowin v. Remington*, *supra*, Mr. Freeman says in his note, 51 Am. Dec. 589: "The decision of the principal case is perhaps a little remarkable as coming from the Courts of a State with such narrow equity powers as those of Pennsylvania."

In *Bumgardner v. Leavitt*, *supra*, the Court say: "The question of specific performance of contracts for the delivery of stock is frequently treated by the text-writers in an empirical and unsatisfactory manner, as if there were something peculiar in this character of personal property, which rendered it impossible to classify it under any general rule. Mr. Fry, for example, does not hesitate to say positively that a contract for the sale of stock will not be specifically enforced, although he afterwards admits that railway shares form an exception. Fry Spec. Perf. 24, 27. Mr. Pomeroy's treatment of the subject is equally unsatisfactory. See Pom. Spec. Perf. 17-19. The true principle would seem to be, that as a general rule, Courts of equity will not enforce specific performance of contracts for the delivery of shares of stock, but when a purchaser has bargained for such shares, or taken an option upon them,

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because they have for him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution. This principle we find laid down and insisted upon in the more recent work of Mr. Waterman (1881). ‘The same principles,’ he says, ‘govern in contracts for the sale of stock as in the sale of property, — that is, if a breach can be fully compensated in damages, equity will not interfere; while it will do so, when notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed.’ Waterman on Spec. Perf. 19. Among the many other cases cited in support of this proposition is the leading case of *Doloret v. Rothschild*, decided by Sir JOHN LEACH, Vice-Chancellor, in 1821, 1 Sim. & Stu. 590, in which it is said that a bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock. There are many other cases however both in England and America, which sustain the correct principle as laid down above, but which it is unnecessary to cite. In the present case the purchaser of the refusal of or option upon the stock in the steamboat was dealing for an article which he could not go upon the market and buy, and which no one could deliver to him but the holder with whom he bargained. The shares of stock evidently had for him a peculiar value, which could not be compensated by mere damages, such as would be recovered at law. Their possession would enable him to control the company, and to retain his position as master of the vessel.”

In *Rector of St. David's v. Wood*, 24 Oregon, 396; 41 Am. St. Rep. 860, it was held that specific performance of a building contract will be decreed when it appears that it was to furnish stone of a peculiar kind and texture, which could be furnished by the defendant alone, that enough had been furnished to build two-thirds of the walls; and where if defendant was not required to furnish the residue, it would be necessary to use other stone, and thus destroy the harmony and beauty of the building, or to tear down the part already built and rebuild with other materials.

No. 63. — *GERVAIS v. EDWARDS.*

(1842.)

No. 64. — *LUMLEY v. WAGNER.*

(1852.)

RULE.

THE Court will not order specific performance of a contract the execution of which it cannot superintend.

But where the contract to perform a service is accompanied by a stipulation not to do certain acts in derogation of the value of that service, the Court will enforce the negative stipulation by injunction.

Gervais v. Edwards.

2 Dr. & War. 80-85.

Specific Performance. — Execution of Engineering Works. — Equity. — Jurisdiction.

[80] Where a bill prayed the specific performance of a contract, one of the terms of which was to the effect, that if any damage should result to the defendant from certain works, the erection of which had been agreed upon between the parties, the plaintiff would give to the defendant an equivalent in land, the amount of the damage, and the quantity of the compensatory land to be ascertained by certain arbitrators, — *Held*, that the Court had not jurisdiction to grant such relief; and that the execution of a deed, containing covenants for the performance of that part of the contract, which lay *in fieri*, would not be a specific performance.

The bill stated, that at the time of the execution of certain written articles of agreement thereafter mentioned, the plaintiff and defendant were possessed of estates in the county of Tyrone, separated by a stream, which frequently during wet seasons overflowed its banks, to the injury of the said lands; that the defendant proposed to the plaintiff that they should join in some measure for the remedy of this evil; and that with this view, in the month of July, 1838, a written agreement, consisting of eleven articles, was entered into between the said parties.

By those articles (which were set out *verbatim* in the bill) it was stipulated, that the course of the stream should be changed; that, as the effect of making the new channel would be to cut off portions from the estates of both parties, exchanges of land should be respectively made, and that a certain mill-dam should be erected; and arbitrators were named for the purpose of carrying into effect the arrangement. The fifth clause of the agreement provided, that, in case at the end of twelve months from the making of a certain cut, it should be found to answer the purposes for which it was designed, then the defendant should contribute one-half of the expense of making the said cut. The sixth article was in the words following, viz. :—

“ That if any damage arise to the lands of said Hugh Gore Edwards,

Esq., above said dam, from the erection thereof, the said Rev. Francis Gervais shall give an *equivalent in land in [* 81] the upper part of said 'give and take' to the said Hugh Gore Edwards, as compensation for such damage; and which damage, if any, the arbitrators shall fix at the time of adjusting the other matters herein, and also lay off the quantity of land to be given by said Rev. Francis Gervais, in lieu of said damage, if any."

The terms of the agreement were, in all other respects, immaterial to the question in the cause.

The arbitrators accordingly proceeded in the discharge of their office, and on the 12th of September, 1838, made their award; but the defendant conceiving that their award was unfavourable to him, declined to comply with or submit to its terms. This refusal on the part of the defendant occasioned the present suit, and the plaintiff having, by his bill, waived all right of contribution under the fifth article of the agreement, prayed generally, that the defendant might be decreed specifically to execute the said proposal and agreement, he undertaking performance on his part.

Mr. Serjt. Warren, Mr. T. B. C. Smith, Mr. Brooke, and Mr. Shiel, for the plaintiff.

The Attorney-General, Mr. Litton, and Mr. James Doherty, for the defendant.

It would be impossible to execute these articles *in toto*; they are unintelligible and uncertain. The Court cannot execute an agreement like the present, of an executory character, providing for matters which are continually altering, *Burton v. Lister*, 3 Atk. 383; in which case Lord HARDWICKE says, * "Noth- [* 82] ing is more established in this Court, than that every agreement of this kind ought to be certain, fair, and just in all its parts." But, besides this, the Court will not enforce a contract, when one party cannot perform his part of it. *Harnett v. Yiddling*, 2 Sch. & L. 549, 554; 9 R. R. 98.

Mr. Brooke, in reply.

It is true, the defendant says he has a great objection to perform this contract; but he does not state that the execution would be impossible, nor is the fact so; the sixth article, upon which the entire difficulty turns, is not prospective; it has reference, no doubt, to a calculation to be made; but it is, in effect, an agreement for an exchange, and may be carried out by a deed, with proper covenants. In *Burton v. Lister*, the bill was dismissed on

the ground of misrepresentation. *Davis v. Hone*, 2 Sch. & L. 341 9 R. R. 89, shows that the Court will execute an agreement according to a conscientious modification of it, as far as circumstances will permit. No difficulty can ensue from its being an award, the specific performance of which is sought. *Wood v. Griffith*, 1 Swanst. 43; 1 Wils. 34; 18 R. R. 18.

THE LORD CHANCELLOR (SUGDEN):—

If the jurisdiction of this Court permitted it, I should willingly grant a specific performance of this agreement, because the merits are altogether on the side of the plaintiff; but I do not see how it is possible specifically to execute this contract. The Court acts only when it can perform the very thing in the terms [* 83] specifically agreed upon; but *when we come to the execution of a contract, depending upon many particulars and upon uncertain events, the Court must see whether it can be *specifically* executed; nothing can be left to depend upon chance; the Court must itself execute the whole contract. There are cases, where some of the acts to be done, consequent on the specific execution of the contract, may be performed subsequently. Thus a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution; this admits of no doubt.

But, then, by the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract. The plaintiff was perfectly aware of the difficulties arising out of the contract, and he accordingly, by his bill, waived his right to compensation, by way of payment of half the expenses from Mr. Edwards of making a certain cut, pursuant to the terms of the fifth article; that part of the contract being one which the Court could not specifically execute; but he was not enabled to remove what is the real difficulty arising from the sixth clause, because that contains a stipulation, not for the benefit of the plaintiff, but for the advantage of the defendant, and which the plaintiff could not waive. That important stipulation I

cannot disregard. It is said this is in effect an exchange (which I think it is), and that it may be carried out by a *deed, and that there may be covenants to execute that [* 84] portion of it, which is to be performed hereafter. There is no authority in support of this; nor is the difficulty removed by saying that a deed may be executed to carry out the contract. If a man agree to do a certain act, for example, to dispose of an estate, with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for, the immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing. But here there is an entire contract, which must be executed. Certain things were to be done at once, and certain other things were dependent upon future contingencies. The plaintiff has waived his right, as far as he could. But by another clause (sixth clause) it is provided that if any damage should arise to the lands of Mr. Edwards from the erection of the dam, the plaintiff should give an equivalent in land as a compensation for such damage; which damage the arbitrators were to fix at the time of adjusting the other matters, and also lay off the quantity of land to be given in lieu of such damage.

It is said that this operates either *in presenti*, and has been executed by the award, or that the agreement, in this respect, might form a part of the deed. I am clearly of opinion that this is not a matter to be presently ascertained, but is dependent upon the operation of works contracted to be erected, and can only be ascertained after the works have been in operation. The provision was to guard against the probable chance of future damage to the defendant's land; no evidence has been read to show that it *formed any part of the award, or that the arbitrators [* 85] took it into their consideration; and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be? It cannot be made the subject of covenant; that is not the agreement of the parties. Am I to decree the specific performance of that which is now capable of being executed? and then (for I must go on) am I to decree that, if hereafter, when the works, not now commenced, are completed, damage should arise to the defendant's land, the arbitrators shall ascertain the damage, and the plaintiff shall convey land, equivalent in value to such damage? No one ever heard of such

a decree. If the case should ever arise of damage, it would, I dare say, lead to a new bill being filed, new witnesses, new questions as to the extent of the damage sustained, and whether the arbitrators acted fairly, and had valued the property correctly. It is impossible to execute this contract specifically. No precedent has been cited on either side, and indeed it was scarcely worth while searching for precedents, as the question is one of principle; but the authorities upon the right of the Court to compel the execution of the contract, where the price is to be fixed by arbitrators, will show how many difficulties the Court would have to struggle with in this case. I am, however, so little satisfied with the conduct of the defendant, in his attempt to evade the contract, that, although I must dismiss the bill, I shall do so without costs.

Lumley v. Wagner.

21 L. J. Ch. 898–903 (s. c. 1 De G. M. & G. 604; 5 De G. & S. 485; 16 Jur. 871).

Theatrical Contract. — Negative Stipulation. — Specific Performance by Injunction.

[898] Mdlle. J. W. agreed in writing with L. that, for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with L., she would not sing elsewhere without his license in writing. Afterwards J. W. contracted with G. to sing and perform at his theatre during the period specified in her engagement with L. Upon bill by L. praying simply that J. W. might be restrained from singing and performing elsewhere than at his theatre during the period specified, the Court granted an injunction accordingly.

Motion to dissolve an injunction granted by V.-C. PARKER.

In November, 1851, Joanna Wagner and Albert Wagner (her father), by Dr. Joseph Bacher, as their agent, entered into an agreement in writing with B. Lumley, the plaintiff, in the French language, which as translated was as follows: —

“The undersigned, Mr. B. Lumley, possessor of Her Majesty’s Theatre in London, and of the *Italienne* at Paris, of the one part, and Mdlle. Joanna Wagner, cantatrice of the Court of his [*899] Majesty the *King of Prussia, with the consent of her father, Mr. Albert Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract: First, Mdlle. J. Wagner binds herself to sing three months at the theatre of Mr. Lumley, her Majesty’s, at London, to date from the 1st of

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April, 1852, (the time necessary for the journey comprised therein), and to give the parts following: 1. Romeo, 'Montecchi;' 2. Fides, 'Prophète;' 3. Valentine, 'Huguenots;' 4. Anna, 'Don Juan;' 5. Alice, 'Robert le Diable;' 6. An opera chosen by common accord. Second, the three first parts must necessarily be: 1. Romeo; 2. Fides; 3. Valentine, &c. Third, these six parts belong exclusively to Mdlle. Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented by any cause whatever from giving these operas, he is nevertheless held to pay to Mdlle. J. Wagner the salary stipulated lower down for the number of her parts, as if she had sung them. Fourth, in the case where Mdlle. J. Wagner should be prevented by reason of illness in singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mdlle. J. Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have a right to give at a later period the omitted representation. Sixth, if Mdlle. J. Wagner, fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mdlle. J. Wagner £50 sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mdlle. Wagner a salary of £400 sterling per month, and payment will take place in such manner that she will receive £100 sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mdlle. Wagner at Berlin, on the 15th of March, 1852, the sum of £300 sterling, a sum which will be deducted from her engagement, in his retaining £100 each month. Ninth, in all cases, except that where a verified illness would place upon her a hindrance, if Mdlle. J. Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have a right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, in the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and, in that case, Mdlle. Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

(Signed) JOANNA WAGNER.
ALBERT WAGNER."

"BERLIN, Nov. 9, 1851."

Shortly after the execution of the above contract Dr. Bacher produced the same to Mr. Lumley in Paris, whereupon the latter objected that it did not contain the usual clauses prohibiting Mdlle. Wagner from singing or performing, during her engagement with Mr. Lumley, in any other place in England without his consent, whereupon Dr. Bacher, on the 15th of November, as agent of the Wagners, added thereto a clause to the following effect: —

“Mdlle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley. (Signed) Dr. Joseph Bacher, for Mdlle. Joanna Wagner, and authorized by her.”

Early in March the Wagners wrote to Mr. Lumley, requesting an enlargement of the time for the lady's appearance in London, which was consented to. Subsequently, on the 5th or 6th of April, Mdlle. Wagner and her father entered into an agreement with the defendant Gye, whereby it was agreed that they should abandon the contract with Mr. Lumley, and that the defendant, Mdlle. Wagner, should sing at the “Royal Italian Opera,” Covent Garden, instead of “Her Majesty's Theatre.” The bill was filed on the 22nd of April, 1852, by Mr. Lumley against Mdlle. Wagner, Albert Wagner, and F. Gye, praying that the defendant Joanna Wagner might be restrained by injunction from singing and performing, or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place, without the sanction or permission in [* 900] writing of the plaintiff during the existence of the * agreement with the plaintiff mentioned in the bill. The VICE-CHANCELLOR, PARKER, on the 9th of May, granted the injunction in the terms of the prayer, and the defendants now moved to dissolve it.

Mr. Bethell, Mr. Malins, and Mr. Martindale, for the motion.

Mr. Bacon and Mr. Hislop Clarke, *contra*.

The following cases were cited: —

Martin v. Nuthin, 2 P. Wms. 266; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; 2 Cox, 4; *Morris v. Colman*, 18 Ves. 437; 11 R. R. 230; *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; 5 L. J. (N. S.) Ch. 115; *Gerrais v. Edwards*, 2 Dr. & War. 80 (No. 63, p. 648, *ante*); *French v. Macaulay*, 2 Dr. & War. 269; *Barret v. Blagrove*, 5 Ves. 555; 6 Ves. 104; *Collins v. Plumb*, 16 Ves. 454; 10 R. R. 214; *Clark v. Price*, 2 Wils. C. C. 257; *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 9 Sim. 393; *Hooper v. Brodrick*, 11 Sim. 47; 9 L. J. (N. S.) Ch. 321;

Rolfe v. Rolfe, 15 Sim. 88; *Whittaker v. Howe*, 3 Beav. 383; *Dietrichsen v. Cabburn*, 2 Phil. 52; *Hills v. Groll*, 2 Phil. 60; 14 L. J. Ch. 444; *Smith v. Fromont*, 2 Swanst. 330; 1 Wils. 472; 19 R. R. 80; *Stocker v. Brockelbank*, 3 Mac. & G. 250; 20 L. J. Ch. 401; *Swallow v. Wallingford*, 12 Jur. 403.

THE LORD CHANCELLOR (LORD ST. LEONARDS). This case arises out of a very simple contract. Without considering for a moment the difficulties which have been raised by the conduct of the parties, and independently of the question of law, the contract simply is, that this young lady should sing at the Queen's Theatre for a certain number of nights, and that she should not sing elsewhere during (for that is the true construction of it) that period. Nothing can be more simple than the case on which I have to decide the points of law that have now been so elaborately and so well argued. As I can understand the objection, it is this: that there is no case in which this Court can — that is, in which this Court ought to — grant an injunction, unless in cases that are connected with specific performance, or cases where, if the injunction is to compel a party to forbear from doing an act, or to compel a party not to perform an act, the injunction will execute the whole of the agreement or the whole of that which remains to be performed. Without going into other cases of injunction, I understand that to be the precise case that is now presented before the Court. The point, therefore, first is, how that stands upon principle; and, in the next place, how it stands upon authority. Before I consider it upon principle, I will refer to two or three of the cases that have been cited by the defendants, the appellants, in support of the argument.

The first case was that of *Martin v. Nulkin*, where an injunction was granted to prevent the ringing of a bell. That was a case in which the Court did issue an injunction restraining an act from being done, which can in no respect be considered as a case in which the Court could have granted a specific performance; but that case falls within the second of the class of cases which the defendants admit are proper cases for the interference of the Court, because there the ringing of the bell had been agreed to be suspended by the churchwardens, who represented the parish, in consideration of money paid by Martin and his wife in the erection of a cupola and clock and so on, the price in fact stipulated for by the parish in consequence of their relinquishing the great enjoy-

ment of constantly hearing the church bell ringing at five o'clock every morning at certain periods of the year. In that case, the parish accepted the benefit, but refused the compensation. Lord MACCLESFIELD granted an injunction, and the Lords Commissioners, on the hearing of the cause, continued the injunction during the lives of Martin and his wife. That is a case in which the Court did grant an injunction to prohibit a party from doing an act, in which this Court could never have interfered by way of directing a specific performance. The next case referred to is *Bar-*

ret v. Blagrace, which came before Lord ROSSLYN (then [* 901] Lord LOUGHBOROUGH). There * a lease had been granted

by the proprietors of Vauxhall Gardens, with a negative stipulation that the tenant of the house was to do no act to damage the custom or business of Vauxhall itself. After some time the proprietor of Vauxhall filed a bill for an injunction against the then tenant of the house for breaking that stipulation, and Lord ROSSLYN granted an injunction; but Mr. Bethell observes, how remarkable are the words which Lord ROSSLYN made use of; for he said it was a case of specific performance. The case subsequently came before Lord ELDON, who dissolved the injunction; there being so much acquiescence, he said that the Court could not interfere, but he also treated it as a case of specific performance.

So far as the words go, the decisions of those eminent men would seem to justify the argument addressed to me. But what is the fact with respect to the case decided by Lord ROSSLYN? The granting of the injunction was, in that case, a specific performance; because the prohibition, preventing the man from doing the act, does as effectually make him perform his agreement as if the Court compelled him to do the act by compelling the direct performance of it. The Court said, you shall not open your house as a house of entertainment. That was the performance of the agreement in substance, because the man could not then do the act complained of. Therefore, the term "specific performance" was aptly applied to such a case; but not in the sense addressed to me under the first general head. It is no objection to this jurisdiction to say that the remedy is at law; the decision in *Robinson v. Lord Byron* is a clear illustration of that. There the remedy was at law; but this Court felt no difficulty in restraining Lord Byron from abusing the right of the head of the water which he had. There are cases, such as that cited for the appellants, *Collins v. Plumb*, in which

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the power was not exercised; but it was there admitted that the Court had the power of preventing the act from being done; though the power will not be exercised, because it cannot be exercised properly or beneficially. The negative covenant not to sell water was not enforced by Lord ELDON, not because he had any doubt of the jurisdiction, but because it was impossible to measure the damage sustained by the different parties, and from the nature of it the Court could not interfere. The learned Judge did not mean to break in on the general rule, whatever it may be; but refused to exercise the jurisdiction on very sufficient grounds.

I took the liberty of calling counsel's attention to those familiar cases of attorneys' clerks and surgeons' or apothecaries' apprentices and the like, that are frequently arising in this Court. On what principle are they decided? I am told that they are decided upon this principle: that they arise out of benefits received and out of concluded contracts, and that therefore the prohibition finishes everything and brings it within the second category. I do not apprehend the jurisdiction of the Court depends upon that. Take the case of landlord and tenant. When that relation is fixed and consummated by the contract and by the lease executed, what is there to make that case differ from any other? No doubt, in a contract to grant a lease there might be a specific performance; but the lease being executed with a negative covenant not to do a particular act, the moment you are called upon to perform that covenant by inhibition, you have to deal upon that covenant alone. And scarcely, I think, a case has occurred in this Court in that relation in which there were not many stipulations affirmative remaining to be performed in the very contract from which the Court picks out this particular negative covenant for the purpose of enforcing it by prohibition. In leases there are often twenty affirmative covenants, and perhaps but one negative covenant; that the tenant, for example, is not to cut timber trees, or lop them, or do any similar act. The court does not ask what remains to be performed under the contract; but the Court gives effect to the negative contract, and specifically executes it by prohibition. All these cases are in direct contradiction of the rules that have been so elaborately pressed upon me.

This is a mixed case; but of this nature, it consists, not of two acts to be done by each of the parties, — not that Mr. Lumley is to do one act and the *young lady is to do [*902]

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another; but the acts are to be done by the young lady alone. The one is ancillary to the other; they are co-equal and co-existent, and operate together, and not in opposition. She says, "I will sing for three months at your theatre, and during that time I will not sing for any one else." In fact, it is one contract, and according to all sound and judicious construction, and according to the true spirit and essence of men's acts, an agreement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another. It appears that according to the lady's capacity and physical powers, she was by the exertion of her abilities to aid the theatre to which she attached herself; and if there was no such stipulation not to perform at another theatre she would have broken the spirit and true meaning of the contract by entering into this other contract. Let us see for a moment what is the principle of the jurisdiction of the Court. That principle is to bind men's consciences to a fair and liberal performance of their agreements. I have always thought you may attribute a great deal of the right feeling and fair dealing that exists between Englishmen to the exercise of this jurisdiction. Men are not suffered by the law of this country to depart from their contracts at their pleasure. It does not leave the party with whom the contract has been broken to the mere chance of what a jury may give in the shape of damages, but it enforces, where it can, the literal performance of the contract; and this I believe has mainly tended to produce the good faith that exists to a greater extent in this country than in many others. Although the jurisdiction of the Court is not to be extended, a Judge would desert his duty if he did not act up to the rule which his predecessors have laid down as the proper exercise of a most valuable and wholesome jurisdiction. Where is the mischief in this case of exercising that jurisdiction? It is objected that if I refuse this application I exclude this lady from performing at Covent Garden, when I cannot compel her to perform at the Queen's Theatre. I cannot compel her to perform, of course; that is a jurisdiction that the Court does not possess, and it is very proper that it should not possess that jurisdiction; but what cause of complaint is it that I should prevent her from doing an act which may compel her to do what she ought to do? — though that is not the object the Court has in view; for the Court cannot indirectly do a thing, and I disclaim doing a thing indirectly which I cannot do directly. In my opinion this is a proper case for inter-

ference, and, though I cannot compel the execution of the whole of the contract, I leave nothing unaccomplished by my order which I hold it is in the power of the Court to accomplish. She will be committed to prison by this Court if she does any act in breach of this injunction; and it will have this effect: by preventing her from doing the act there will be no case, in an action by Mr. Lumley against her, for such an amount of vindictive damages as a jury might probably be disposed to give, if she exercised her talents in the rival theatre. It appears to me that, in granting the injunction, I shall do nothing contrary to the settled rule of the Court, but merely carry out, as far as I can, the whole power of the Court on one subject, which fortunately has a bearing upon another subject which I cannot directly touch.

This case has been elaborately argued upon the authorities. I bow to the authorities. I mean to execute the authorities; I am giving no authoritative decision from myself; I mean to follow the current of authority of my predecessors; to weigh their opinions where there is a difference of opinion between the Judges that have preceded me, calmly and patiently to consider them, and to arrive at the best conclusion I can as to the meaning to be drawn from the various expressions which I find in those decisions. With respect to the case of *Morris v. Colman*, it was said that Lord ELBOX had decided that case as a case of partnership, but he did not exclusively decide it as a case of partnership; and I have come to a clear conclusion that Lord ELBOX would have granted the injunction in that case, though it had not been a case of quasi-partnership. The case of *Clark v. Price* does not apply, for there was no negative stipulation, and therefore Lord ELBOX very properly refused an injunction. * As to the case of *Kemble v. Kean*, [*903] decided by Sir L. SHADWELL (of whom I wish it to be understood that I speak with the highest respect), I should have come to a different conclusion; for there was in that case a negative covenant. My apprehension is that the case of *Kemble v. Kean* was wrongly decided, and could not be maintained. That learned Judge followed that decision up in *Kimberley v. Jennings*; but with great submission, it appears to me that the whole of the authority of Vice-Chancellor SHADWELL is removed by himself, and I think the case of *Rolfe v. Rolfe* displaces the entire of his authority upon this question. In the case which has been referred to, *Hooper v. Brodrick*, though the Court would not enforce the affirmative cov-

enant, yet it would have restrained the defendant from breach of the negative covenant. This case is directly against the appellants. In *Smith v. Fromont*, there was no negative covenant, and consequently it does not bear upon this question. An observation has been made upon an opinion of my own in Ireland, *Gervais v. Edwards*, and I abide by that opinion. There the whole case was properly a case of specific performance; but, from the nature of the contract itself there was a portion that could not be executed. It is said that in *Hills v. Uroll*, Lord LYNCHURST refused to enforce by injunction a negative contract. But I find in that case, that while A. was to supply B. with certain acids, and B. was not to get the acids anywhere else, there was no power to compel A. to supply B. with the acids; and therefore B.'s manufacture might be paralyzed and he might be ruined if A. did not supply him; therefore Lord LYNCHURST said, I cannot interfere. It is supposed that Lord LYNCHURST improperly applied there the rule that was properly applied in *Gervais v. Edwards*; but he did not improperly apply it; as he could not enforce an affirmative covenant with respect to one part, he would not enforce a negative covenant as to the other, for by doing so he might ruin the man. With respect to the case of *Dietrichsen v. Cabburn*, I wholly deny that it was a case of partnership; it was strictly a case of principal and agent, and it was only because there was that negative contract that the Court gave effect to it.

The clear result from all those cases in my mind is, that the point of law has been properly decided in the Court below, and that I must, as regards that point, affirm the decision.

The LORD CHANCELLOR then went into certain points upon the merits of the case, and refused the motion with costs.

ENGLISH NOTES.

The rule that a Court of equity will not order specific performance of a contract unless it can execute the whole contract on both sides has been laid down and acted upon in many cases decided prior to and after the principal case of *Gervais v. Edwards*. In this note it will be sufficient to refer to the subsequent cases. In *Stocken v. Wedderburn* (1857), 3 K. & J. 393; 26 L. J. Ch. 713, the defendants entered into an agreement with the plaintiff to form a joint stock company for the purpose of working the plaintiff's patent, and the plaintiff agreed to devote his whole time to the interests of the company and the improvement of the patent. It was held that a bill for specific performance

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could not be sustained, as the Court could not have enforced his stipulations against the plaintiff; and further, because the Court could not execute the contract by ordering the execution of a deed, — the agreement being to do certain acts and not to enter into covenants to do them. In *Ogden v. Fossick* (1862), 32 L. J. Ch. 73, the defendant agreed to grant to the plaintiff a lease of a wharf and premises for twenty-one years, and the plaintiff agreed to employ the defendant as a manager at the wharf. The employment was to be co-extensive with the tenancy. Specific performance of the agreement for lease was refused. So also in *Downs v. Collins* (1848), 6 Hare, 418, inability to order continuance of a partnership for the residue of an agreed term of twenty-one years was held to be a reason for refusing specific performance of the partnership articles. In *South Wales Railway Co. v. Wythes* (1857), 5 DeG. M. & G. 880, inability to decree performance of a contract for constructing a railway line was held a reason for refusing to order execution of a bond to secure the performance. In *Nickels v. Hancock* (1859), 7 De G. M. & G. 300, excess of authority in part of the award was held to bar specific performance of the rest of it. In *Scott v. Rayment* (1868), L. R., 7 Eq. 112, 38 L. J. Ch. 48, the Court refused to order specific performance of a contract to enter into a partnership. In *The Merchants' Trading Company v. Banner* (1871), L. R., 12 Eq. 18; 40 L. J. Ch. 515, inability to compel a shipbuilder to alter a ship was held a reason for refusing to order specific performance of the covenant that the owners might re-enter and make the alterations themselves.

This rule is, however, subject to exceptions, one of which is furnished by the principal case of *Lumley v. Wagner*. These exceptions are: —

First, where the contract is divisible, inability to order performance of one or more parts will not deter the Court from ordering performance of the rest. For instance, if at an auction A. buys several plots of land, the inability of the vendor to make out a good title to one plot will not prevent him from enforcing specific performance as to the other plots; *Lewis v. Guest* (1826), 1 Russ. 325. *Secus* if all the plots were bought at a single price, or if the separate contracts were treated by the parties as one contract. *Dalby v. Pullen* (1829), 3 Sim. 29; *Cass v. Strodes* (1833), 2 My. & K. 722; *Dykes v. Blake* (1838), 4 Bing. N. C. 463. Similarly where the parties stipulate for piecemeal performance, specific performance of one part will be decreed; *Wilkinson v. Clements* (1873), L. R., 8 Ch. 96; 42 L. J. Ch. 38; and this although the contract as to the other parts may be illegal; *Odessa Tramways Company v. Mendell* (1873), L. R., 8 Ch. 235. So also where two contracts entered into at the same time and between the

same parties are independent of each other, specific performance of one may be decreed: *Croome v. Lediard* (1833), 2 My. & K. 251; 3 L. J. (N. S.) Ch. 98; *Green v. Low* (1856), 22 Beav. 625.

Secondly, where the contract has been wholly or partly executed on one side, the Court will decree specific performance against the other party. For instance, where a railway company in consideration of conveyance of some lands agreed to construct a road, to contribute towards its maintenance, and to construct and maintain a wharf; and the lands were conveyed to the company, the Court ordered the specific performance of the agreement against the company; *Wilson v. The Furness Railway Co.* (1870), L. R., 9 Eq. 28; 39 L. J. Ch. 19. On the same principle the Court has ordered specific performance of covenants in executed contracts, such as leases; *Rigby v. Great Western Railway Co.* (1847), 2 Phil. 44, distinguishing *Gervais v. Edwards*.

Thirdly, where the contract is to do a thing and to execute a deed for that purpose, a deed will be ordered to be executed though the acts to be done be future and continuous. A railway company offered some of its lands to the plaintiff, one of the terms being that the plaintiff should use the defendants' railway "whenever reasonably practicable, and for the longest distance it is reasonably capable of use." The offer was accepted, and the land was put to various uses by the plaintiff. TURNER, L. J., on appeal affirmed the judgment of Lord ROMILLY, M. R., ordering the execution by the railway company of a deed containing the terms of the agreement. *Wilson v. West Hartlepool Harbour and Railway Co.* (1864), 34 Beav. 87; 2 De G. J. & S. 475; 34 L. J. Ch. 241.

Fourthly, where a part cannot be performed through default of the defendant, he will nevertheless be ordered to perform the remainder: *Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co.* (1847), 2 Ph. 597; *Jones v. Evans* (1848), 17 L. J. Ch. 469; *Saunders v. Edge* (1860), Johns. 669; *Norris v. Jackson* (1861), 1 J. & H. 319; *Barnes v. Wood* (1869), L. R., 8 Eq. 424; 38 L. J. Ch. 683; *Hooper v. Smart* (1874), L. R., 18 Eq. 683; *Horrocks v. Rigby* (1878), 9 Ch. D. 180, 47 L. J. Ch. 800.

Fifthly, as in the principal case of *Lumley v. Wagner*, where the contract contains positive terms which are not proper subjects of specific performance, and contains either expressly or by implication stipulations a breach of which can be properly prevented by injunction. In *De Mattos v. Gibson* (1858), 4 De G. & J. 416, 28 L. J. Ch. 165, a ship-owner (A.) by charter-party contracted with the plaintiff to carry for him a cargo from Newcastle to Suez. A. then mortgaged the ship to the defendant, who had notice of the charter-party. The defendants were about to exercise their power of sale when the plaintiff filed a bill

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for the specific performance of the charter-party, and moved for an injunction to restrain the defendant from interfering with the voyage. It was held that the plaintiff was entitled to an injunction to restrain the mortgagee from exercising his power of sale and from interfering with the ship on her voyage. Lord CHELMSFORD in affirming the judgment of the Lords Justices said that "although a Court of equity cannot compel a specific performance of 'a charter-party,' yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden according to the principle so fully expressed in the case of *Lumley v. Wagner*." This case was followed in *Serin v. Deslandes* (1861), 30 L. J. Ch. 457, and in *Le Blanch v. Grainger* (1866), 35 Beav. 187. In *Brett v. East India, &c. Shipping Co.* (1865), 2 H. & M. 404, it was laid down that whenever the principal portion of an agreement is incapable of specific performance by the Court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is purely incidental to the general relief sought; although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed. In *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.* (1873), L. R., 16 Eq. 433, 43 L. J. Ch. 131, there was an agreement sanctioned by an Act of Parliament, whereby the plaintiff company agreed to construct a line of railway, and the defendant company agreed to work it, to develop the local traffic, and to carry over it certain traffic particularly specified. All differences were to be determined by a standing arbitrator nominated annually, or by the Board of Trade, on the application of either company. The plaintiff company constructed the line and the defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the plaintiffs' line by other lines belonging to the defendant company, and a bill was filed to restrain the defendant company from so doing. The injunction was granted. In delivering judgment, Lord SELBORNE criticised the principal case of *Lumley v. Wagner*, and said (L. R., 16 Eq. 440): "It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made, that if you find the word 'not' in an agreement — 'I will not do a thing' — as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule, if it should eventually be adopted by this

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Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative." In *Fothergill v. Rowland* (1873), L. R., 17 Eq. 132, 43 L. J. Ch. 252, the Court refused to restrain by injunction the lessee of a colliery from selling it, at the instance of a person to whom the lessee had promised to sell all the coals in the colliery for five years. In *Jones v. North* (1875), L. R., 19 Eq. 426, 44 L. J. Ch. 388, a person who had contracted with the plaintiff not to send in a tender invited by a corporation, and not to compete with him in supplying goods to the corporation for one year, sent in a tender which was accepted. It was held that the agreement was not void, and that the plaintiff could restrain its breach by injunction. In *Donnell v. Bennett* (1886), 22 Ch. D. 835, 52 L. J. Ch. 414, where these cases are reviewed, there was a contract for the sale of chattels to the plaintiff, which contained an express negative stipulation not to sell them to any other manufacturer. An injunction to restrain the breach of this negative stipulation was granted, though specific performance of the contract could not have been decreed. It was also said that the mere use of the word "not" will not necessarily found a jurisdiction for injunction in such cases. In *Whitwood Chemical Co. v. Hardman* (1891), 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433, the defendant agreed to become manager of the plaintiff company's works for a certain period, and during that period to give the whole of his time to the company's business. The defendant having engaged himself to act as director of a rival company, it was held by LINDLEY, L. J. and KAY, L. J., reversing the decision of KEKEWICH, J., that the Court should not grant an injunction, which would be the same thing as ordering specific performance of a personal service of an ordinary kind.

In the later case of *Davis v. Foreman* (1894), 1894, 3 Ch. 654, 64 L. J. Ch. 187, 43 W. R. 168, where an agreement for the employment of manager of a business contained a clause providing that the employer would not, except in cases such as misconduct, require the manager to leave his employment, it was held by KEKEWICH, J., that *Lumley v. Wagner* ought not to apply to an agreement which though negative in form is affirmative in substance; and he refused to grant an injunction to restrain the employer from acting on a notice purporting to dismiss the manager.

AMERICAN NOTES.

The second principal case is cited in Lawson on Contracts, § 178, and in Pomeroy Equity Jurisprudence, p. 2070. See note, 71 Am. Dec. 750.

Specific performance of contracts for personal service will not be enforced. *William Rogers Manuf. Co. v. Rogers*, 58 Connecticut, 356; 18 Am. St. Rep. 278; 7 Lawyers' Rep. Annotated, 779; (citing *Lumley v. Wagner*); *McClister v. Armstrong*, 32 South Carolina, 203; 8 Lawyers' Rep. Annotated, 625; *Mappleson v. Del Puente*, 13 Abbott New Cases (New York), 111 (singer); *South, &c. R. Co. v. Highland, &c. R. Co.*, 98 Alabama, 400; 39 Am. St. Rep. 74; *Clark's Case*, 1 Blackford (Indiana), 122; 12 Am. Dec. 213 (free negro woman binding herself to apprenticeship). But where the services are of special and extraordinary value, injunction may issue against the rendition of the services for others. *Metropolitan Ex. Co. v. Ewing*, 42 Federal Reporter, 198; 7 Lawyers' Rep. Annotated, 381 (base-ball player); *Cort v. Lassard*, 18 Oregon, 221; 17 Am. St. Rep. 726; 6 Lawyers' Rep. Annotated, 653 (acrobat); *Marble Co. v. Ripley*, 10 Wallace (U. S. Supr. Ct.), 358; *Richardson v. Peacock*, 26 New Jersey Equity, 40; *Frank v. Brummernan*, 8 West Virginia, 462; *Parker v. Garrison*, 61 Illinois, 250; *Port Clinton R. Co. v. Cleveland, &c. R. Co.*, 13 Ohio State, 550; *Publishing Co. v. Teleg. Co.*, 83 Alabama, 498; 3 Am. St. Rep. 758, citing *Lumley v. Wagner*.

"The Courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation." Citing *Rutland Marble Co. v. Ripley*, 10 Wallace (U. S. Supr. Ct.), 310; *Barton v. Marshall*, 1 Gill (Maryland), 487; 45 Am. Dec. 171. "The Courts in both countries have however receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the Court will grant an injunction in aid of a specific performance. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages." *William Rogers M. Co. v. Rogers*, *supra*, citing *Bank v. Fresno, &c. Co.*, 53 California, 201.

In *Publishing Co. v. Teleg. Co.*, *supra*, the Court said that "the American Courts have generally been disposed to follow the rule declared in *Kemble v. Kean*, 6 Sim. 333, and as said by Mr. Pomeroy, they have exhibited a strange disinclination to adopt the modern English rule declared in *Lumley v. Wagner*. . . . The American cases are however divided on this subject, with a numerical weight of authority perhaps against the later English rule, but as we apprehend, with a disposition recently to fall into line with the more reasonable doctrine of *Lumley v. Wagner*." Very decidedly so, the present writer believes.

In *Metropolitan Ex. Co. v. Ewing*, *supra* (the base-ball case), the Court said: "The doctrine is now generally recognized that while a Court of Equity will not ordinarily attempt to enforce contracts which cannot be carried out by

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the machinery of a Court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise, and this power will be exercised whenever the contract is one of which the Court would direct specific performance if it could practically compel its observance by the party refusing to perform, through a decree for specific performance."

In the acrobat case, *Cort v. Lassard*, *supra*, the Court cited *Lumley v. Wagner*, and held "that its doctrine should be applied even where the contract contained no negative promise, but that an injunction should not issue in this case because the performances were not shown to be extraordinary or unique, but only those of the ordinary acrobat." The Court observe: "As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American Courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until *Daly v. Smith*, 19 Howard Practice (New York), 150, was decided, the doctrine of *Lumley v. Wagner*, 1 De Gex, M. & G. 604, was either entirely rejected or only partially accepted. . . . In that case (*Daly v. Smith*), the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theatre for a stated period, and the case is on all fours with *Lumley v. Wagner*." The same doctrine was held in *Butler v. Gallette*, 21 Howard Practice (New York), 165, the case of a dancer.

In *Burton v. Marshall*, A. D. 1846, *supra*, it was held (citing *Kemble v. Kean*), that injunction would not lie to restrain an actor from performing at another theatre, where there are no negative stipulations in the contract. But in the subsequent case of *Hahn v. Concordia Society*, 42 Maryland, 463, where the contract contained negative stipulations and provided a forfeiture of \$200 for breach, an injunction issued.

In *De Rivaflinoli v. Corsetti*, 4 Paige Chancery (New York), 264; 25 Am. Dec. 532, Chancellor WALWORTH denied a writ of *ne exeat* against an Italian opera singer, on a bill *quia timet* that the singer was about to break his contract and leave the country, and condescended to a good deal of humour and to a mock adherence to the old adage, that "a bird that can sing, and will not sing, must be made to sing." (In answer to which counsel should have cited the other old adage that "although you can lead a horse to the water you cannot make him drink." . . .)

In *Prospect Park, &c. R. Co. v. Coney Island, &c. R. Co.*, 144 New York, 152; 26 Lawyers' Rep. Annotated, 610, it was held that specific performance of a contract to run street-cars for a series of years over a track of another company to a depot, will not be denied on the ground that it requires the exercise of skill and judgment and continuous series of acts. The Court observed: "As a final point, the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some

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years to run, which requires the exercise of skill and judgment, and a continuous series of acts. While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar. The special term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff. The provisions of this contract are neither complicated nor difficult, and are such as a Court of equity can enforce in its discretion. A few of the cases may be referred to, as illustrating the power vested in a Court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer v. Great Western R. Co.*, 2 Younge & C. Ch. Cas. 48, the Court compelled the defendant to construct and forever maintain an archway and its approaches. The Court said there was no difficulty in enforcing such a decree. In *Wilson v. Furness R. Co.*, L. R., 9 Eq. 28, the defendant was compelled to erect and maintain a wharf. See also *Greene v. West Cheshire R. Co.*, L. R., 13 Eq. 44. In *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, L. R., 16 Eq. 433, the agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement, develop and accommodate the local and through trade thereof, and carry over it certain specific traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made that the Court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a Court of justice. The injunction issued, and Lord SELBORNE said (p. 438): "With regard to the argument that upon the principles applicable to specific performance, no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which, in cases of this character, those words "specific performance" are used. . . . The common expression, as applied to suits known by that name, presupposes an executory, as distinct from an executed agreement. . . . Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the Court requiring something or other to be done *in specie*. . . . Ordinary agreements for work and labour to be performed, hiring and service, and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for "specific performance;" in other words, the nature of the contract is not one which requires the performance of some definite act, such as the Court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. . . . The question is whether, the defendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession." The American cases are equally clear. In *Lawrence v. Saratoga Lake R. Co.*, 36 Hun. 467, the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed, the Court holding that although under the agreement the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined from running

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any regular trains which did not stop at the station. The objection that the judgment in this case involves continuous acts, and the constant supervision of the Court, is well met by the reasoning in *Central Trust Co. of New York v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 546, being affirmed as *Joy v. St. Louis*, 138 U. S. 1, 47, 50, where Mr. Justice Blatchford wrote the opinion.

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(1815–1817).

RULE.

WHERE the plaintiff has so acted as to have deprived the defendant substantially of the benefit which he should have obtained under the contract, specific performance will not be decreed.

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1 Madd. 153–172, 3 Merivale, 124–147 (s. c. 17 R. R. 35).

Contract. — Plaintiff in Default. — Specific Performance refused.

On a bill by vendor for specific performance with allowance by way of compensation for a part of the estate to which the plaintiff was unable to make a title, the VICE-CHANCELLOR, Sir T. PLUMER, refused specific performance on the ground that the part of the estate to which the plaintiff had failed to make a title, though relatively small, was essential to the enjoyment of the whole. The LORD CHANCELLOR, Lord ELDON, affirmed the decree on the ground that the plaintiff, having turned the purchaser out of the possession of the property which he had taken under the agreement, had abandoned any right to specific performance.

[153] This was a bill praying for the specific performance of a purchase agreement; and that if the defendant was not bound to take a part of the purchased estate, called Cole Nash, then that it might be ascertained how much ought to be allowed the defendant by way of deduction out of the purchase-money in respect of such premises, and allowed him accordingly.

The plaintiffs being seized in fee, in right of their wives, of a mansion-house and premises, called Nash Court, situated in Kent, consisting of upwards of 700 acres, advertised to sell the same in three lots, by auction, on the 16th October, 1811; but before any sale, the plaintiffs agreed, by private contract, to sell the estate to the defendant Grueber. The purchase agreement signed by the parties, was as follows:—

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“Agreement made the 15th October, 1811, between Sir Edward Knatchbull, of Mereham Hatch, Kent, Bart., and Dame Mary his wife; Henry Curson, of Waterperry, Oxfordshire, Esquire, and Bridges his wife; George de Billingham, of Bulstrode Street, Middlesex, Esquire, and Ann his wife; and Henry Michael Goold, of Hawkesworth Hall, Yorkshire, and Eleanor his wife, of the one part; and Stephen Henry Grueber, of Coleman Street, London, tea-dealer, of the other part, as follows: That the said Sir Edward Knatchbull and other parties of the first part have sold by private contract to the said S. H. Grueber, for £52,000, and the said S. H. Grueber hath agreed to purchase for that *sum the [* 154] fee-simple of estates of the late Mr. Hawkins, advertised to be sold by auction at Feversham on the 16th instant, in three lots, including the timber and underwood, free from all incumbrances, except the quit rents and reliefs, the land tax, the existing lease of Stone Stile Farm, and to the other incumbrances set forth in the printed particulars of the sale. That the said Stephen Henry Grueber shall pay Mr. John Humphries, of 14 Clement’s Inn, London, the agent of the vendors, on the execution of this agreement, as and by way of deposit the sum of £5000 to be paid to the vendors on the title being approved of, the sum of £12,300 to the vendors on the 1st day of February next; the further sum of £17,300 to the vendors on the 1st day of August next; and the sum of £17,400 being the remainder of the said sum of £52,000 on the 29th day of September next, with interest upon the unpaid instalments from the date of this agreement, until paid, after the rate of £5 per cent per annum. That Stephen H. Grueber shall have immediate possession of the mansion-house, gardens, and back-orchard at Nash; and also of the wood-land and marsh-land on hand, and shall receive the rents of Stone Stile Farm, and of the farm at Nash, and other parts of the estates, which are let, from Michaelmas Day last, to which time all outgoings shall be paid by the vendors; but the said vendors shall retain possession of the title-deeds until the above consideration money and interest shall be fully paid and the purchase completed; and in the mean time, the unpaid part of the consideration money shall stand charged and secured upon the said estate; that taking the possession and receipt of the rents shall not be considered as an acceptance of the title; but the said S. H. Grueber shall, *notwith- [* 155] standing, have a good and marketable title made out to

him. That the vendors shall, at their expense, forthwith furnish to the said S. H. Grueber an abstract of the title to the said estates, and make out a good and marketable title to the same, free from incumbrances as aforesaid; and this agreement shall, on or before the 1st day of February next, be carried into execution by such conveyances and assurances as shall be advised by and on behalf of the said S. H. Grueber, and such part of the purchase-money as shall remain unpaid shall be secured according to the intent of this agreement, in such manner as shall be advised and approved by Charles Butler, of Lincoln's Inn, on the part of the said vendors, and by George Cooke, of the Temple, on the part of the said S. H. Grueber; that the expenses of all fines and recoveries, if any necessary, and the making out the title, and such other expenses as are usually paid by the vendors upon sale by private contract, shall be borne by the vendors; and the expenses of the conveyances and of such other deeds as shall be deemed necessary for securing the payment of the said instalments, shall be borne by the said S. H. Grueber. That the said S. H. Grueber shall, if he thinks proper, have the furniture and fixtures in and about the mansion-house, upon paying for the same, according to valuation, in the usual way, otherwise the said furniture and fixtures shall be forthwith removed from the said premises; that the sale of the aforesaid estates shall take place as advertised; but the same shall be bought in on the part of the vendors; and if any part is sold, such sale shall be on the account and at the risk of the said S. H. Grueber, as well in respect of the said auction duty (if any shall be incurred) as in all other respects, except with regard to the [* 156] * expenses already incurred, by advertising, by catalogues, and for the commission of the auctioneer; and, if by any accident or oversight the auction duty for what is bought in shall become payable, it shall be referred to two persons, one to be chosen by the vendors and the other by the said S. H. Grueber, to consider and decide by whom the said auction duty shall be borne, whether by the vendors, or by the said S. H. Grueber; and in case they differ, the said arbitrators shall choose an umpire, whose decision shall be final; and that upon the delivering up of Nash Farm by the present occupier who is tenant at will, such part of the stock and crop as is usually taken by landlords shall be taken by the said S. H. Grueber at a valuation, according to the custom of the country. That if the said S. H. Grueber shall neglect or fail in the

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above agreement, the said deposit of £5000 shall be forfeited, and the vendors be at liberty to resell the said estate, either by private contract or public auction, and the deficiency of the aforesaid sum of £52,000 on such sale (if any), together with all charges attending the same, shall be made good by the said S. H. Grueber. That in case the said S. H. Grueber shall sell either of the said lots at the present auction, the auctioneer's commission on such lot or lots shall be paid by him, the said Stephen Henry Grueber; and in that case, the said vendors hereby agree to convey such lot or lots to the said Stephen Henry Grueber, or the purchaser or purchasers, on payment of the parties of the first part of the sum or sums of money for which the same shall be so sold, in payment *pro tanto* of the aforesaid instalments. That the said vendors shall join in all such notices to quit, or to repair, as shall be required by the said Stephen Henry Grueber to be given to the tenants of * the said estate. As witness the hands of the above- [* 157] named parties, the day and year first above written."

The purchased estates were afterwards, in pursuance of the agreement, put up to sale in three lots: The first lot comprised the mansion house, called Nash Court, with 314 acres; the second lot comprised the manor farm, called Stone Stile Farm, and sundry woods, containing in the whole, 307 acres; the third lot consisted of 95 acres of meadow land. £34,000 was bid for lot 1, but the defendant bought it in. Lot 2 was sold to James Wildman for £10,550, the timber and underwood to be taken at a valuation, and was afterwards valued at £1,350. There was a bidding of £7,500 for lot 3, but that also was bought in by the defendant.

On the 18th October, 1811, the defendant paid to the agent of the plaintiffs a deposit of £5000, and immediately, by the authority of Knatchbull, entered into the possession of the mansion house and gardens, but not by way of residence.

After several applications on the part of the defendant, some of the abstracts of title were delivered to him on the 26th December, 1811; the remaining abstracts were not sent to the defendant until the 24th April, 1812. Previous to this time, Grueber caused notices to quit to be signed by Sir Edward Knatchbull, to be served on the different tenants of the premises comprised in lots 1 and 3, it being doubtful whether they had been served with proper notices.

Some delay took place in obtaining opinions upon the abstracts, and an opinion was given on the 15th * May, [* 158]

1812, that there was not a good title to Cole Nash, a part of the estate, consisting of not quite 12 acres, unless certain queries and observations were satisfactorily answered. The agent of the plaintiffs endeavoured to obviate the objections to the title, but his answers were not considered as satisfactory; and on the 13th June 1812, he wrote to the defendants' agents, saying, he was unable to throw any further light on the title.

On the 29th July, 1812, after a consultation between Mr. Butler and Mr. Cooke, one of the plaintiffs caused a letter to be written to the defendant, saying, "We have had a consultation at Mr. Butler's chambers this morning, and both he and Mr. Cooke are decidedly of opinion, that the title to Cole Nash is irremediably bad, or at least, it is absolutely bad, unless further inquiries are made, and the result of these inquiries should turn out favourable. The parties think it would be extremely imprudent, as well as a useless loss of time, to institute any further inquiry, and propose, with a view to the speedy completion of the purchase, that they should either indemnify you, or take Cole Nash back at a fair valuation, or relieve you altogether from the purchase, whichever of these proposals is most acceptable to you." In consequence of this letter, it was proposed, on the part of the defendant, that, pending inquiries as to Cole Nash, Wildman's purchase of lot 2 should be suspended for twelve months; and if the title was not cleared within that time, to take the title upon absolute covenants. The plaintiffs determined, that the purchase of lot 2 should stand still, till a final determination was made by the defendant, whether he would take the estate. The [*159] defendant *afterwards, by a letter of his agents, dated the 7th August, 1812, stated he had no objection to Wildman's purchase proceeding, without prejudice to the title of the other parts of the estate, and consented to his deposit of £5000 being appropriated in any way that suited the convenience of the plaintiffs; and that he was willing to advance part of his purchase-money; and was desirous of completing the purchase; and that, if after diligent inquiries had been made, in order to perfect the title, the result should not be favourable, he would then be willing to take such title to Cole Nash as the proprietors would be able to give him, upon having absolute covenants and a compensation. Lot 2 was afterwards conveyed to Wildman in fee, and the plaintiffs received the purchase-money. On the

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10th August, 1812, Humphries, the plaintiffs' agent, wrote to the defendants' agents, mentioning some further inquiries as to the title of a Mr. Tappenden, of Feversham, and enclosing his letter; and on the 19th August, 1812, he again wrote to the defendants' agents, urging the completion of the purchase.

On the 26th September, 1812, the defendant's agents, by a letter to Humphries of that date, observed, that defendant "expects the vendor to make him out a good title, and upon this being done he is ready to complete his purchase."

On the 5th of October, 1812, Humphries wrote to the defendant's agents, saying that he had been directed to tender Mr. Grueber his deposit, with interest, and to demand from him that part of the estate of which he was in possession, and that he should attend at Grueber's house for that purpose. The tender was *accordingly made, but Grueber refused to [*160] accept the money.

On the 12th of October, 1812, one Rutton was directed by the vendors, who gave him a written indemnity, to drive Grueber's live stock off the premises into the farm yard, lock the gates, and turn him out of possession of Nash Court Farm. This stock and the crop, on the faith of the contract being completed, had been, from necessity, purchased by Grueber in July, 1812, of Rutton, who occupied the farm called Nash Court Farm, comprising the greater part of lot 1, for £5500, and, as it appeared, with the privity of Sir E. Knatchbull. Rutton was only a tenant at will, and had notice to quit at Michaelmas, 1812. Orders also were given to the tenants who rented part of lots 1 and 3, not to pay their rents to the defendant.

On the 14th of October, an interview took place between the plaintiffs and defendant's agents; and a proposal was made by the defendant's agent, that if on the 25th March, 1813, the title was not cleared up, there should be a reference to Mr. Butler and Mr. Cooke, upon what indemnity or compensation Grueber should take the twelve acres, if he determined to take them; and if he wished to decline his purchase altogether by reason of the twelve acres, it should be referred to the same gentlemen, whether he was not bound to complete the remainder of his purchase, the vendor taking back the twelve acres upon a compensation? and if the referees disagreed, an umpire to decide. And it was agreed, that the parties should have till the 18th October,

1812, to determine upon such proposal; and that in the [*161] mean time the stock should be driven back on * the premises; and if such proposal was not acceded to by that time, the *turn out* to be considered as in full force. The stock was accordingly driven back.

The plaintiffs would not agree to the proposal, unless the reference was to take place sooner; and on the next day, the 19th, the stock was again driven off the farm. Some negotiation afterwards took place as to the management of Nash Court Farm, but nothing was agreed upon; and the farm, at a great loss, remained 'uncultivated, and the defendant was obliged, at a disadvantage, to sell his stock.

On the same 19th of October the defendant gave notice to the plaintiffs, that they might have possession of the mansion-house and gardens (the only part of the estate left in the defendant's possession), whenever they pleased, and possession was accordingly delivered up; and the defendant from that time continued altogether out of possession of the estate, except a yard, in which some stocks were, purchased by the defendant of Rutton.

On the 28th of October, 1812, Humphries wrote to the defendant's agents proposing a reference immediately of the matters in dispute; and other subsequent letters were sent to Grueber, expressing a willingness to deliver up the possession of the estate, if the defendant would complete his contract; but after a subsequent letter from Grueber, on the 22nd of February, 1813, all treaty on the subject was discontinued.

A passage was read from the defendant's answer, in which he admitted, that having it in contemplation to sell the [*162] marsh land comprised in lot 3, and part of the * premises comprised in lot 1, in order to reduce his purchase; and being desirous at the same time of ascertaining the value of other parts of lot 1 (including Cole Nash), with a view to a more equal disposition of his property by will, he in the latter end of March, 1812, gave orders to an auctioneer to put up the same for sale; but on the representations of his solicitors he desisted from the sale; and that at the time of such proposed sale he had not obtained an opinion upon the title.

It was also in evidence, that as Grueber was called upon for taxes in respect of the mansion-house, the furniture remaining there, he requested of the plaintiffs that the same might be

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removed, or that the plaintiffs would pay the taxes if it remained there; and in consequence, it was afterwards sold on the 6th July, 1812.

Witnesses were examined on the part of the plaintiffs, to ascertain the locality of Cole Nash, and to show that the possession of Cole Nash, though a desirable appendage, was not essential to the enjoyment of the purchase, Cole Nash being situated about sixty or seventy rods from the mansion-house, and not within the inclosure, nor forming part of the park, or paddock which surrounds it, but detached and separated from it by the turnpike-road, and not forming an object of sight or ornament to the mansion-house, or to the pleasure grounds and walks in and about the same, the land being hidden by shrubberies, and an avenue of chestnut trees.

On behalf of the defendants, witnesses were examined to prove that Cole Nash was essential, being *nearly [* 163] surrounded by other lands, part of the Nash estate, and contained loam and brick-earth, which in the hands of a stranger would probably occasion a nuisance. Rutton in his evidence stated, that he had driven off the stock by the plaintiffs' orders, as owners, they having given him notice to quit, and Grueber then standing in the situation of under-tenant to him, and in order to enable him to give up possession to the plaintiffs.

After argument,

The VICE-CHANCELLOR (Sir T. PLUMER).—

After minutely stating all the facts of the case, proceeded [165] to observe,—The first objection to the prayer of this bill is, that no title can be made to that part of the estate called Cole Nash. This is admitted; and that no reference to the master is necessary on that point. Degrees of title, the probability, more or less, * of any claimant of the estate appearing, are [* 166] not considered in these cases. In answer to this objection of want of title, it is said, that Cole Nash, consisting of not quite twelve acres, bears so small a proportion to the rest of the purchased estate, amounting to 700 acres, that it is a case for compensation; but then, it is replied, that the situation and nature of Cole Nash is such as not to bring it within the doctrine as to compensation; it being essential to the enjoyment of the purchase.

At law, it is clear, the plaintiff could not enforce the contract; the law knows nothing of compensation; but in equity a different

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rule has prevailed (whether wisely or not, it is now too late to consider), and the court will relieve, where compensation can be made. Is this then a case falling within that doctrine? Many witnesses produced on the part of the plaintiffs, long acquainted with the estate, consider the possession of Cole Nash as not essential to the enjoyment of this estate. On the other hand, witnesses on the part of the defendant swear that the possession of Cole Nash is essential; and that the land, instead of being ornamental to the premises, as it is at present, may in other hands become a nuisance; it containing loam and brick-earth; and that any person buying these twelve acres with a view to profit might render them worth £5000. Brick-kilns, and a row of houses, might be built on the land, which would prove a nuisance. Under these circumstances, the defendant insists this is not a case for compensation.

There is no denial that Cole Nash contains brick-earth.

[*167] There is great difficulty in applying the doctrine of *compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Tastes, opinions, ages, create different views. Some particularity, some whim, may have induced him to purchase. What is desirable to one is not so to another. One wants a wood for game, another desires it only as a beautiful object; one looks only to agriculture, another dislikes tithes; it therefore seems a little arbitrary to insist on a party taking compensation. Why am I bound to take what I did not mean to buy? You say you will give me compensation; but who is to judge of the compensation? Can you be sure it is a compensation? It is a difficult thing for a master to ascertain what is essential to the enjoyment of the estate, and what is a proper compensation. It is as difficult for the Court to decide, if, having all the *data* before it, it decides, as it is then proper to do, without sending it to the master. Are you to look at the land in its present state, or to consider in what state it may be in future? If the latter, some possible nuisance may, in every case, be suggested. In these cases, I admit, difficulties must not be founded on speculative conjectures of what may never take place; but in this case, the most profitable and most probable use of this land by a purchaser, who was not the owner of this estate, would be to apply it to building purposes; it is a purpose best adapted to the land, and a purchaser must forego his interest who

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did not so apply it. The nuisance here apprehended is not distant, fanciful and conjectural, but strongly probable; not merely what may happen, but what will probably happen.

* It is said a purchaser should communicate his motives for purchasing; if so, the vendor might enhance the price. It is also said, that the defendant's objection, that these twelve acres are essential, was an after-thought. Suppose it was: is a Court of equity to say no advantage can be taken of the objection? Though a purchaser may not at first be aware of the essentiality of the land to which no title can be made, yet if he afterward finds it is essential, is a Court of equity to say he shall not avail himself of the objection?

It is then said, that if the twelve acres be essential to the enjoyment of this estate, yet that the defendant must by his conduct be considered as having waived the objection; and *Fordyce v. Ford*, 4 Bro. C. C. 494, is cited. In that case, as soon as the abstract was delivered, the objection appeared, and no further inquiry was necessary, and therefore the conduct of the parties afterwards was considered as a waiver of the objection. Lord ELPHINSTONE observes, upon that case, in *Drewe v. Hanson*, 6 Ves. 679, "Upon the conduct of the party this may differ materially from *Fordyce v. Ford*. In that case, only seven acres were freehold, and all the rest leasehold; but the abstract distinctly stated what was freehold, and what was leasehold. From the delivery of the abstract, it was perfectly understood beyond dispute, without any ground for inquiry, that it was leasehold unquestionably and irrevocably. The purchaser receives the abstract; treats upon it with full knowledge up to, and long after, the day on which the contract was to be performed, not upon the nature of the property, but upon the title; * and the MASTER OF THE ROLLS thought [* 169] there was a clear waiver. I doubt extremely whether that will turn out to be the case here. Taking the representation in the conversation to be, that they believe it to be a *modus*, and supposing the purchaser could have been off the bargain at that moment, which is very questionable, can it be said, from what passed afterwards, that he cannot now; having contracted under this representation, and learning no more afterwards than that they conceive it to be a *modus*? That is not like the representation as to the leasehold property, but one requiring a reasonable time for inquiry." In *Halsey v. Grant*, 13 Ves. 73; 9 R. R. 143,

the late Chancellor, Lord ERSKINE, reviewing the authorities, notices *Fordyce v. Ford*, and adopting the doctrine in that case, and in *Drewe v. Corp*, 9 Ves. 368, and *Drewe v. Hanson*, says, that “where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted; not where the effect will be to put upon him something constitutionally different from that for which he contracted.” And in *Stapylton v. Scott*, 13 Ves. 426; 16 Ves. 272; 10 R. R. 179, he expresses a similar opinion.

The received doctrine of the court, therefore, appears to be, as the MASTER OF THE ROLLS expresses it, in *Drewe v. Corp*, “That where the party gets substantially that for which he contracts, any small difference may be remedied by compensation; but not when it extends to the whole estate.” What is substantially that for which a man contracts, must always be a very difficult question.

One objection made by the defendant is, as to the [*170] *locality of Cole Nash; but that objection appears to me untenable; and if the defendant’s case stood upon that objection only, it would be very weak; for the evidence clearly fixes the situation of Cole Nash.

The next question is, whether the defendant has by his conduct precluded himself from insisting on a good title to Cole Nash? It is said, that by meditating a sale of Cole Nash he showed that he did not look upon it as essential to the enjoyment of the estate; but the defendant by his answer, which, as to this, has been read as evidence, says, that though he put it up to sale, he did it only to ascertain its value, and not with a view of really selling it. The ratifying of the sale to Wildman, purchasing the stock, and agreeing as to the employment of his deposit after he was fairly informed by the plaintiff’s solicitor, that the title to Cole Nash could not be bettered by further inquiry, are not conclusive circumstances to show he did not consider Cole Nash as essential to his purchase, because he is constantly asking for the title to Cole Nash, and never appears to have lost sight of a good title, but from first to last insists upon it. The title was not, as in *Fordyce v. Ford*, incurable, but might have been rendered good, if certain inquiries were satisfactorily answered; it was not absolutely, but contingently, bad. A man by going on to treat does not waive an objection he is continually insisting upon. If nothing had been said of Cole Nash after the title to it was found defective, the

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objection might have been considered as waived; but here he is perpetually desiring to have a good title. This case, therefore, is like *Drewe v. Hanson*, where further inquiries being insisted on, the objection was *not considered as waived. A treaty [*171] cannot waive that which it treats about. There is nothing, therefore, in the conduct of the defendant which precludes him from insisting on a title to Cole Nash. If a man goes on treating, and then finds a particular piece of land to which no title can be made, is essential to his purchase, may he not, notwithstanding such treaty, insist on the materiality of the land? Surely, in justice and common sense, he may.

There is another part of this case to which no satisfactory answer has been given; I mean, the conduct of the parties in turning the defendant out of possession. The vendors wanting the purchase-money, and the defendant refusing to give up the estate, but insisting on a good title, the vendors take the law into their own hands; they tender the deposit of £5000 with interest; insist on the mansion-house being delivered up; and finally authorize Rutton (who is indemnified) to turn him out. They drive Grueber to the necessity of selling the live and dead stock he had purchased in July for £5500, on the faith of the contract being performed. It is said that this was done to enable Rutton to give up possession to the plaintiffs, but that could not be; for the time when it was to be given up, Michaelmas, was passed; it was not Rutton, but the vendors, that turned him out, and indemnified Rutton. This was done to force Grueber to give up, or complete his contract. They afterwards offer him possession again; but they were not to put him *in* and *out* of possession as they thought proper. Having thus rescinded the contract, are the vendors, who can have no relief at law, to come to a Court of equity to enforce it? If this contract were enforced, who is to be *at the loss [*172] occasioned by the sale of the stock, and the neglect of the land? Much of the benefit which Grueber looked forward to in his agreement, was destroyed by this conduct in turning him out. The vendors themselves put an end to the contract, nor was there anything in the subsequent transactions to revive it.

Vendors ought always to examine their title before they bring their estate to market. It is owing to their neglect in this respect that so many suits are occasioned. The fact that no complete title could be made to Cole Nash should have been stated on the

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sale of the estate, and all this controversy would then have been prevented.

Bill dismissed without costs.

The case subsequently came by appeal, and was repeatedly argued before —

The LORD CHANCELLOR, Lord ELDON, who, after going minutely into the facts of the case, concluded as follows: — [3 *Merivale*, 144] Where parties enter into a contract for the sale and purchase of an estate, and the vendor is unwise enough to make it part of the contract that the purchaser shall take immediate possession, and the question afterwards arises whether it is a case for compensation as to a part to which he is unable to make a title, the vendor cannot, in such a case (to use the language of this defendant), turn the purchaser in and out of possession just as and when he thinks proper.

Upon that part of the case, then, I think the transaction of the 5th of October is alone sufficient to put an end to the question. If it were necessary to go into the other part of the case, although I apprehend that the Court is not always bound to send such matters to the master in the shape of a reference, but may decide for [* 145] itself upon the evidence before it, if sufficient to enable *it so to do; I should nevertheless hesitate long before I could determine (regard being had to all the circumstances, as the question of materiality is here put in issue), that these twelve acres of land do not form, in the sense of the Court, a material part of the purchase; as to which there is the evidence of what was Hawkins's opinion at the time when he became the purchaser, and there is also the material fact that a considerable part of the estate is intersected by these twelve acres. I have looked into the case of *Drewe v. Hanson*, 6 Ves. 675; *Drewe v. Corp*, 9 Ves. 368, and that other case before the present MASTER OF THE ROLLS, *Dyer v. Hargrave*, 10 Ves. 505; 8 R. R. 36; where, the representation being that the house was in good repair, and the land in a state of high cultivation and in a ring fence, the MASTER OF THE ROLLS thought that, as to the house not being in repair, that might be compensated by its being put into repair, unless it could be shown that the purchaser wanted possession of the house to live in within a certain time — and so also as to the marsh land not being in so good a state of cultivation as had been represented. But as to the estate not being in a ring fence, it was not quite so certain that a pecuniary value could be

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set upon the difference between a farm so situated, and one which is scattered and dispersed with other lands. I know by experience that a small piece of land running through one person's ground to another's may occasion as sensible an inconvenience as a landlord is capable of sustaining. Still, I agree that a mere speculative objection as to the mischief likely to result is not that which the Court will proceed upon, and that I must ask, what is the nature of this land? — and, in answer to this question, I do not find that the nature of the land is so put in issue as to enable the Court to determine as to its materiality. But, considering that all the witnesses for the defendant *speak as to its being [*146] material, and that nothing is said with regard to the question on the part of the plaintiff; and, regard being had to the decided cases, and to the circumstance that this Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have, — I should be going much too far in saying that the twelve acres are not material, and that he shall be compelled to take the estate without them.

In the case of the estate sold as freehold with leasehold adjoining, which turned out to be almost all leasehold (*Fordyce v. Ford*, 4 Bro. C. C. 494); the abstract having been delivered, upon which no objection was made by the purchaser, the MASTER OF THE ROLLS held that, if the purchaser had made the objection, he could not have been bound to perform the contract; but that, having known the fact as it appeared by the abstract, and yet made no such objection, it became a question whether the quality of the land at all entered into the intention with which he made the purchase. So, where the contract was for land lying within a ring fence, and the defendant purchased, knowing that it was not within a ring fence, the MASTER OF THE ROLLS held that he could not be admitted to say afterwards that he would not perform the contract for want of a ring fence, when he probably bought the land for less money on that very account. *Dyer v. Hargrave*, 10 Ves. 505; 8 R. R. 36; see *Sugd. Vend. and Purch.*, chap. 6, sect. 2.

But, without entering into those cases, the ground upon which I rest the present case is this, — that nothing was done previous to the 5th of October, 1812, amounting to a waiver on the part of the defendant of his *right to the possession, and [*147] that the turning him out of possession at that time was an

act, however meant, which has rendered it impossible for the vendors specifically to perform their part of the contract, even if they would otherwise have been entitled to a specific performance with a compensation to be made for the defect of title to Cole Nash. And, upon this ground, I am of opinion that the decree of the Vice-Chancellor should be affirmed. *Decree affirmed.*

ENGLISH NOTES.

In *Royou v. Paul* (1858), 28 L. J. Ch. 555, a purchaser raised certain valid objections to the vendor's title. The latter refused to satisfy them, and gave notice that if the purchaser refused to complete within five days, he should resell and debit the expenses to the purchaser. The purchaser thereupon gave a counter-notice of his intention to recover the deposit by action in case the requisitions were not complied with within a week. After the action for return of the deposit was commenced, the vendor offered to satisfy the requisitions at the purchaser's expense; but the proposal was rejected. On a bill filed by the vendor for specific performance, the Court decided that the plaintiff by giving notice to resell had deprived himself of the remedy sought. In *Modlen v. Snowball* (1861), 31 L. J. Ch. 44, A. agreed to take the lease of a public-house from B., upon condition that B. should procure a retail license for him. The license was obtained on the application of A., but contained a clause against the sale of spirits to be consumed on the premises. On a bill filed by B. for specific performance, it was held that the plaintiff not having procured the retail license without any qualification was not entitled to specific performance. So where the plaintiff applied for a mining lease according to a previous agreement, but refused to give securities for the carrying out of mining operations and for performance of the covenants in the lease, he was held not entitled to demand specific performance of the agreement for the lease; *Lancaster v. De Trafford* (1862), 31 L. J. Ch. 554. In *Sykes v. Sheard* (1864), 33 Beav. 114, 2 De G. J. & S. 6, 33 L. J. Ch. 181, the trustees of a will who held lands on trust for sale only with the consent of the sons and daughters of the testator, entered into a contract for the sale of the lands after the decease of one of the daughters. It was held that, since without the consent of that daughter a good title could not be made out, the trustees were not entitled to have the contract specifically enforced. So, where the plaintiff had previously taken steps to set aside an award, specific performance of the agreement embodied in the award was refused; *Blackett v. Bates* (1866), L. R. 1 Ch. 117, 35 L. J. Ch. 324. Where upon an agreement for the sale of a public-house as a going concern, the vendors

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were not able to procure a transfer of the license to the purchaser, the latter was held entitled to repudiate the contract. *Dug v. L.* 5 Eq. 336, 37 L. J. Ch. 339. This case was followed in *Cowles v. Gale* (1871), L. R., 7 Ch. 12, 41 L. J. Ch. 11.

AMERICAN NOTES.

The principal case is cited by American text-writers in considering the doctrine that specific performance may be decreed against a purchaser, with compensation for an inconsiderable part of the subject of sale, which the vendor cannot convey and which is not material to the enjoyment of the rest. Lawson on Contracts, § 472 (4); Pomeroy on Equity Jurisprudence, pp. 535, 2169. See *Howard v. Kimball*, 65 North Carolina, 175; 6 Am. Rep. 739; *Taylor v. Williams*, 45 Missouri, 80; *Holland v. Holmes*, 11 Florida, 390; *Harens v. Bliss*, 26 New Jersey Equity, 363; *Bogan v. Draughdrill*, 51 Alabama, 312; *Smith v. Turner*, 50 Indiana, 367; *Botsford v. Wilson*, 75 Illinois, 132; *Gregory v. Perkins*, 40 Iowa, 82; *Walsh v. Barton*, 24 Ohio State, 28; *Foley v. Crow*, 37 Maryland, 51; *Evans v. Kingsberry*, 2 Randolph (Virginia), 120; 14 Am. Dec. 779; *King v. Bardeau*, 6 Johnson Chancery (New York), 38; 10 Am. Dec. 312. Kent, Chancellor, citing *Dyer v. Hargrave*, 10 Ves. 505, as establishing "the true doctrine."

Pomeroy says: "But where the defect or failure is partial and immaterial, so that he can give substantially what he contracted to give, the Court may grant the remedy with compensation to the purchaser; but the defect or failure must be *immaterial*."

The purchaser may demand part performance with compensation for the unperformed part. *Walling v. Kimard*, 10 Texas, 508; 60 Am. Dec. 216; *Harbers v. Gadsden*, 6 Richardson Equity (So. Car.), 284; 62 Am. Dec. 390; *Towner v. Ticknor*, 112 Illinois, 217. So in *Martin v. Merritt*, 57 Indiana, 31; 26 Am. Rep. 45, it was held that if the vendor's wife refuses to join, the vendee may have a decree for performance with a deduction for the value of the wife's inchoate dower, citing cases from Massachusetts, Iowa, Wisconsin, and Minnesota. But the contrary has been held: *Burr's Appeal*, 75 Pennsylvania State, 141; 15 Am. Rep. 587; *Graybill v. Brugh*, 89 Virginia, 895; 37 Am. St. Rep. 894.

No. 66. — MILNES v. GERY.

(1807.)

RULE.

COMPLETENESS and certainty of the contract are essential to form the ground of a claim to specific performance.

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14 Ves. 400–409 (s. c. 9 R. R. 307).

Contract. — Uncertainty. — Specific Performance.

[100] Agreement for sale according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two in case of disagreement.

Bill for a specific performance; praying, that the Court will appoint a person to make the valuation, or otherwise ascertain it, dismissed.

The case would have been different if the agreement had been to sell at a fair valuation.

By indentures of lease and release, previous to the marriage of John Milnes and Mary Selina Gery, one-third part of certain estates was settled after the respective deaths of William Gery, the father of Mary Selina, and of his mother Eleanor Gery, on the husband and wife for life, and afterwards on the children of the marriage in the usual manner; and the settlement contained the following proviso:—

Provided nevertheless, that notwithstanding any of the uses of estates, hereby created, it shall and may be lawful to and [*401] for the trustees or the survivor of * them, &c., at any time or times during the joint lives of the said John Milnes and Mary Selina Gery, his intended wife, or during the life of the survivor, with the consent and approbation of them, or the survivor of them, testified in writing for that purpose, by good and sufficient conveyances and assurances in the law to sell, convey, and dispose of, the same undivided third part of and in all and every the said manor and messuages, lands, &c., hereinbefore conveyed to the Rev. Hugh Wade Gery, for one-third part or share of such price as the entirety of the same hereditaments shall be valued at by two different persons, the one to be named by the said John Milnes and Mary Selina Gery during their joint lives, or by the survivor of them during his or her life, and the other by the said Hugh Wade Gery; and that, if such persons, so nominated, should happen to disagree, then those two shall choose a third person, whose determination therein shall be final, according to the condition of a certain bond, bearing even date with the said settlement, and made from the said John Milnes to the said Hugh Wade Gery in the penal sum of £12,000, in case the said Hugh Wade Gery should choose to become the purchaser thereof; and should declare such his intention in writing six

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months next after the several deceases of the said William and Eleanor Gery; with a power, in case of the refusal of Hugh Wade Gery, to sell to other persons.

Notice was served accordingly in due time after the decease of William and Eleanor Gery by Hugh Wade Gery upon Mr. Milnes; and the parties appointed each a person to set a value on the said estate. The persons appointed measured the premises, and held several meetings, in order to determine the value, but they differed greatly in their respective estimates, the valuer of Milnes estimating the property very considerably higher than the * valuer of the other party, nor were they able to agree upon [*402] any third person who should make a final determination.

The plaintiff therefore filed this bill to have the agreement carried into execution, praying that the notice by the defendant may be considered binding, and that a proper person or proper persons may be appointed by the Court to make a valuation of the entirety of the said premises, or that the valuation thereof should be ascertained in such other manner as the Court should direct.

The defendant by his answer relied upon the incomplete state of the agreement, when it broke off, and also upon a waiver on the part of the plaintiff, insisting also that no consent was given by Mrs. Milnes.

After the argument, which turned chiefly upon the circumstances insisted upon by the answer, the MASTER OF THE ROLLS desired that the case should be argued upon a point that had not been much noticed, whether this Court has any jurisdiction to do what was prayed by the bill, observing that the parties having agreed upon a particular mode of settling the price, if that mode fails by any means, it seems this Court cannot substitute another mode, and no action could be maintained. That doubt occurred in the case of *Cooth v. Jackson*, 6 Ves. 12; and both Lord ROSSLYN and Lord ELDON thought that the failure of the arbitration put an end to the agreement; and in *Hall v. Warren*, 9 Ves. 605; 7 R. R. 306 (which was mentioned by Mr. Alexander) the point in favour of such a jurisdiction was assumed, but not argued.

* Mr. Alexander and Mr. Johnson for the plaintiff. [*403]

Upon the question whether the Court has jurisdiction to decree a specific performance under these circumstances, a contract for sale at a price to be fixed by valuers, to be appointed by the parties, and to have power in case of difference to appoint an un-

pire, and a bill filed, the persons appointed to value not agreeing either in the valuation or in the choice of an umpire, the cases, *Cooth v. Jackson*, 6 Ves. 12, and *Hall v. Warren*, 9 Ves. 605; 7 R. R. 306, confirm the general understanding. In the latter case, the point was stated, not contradicted, and was acted upon by the Court directing the issue. In *Cooth v. Jackson*, the LORD CHANCELLOR certainly said there was no decision, that such a jurisdiction had been assumed by this Court, substituting itself for arbitrators; but did not say the Court would not act under such circumstances; and the inference is that his Lordship's opinion is the other way, the judgment being put at great length upon other grounds.

The question may be asked, what action would lie in this case? There are many instances where a specific performance may be granted, though the action either never existed or is entirely gone, as where a party under an obligation to convey an estate by a particular day dies before that day, though the strict execution of the contract being by the act of God rendered impossible, an action would not lie, a specific performance would be decreed; so upon a contract by an ecclesiastical person to make a lease, contrary to the restraining statutes, though an action would not lie for breach of

that illegal contract, this Court would compel him to execute his *contract within the limits of his power. This instrument fails by the conduct of the parties themselves, from bad faith on the one side or the other, affecting the conscience, upon which the jurisdiction must attach.

This objection, if it could prevail, must frequently have occurred upon the usual contract for sale of an estate or a house, the timber in one case or the fixtures in the other to be valued by persons to be appointed. Many such contracts must have been executed upon the valuation of the Master; otherwise one party by withholding his nomination could defeat the contract. If a rule existed that would prevent a specific performance on that ground, many instances would be found. It is difficult upon principle to maintain that the jurisdiction shall not be exercised, as the parties have not defined all the incidental terms; and that their failure in that respect shall defeat the contract. This case is not stronger than a contract for sale at a fair valuation, and a contract of that nature was executed in the recent case of *Gaskarth v. Lord Lowther*, 12 Ves. 107; 8 R. R. 310. The Court, according to the usual course, where a vendor cannot make a title to the whole estate, ascertaining through

the Master the value of that part with a view to compensation, goes a great way towards making a new contract for the parties, the effect being to put a value upon the part to which a title can be made, the other part perhaps being the inducement to the contract; and the ground is that the contract is performed in substance by compelling the party to take the estate with a deduction from the price to be ascertained by the Master.

Sir Samuel Romilly, Mr. Leach, and Mr. Wingfield, for the defendant.

* The question is, whether this Court will impose upon [* 405] these parties terms perfectly different from those to which they agreed; different, not in form only, but in substance. It is not very prudent to contract for an estate at a value to be set by another person, as the consequence, if an unskilful person should be named, might be total ruin. This Court cannot be substituted for the umpire, who was to be named by the parties. The Master has no knowledge of the estate. He can only take the averages upon the affidavits he receives as to the value. Such a valuation must proceed entirely in the dark, and has none of those qualities to which the parties looked for the protection of their respective interests. There is no instance of what is prayed by this bill, — that the Court shall name a person to set the value; but it has been supposed that the Court itself would undertake that duty. The parties who would not trust themselves with the determination choose each a person of experience in valuation; and those two persons, acquainted with the land, having all the facts before them, and each informed of the value set by the other, have authority to determine the amount; or, if they cannot agree, — an event for which in such a contract it is natural to provide, — to fix upon an umpire. Persons entering into such an agreement must be aware that by possibility it may never be carried into execution. If the execution was prevented by any practice, or *mala fides*, that might be a ground for the interference of this Court, though it is difficult to point out the mode; but there is no imputation of that sort.

It is true, as a general proposition, that a specific performance shall not be decreed where an action would not lie; and though that may not be in all respects the just criterion, some reason must be shown for the exception. An action could not be brought against this defendant. Having named an arbitrator, he had

[*406] nothing more to do. *When that was done on each side, the case was put out of the reach of the parties. There is no instance of a specific performance decreed under such circumstances. The case of *Hall v. Warren*, approaching it certainly, is however distinguished by this material circumstance, that the price was to be fixed by persons to be nominated by the vendor and vendee; Mr. Morgan was to estimate the value of the advowson, having given to him the age of the incumbent; but by this agreement the two persons appointed by the parties may substitute another person. In the case of timber, that can only be considered an appendage, and the estate itself is the substantial subject of the contract. The Court regards with indifference, and gets over, difficulties of that kind, and acts upon the same principle with reference to compensation; a head of cases which, considering the gross injustice, that may be the consequence of imposing upon a party terms perfectly different from those to which he agreed, the Court would be very unwilling to extend. See *Halsey v. Grant*, 13 Ves. 73; 9 R. R. 143; *Hornblow v. Shirley*, 13 Ves. 81; 9 R. R. 146, n.

THE MASTER OF THE ROLLS (SIR WILLIAM GRANT):—

The more I have considered this case the more I am satisfied that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which this Court is called upon to execute? The price is of the [*407] essence of a contract of sale. In *this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The Court declaring that the one shall take and the other shall give a price fixed in any other manner, does not execute any agreement of their's, but makes an agreement for them, upon a notion that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence which, upon a subject materially interesting to him, he has reposed in an individual of his own selection? No substantial difference arises from

the circumstance that in this case the decision may ultimately fall to an umpire not directly nominated by the parties, as through the medium of the original nominees they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided.

The case of an agreement to sell at a fair valuation is essentially different. *Emery v. Wase*, 5 Ves. 846; 8 Ves. 505; 7 R. R. 109. In that case no particular means of ascertaining the value are pointed out; there is nothing therefore precluding the Court from adopting any means adapted to that purpose. The case in which the Court has modified particular subordinate parts of an agreement falls far short of the decree that is now demanded. Perhaps some of those cases may be thought rather to require defence for the length to which they have gone than to furnish a justification for still farther extending the discretionary power of which they are instances. The Court never professes to bind a man to any agreement, except that which he has made; but sometimes holds the agreement which it executes and that which he has made to be substantially the same, when to common *under- [*408] standings there is a very perceptible difference between them. The Court, however, has never gone the length of compelling a party to buy or sell the whole subject of his agreement at a price that he has never fixed, and that was never fixed in any mode, to which he has given his consent.

In the case of *Hall v. Warren*, 9 Ves. 605; 7 R. R. 306, it was rather assumed than proved that if Warren was competent to enter into the agreement some means might be found to carry it into execution. That was so little discussed that the attention of the Court was not drawn to the point; and the doubt recently thrown upon that point in the case of *Couth v. Jackson*, 6 Ves. 13, was not at all adverted to. I state it as a doubt only, as the decision was ultimately upon a different ground; but neither Lord ROSSLYN nor Lord ELDON conceived that the Court could be substituted for the arbitrators to make a division of the estate. The division of an estate does not imply more personal confidence, or which other persons will be less capable of executing, than the ascertainment of value; and the admission there was that the defendant was instrumental in preventing the award by private instructions to the arbitrator. Upon the principle that a fixed price was an essential ingredient in a contract of sale, the ancient

Roman lawyers doubted whether an agreement that did not settle the price was at all binding. Justinian's Institutes and the Code state that doubt, and resolve it by declaring that such an agreement should be valid and complete when and if the party to whom it was referred should fix the price, otherwise it should be [* 409] totally inoperative: * *quasi nullo Pretio Statuto*; and such clearly is the law of England.

I do not know that upon this point there can be any difference between decisions at law and in equity. If you go into a Court of law for damages, you must be able to state some valid legal contract which the other party wrongfully refuses to perform; if you come to a Court of equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties, which the one refuses to execute. In this case the plaintiff seeks to compel the defendant to take this estate at such price as a Master of this Court shall find it to be worth; admitting that the defendant never made that agreement; and my opinion is that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by an arbitrary discretion that the Court could substitute the one in the place of the other.

This bill must therefore be dismissed without costs.

ENGLISH NOTES.

The rule adopted by the English Courts agrees with that of the civil law laid down in Justinian, Institutes, III. 23. 1. "*Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. Alioquin si ita inter aliquos convenerit, ut, quanti Titius rem æstimaverit, tanti sit emptæ: inter veteres satis abundeque hoc dubitabatur, sive constat venditio sive non. Sed nostra decisio ita hoc constituit, ut, quotiens sic composita sit venditio 'quanti ille æstimaverit,' sub hac conditione stare contractus, ut, si quidem ipse, qui nominatus est, pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur. . . . Sin autem ille, qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto.*"

In *Wilks v. Davis* (1817), 3 Mer. 507, where there was an agreement for sale at a price to be fixed by two valuers, and the defendant refused to execute the necessary arbitration bond, the Court refused to decree specific performance against him. This and the principal case were

No. 66. — *Milnes v. Gery.* — Notes.

followed in *Vickers v. Vickers* (1867), L. R., 4 Eq. 529, 36 L. J. Ch. 946. There, two partners, A. and B., agreed that B. should buy out A., and that if B. should during the life of A. be desirous of retiring, B. should give notice, and A. should have the option of repurchase at the valuation of two persons, one to be appointed by each, or by their umpire. B. gave notice of retirement and A. of repurchase, and two valuers were appointed. After this, B. refused to allow his valuer to proceed with the valuation. It was held that the agreement for repurchase could not be specifically enforced. So if the valuer refuses to proceed, there is no contract to be enforced; *Darbey v. Whittaker* (1860), 4 Drew. 134. The same result follows where the valuation is prevented by the death of one of the valuers appointed: *Firth v. Midland Railway Co.* (1875), L. R., 20 Eq. 190, 44 L. J. Ch. 313.

Where the mode of valuation is not essential, for instance, where there is to be a valuation of matters incidental to the contract, such as timber, fixtures, &c., the Court will ascertain the price, if the indicated mode of valuation has failed. So, where there is a contract to sell land, the works, and the good-will at a fixed sum, and incidental matters, such as furniture, fixtures, stock, plant, machinery, at a valuation, the Court will not regard absence of the valuation as an obstacle to the specific performance of the contract; *Jackson v. Jackson* (1853), 1 Sm. & Giff. 184; *Dinham v. Bradford* (1870), L. R., 5 Ch. 519; *Richardson v. Smith* (1870), L. R., 5 Ch. 648, 39 L. J. Ch. 877; and will restrain the defendant from interfering with the work of valuers; *Smith v. Peters* (1875), L. R., 20 Eq. 511, 44 L. J. Ch. 613.

Incompleteness may not be only in the price, but in other terms. See cases under *Wain v. Warlters* and *Laythorp v. Bryant*, Nos. 22 and 23, *ante*, p. 231 *et seq.*

Specific performance of a contract necessarily implies that the Court should know precisely what the contract is. Hence a greater degree of certainty is demanded than in an action for damages. The degree of certainty required must be reasonable, having regard to the subject-matter of the contract and to the surrounding circumstances. For instance, the insertion of the words *et cetera*, or any other similar word, does not import so much uncertainty as to make the contract necessarily unenforceable; *Parker v. Taswell* (1858), 2 De G. & J. 559, 27 L. J. Ch. 812.

Where A. agreed to sell an estate to B. for £3000, and "the further sum of £20 per cent. on any sum the property might realise above that sum at the sale by auction advertised to take place" the next day; and A. withdrew the estate from the auction, it was held that the contract was sufficiently certain; *Langstaff v. Nicholson* (1858), 25 Beav. 160.

Of cases where uncertainty has been held to constitute a sufficient

bar to an action for specific performance, the following may be mentioned: *Hopcraft v. Hickman* (1824), 2 Sim. & St. 130 (valuation uncertain); *Morgan v. Milman* (1855), 3 De G. M. & G. 24 (neither of two alternative modes of valuation adopted); *Brace v. Wehnert* (1858), 25 Beav. 348, 27 L. J. Ch. 572 (agreement for building according to a plan, — neither plan or specification made); *Tillett v. The Charing Cross Bridge Co.* (1859), 26 Beav. 419, 28 L. J. Ch. 863 (agreement for sale of land, with a vague clause as to building on the land); *Taylor v. Portington* (1858), 7 De G. M. & G. 328 (agreement to take a lease of a house if the drawing-rooms were “handsomely decorated according to the present style”); *Launcester v. De Trafford* (1862), 31 L. J. Ch. 554 (contract to take mines under A.’s lands at B.; B. being neither a township nor a parish); *Price v. Salisbury* (1863), 32 Beav. 446, 32 L. J. Ch. 441 (agreement to let freeholds and leaseholds in consideration of a year’s rent in advance, and the total rental unknown to the lessor); *Wilson v. The Northampton and Banbury Junction Railway Co.* (1874), L. R., 9 Ch. 279, 43 L. J. Ch. 503, (contract to build a railway station at a particular spot for the landowner, the degree of user, and of accommodation and convenience to be afforded by it being undefined); *Pearce v. Watts* (1875), L. R., 20 Eq. 492, 44 L. J. Ch. 492 (a sale of land with a reservation of “the necessary land for making a railway through the estate to Prince Town”).

A contract originally uncertain may be treated as certain so as to be enforced against one party when it has been partly performed on the other side; *Hart v. Hart* (1881), 18 Ch. D. 670, 50 L. J. Ch. 697.

AMERICAN NOTES.

The doctrine of the principal case is uniformly adopted in this country. Cited by Pomeroy on Equity Jurisprudence, § 1405, and the doctrine laid down by Lawson on Contracts, § 472, with citation of many cases. See *Buckmaster v. Thompson*, 36 New York, 558; *Blanchard v. McDougal*, 6 Wisconsin, 167; 70 Am. Dec. 458; *Preston v. Preston*, 95 United States, 200; *McGuire v. Stevens*, 42 Mississippi, 724; 2 Am. Rep. 649; *Lynes v. Hayden*, 119 Massachusetts, 482; *Hardesty v. Richardson*, 44 Maryland, 617; 22 Am. Rep. 57; *Hamilton v. Harvey*, 121 Illinois, 469; 2 Am. St. Rep. 118, and cases cited; *Metcalf v. Hart*, 3 Wyoming, 513; 31 Am. St. Rep. 122, and cases in note, 169; *Blanchard v. Detroit, &c. R. Co.*, 31 Michigan, 43; 18 Am. Rep. 142; note, 26 Am. Dec. 661.

In *Stanton v. Miller*, 58 New York, 192, it is said: “It is an elementary principle governing Courts of equity in the exercise of this jurisdiction, that a contract will not be specifically enforced unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as may, within the rules of law, be referred to, to ascertain its meaning.”

In *Metcalf v. Hart*, *supra*, it is said: “A contract cannot be specifically enforced when it leaves any of its terms open to future treaty, or to be afterwards settled.”

 No. 67. — *Flight v. Bolland*, 4 Russ. 298. 299. — Rule.

No. 67. — FLIGHT v. BOLLAND.

(1828.)

RULE.

The Court will refuse to order specific performance for want of mutuality; that is to say, if the contract cannot be specifically enforced against the plaintiff.

Flight v. Bolland.

4 Russ. 298-301.

Contract. — Specific Performance. — Mutuality.

An infant cannot sustain a suit for the specific performance of a contract, [298] because the remedy is not mutual.

The bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was at the time of the filing of the bill and still continued an infant, moved the Court that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the VICE-CHANCELLOR made an order that the plaintiff should be at liberty to amend his bill by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

Mr. Bickersteth and Mr. Koe, in support of the objection.

There is no instance of a decree for specific performance at the suit of an infant, and it would be contrary to the principles of a Court of equity to entertain such a suit. Courts of equity, acting merely on equitable principle, will not lend their aid where the remedy is not mutual; want of mutuality has always been deemed a sufficient ground for refusing specific performance of a contract. *Howell v. George*, 1 Madd. 1; *Lawrenson v. Butler*, 1 Sch. & Lef. 13. It is clear that a specific performance could not be decreed * against an infant, Co. Lit. 2 b; and therefore it will not [* 299] be decreed at the suit of an infant. Even if a decree were made according to the prayer of the bill, it would be impossible

for the Court to compel the plaintiff to execute that decree. He could not be forced to pay the purchase-money, and on attaining his full age he might repudiate the contract and the suit. At law an infant may maintain an action for breach of a contract, *Warwick v. Bruce*, 2 M. & S. 205; 14 R. R. 634, (*ante*, p. 43), but he has no remedy in equity.

Mr. Pepys, Mr. Morley, and Mr. Stuart, for the plaintiff.

There are cases in which a Court of equity will decree specific performance, though there is not mutuality of remedy. If a husband, seised *jure uxoris*, were to contract for the sale of his wife's estate, the husband and the wife could enforce the contract against the purchaser; yet, if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that the wife would not consent, a Court of equity would not now interfere; it would neither decree the wife to join in the conveyance, nor would it order the husband to procure her concurrence, and send him to prison till that concurrence was obtained. In like manner, a party who has signed an agreement cannot enforce it against a party who has not signed it; and yet the latter may enforce it against the former. *Martin v. Mitchell*, 2 Jac. & Walk. 426; *Hutton v. Gray*, 2 Ch. Ca. 164; *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Buckhouse v. Crossby*, 2 Eq. Ca. Ab. 32, pl. 44; *Owen v. Davies*, 1 Ves. Sen. 82; *Seton v. Slade*, 7 Ves. Jun. 265; 6 R. R. 124; *Western v. Russell*, 3 Ves. & B. 187; 13 R. R. 178. The observations made by Lord REDESDALE [* 300] * in *Lawrenson v. Butler*, 1 Sch. & Lef. 20, are not law.

Mutuality of remedy, therefore, is not essential to entitle one party to file a bill for specific performance against another.

In *Clayton v. Ashdown*, 9 Vin. 393, pl. 1, specific performance of an agreement made by an infant was decreed. In *Campbell v. Leach*, Amb. 740, observations are made which amount to this, that it is not an objection to a bill for specific performance that the party asking the aid of the Court could not have been compelled to perform the agreement; and the instance of a contract between an infant and an adult is referred to as a case in which the one is bound though the other is not. In *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; 9 R. R. 11, one of the objections taken by the defendant was, that there was not mutuality of remedy; and the instance of a contract between an infant and an adult being mentioned, Lord REDESDALE said (1 Sch. & Lef. 58; 9 R. R. 13) · “That case

is no answer to the difficulty raised; it is the peculiar privilege of infants for their protection that, though they are not bound, yet those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract." The Court may refer it to the Master to inquire whether it is for the benefit of the infant that the agreement should be performed.

Mr. Bickersteth in reply.

In *Clayton v. Ashdown* the infant had attained his full age, and had affirmed the contract before the bill was filed. With respect to cases under the Statute of Frauds, if the party who has not signed the agreement files the bill, he gives the Court jurisdiction to bind him by the agreement, and from that moment there is mutuality of remedy. *Martin v. Mitchell*, 2 Jac. & Walk. 427.

No case has occurred — * at least none has occurred since [* 301] the time when it was settled that the Court will not decree a husband, who has contracted for the sale of his wife's estate, to procure her to join in making a good conveyance — in which such a contract has been enforced against the purchaser.

The MASTER OF THE ROLLS (SIR JOHN LEACH).

No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of Courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned by Lord REDESDALE upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

ENGLISH NOTES.

The same principle underlies the cases where the Court has refused specific performance of a contract, because it created a duty from the

No. 67. — *Flight v. Bolland*. — Notes.

plaintiff of such confidential or personal nature that the Court could not have enforced it at the instance of the defendant; *Johnson v. Shrewsbury and Birmingham Railway Co.* (1854), 3 De G. M. & G. 914; *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Co.* (1863), 1 H. & N. 468, 32 L. J. Ch. 677. In the last case, A., an engineer, received a written authority from the directors of the defendant company on their behalf to enter into a contract with the plaintiffs, railway contractors, for the construction of a line of railway. A., on behalf of the company, signed the contract with the plaintiffs. In the mean time the defendant company, having arranged for the sale of their undertaking to the London, Brighton, and South Coast Railway Co., repudiated the authority given to A. On a bill filed by the plaintiffs for specific performance and for restraining the defendants from transferring their property to the London, Brighton, and South Coast Railway Co., it was held that, as the Court could not compel the plaintiffs to carry out their part of the agreement, they would not interfere.

The mutuality of a contract is to be ascertained at the time it is entered into. If there was mutual right to relief, then it is no defence that subsequent events have produced want of mutuality. For instance, where a railway company under their compulsory powers entered into a contract for the purchase of lands, and allowed the statutory time for completion to expire, the plaintiff was held entitled to specific performance, even though he could not then have been compelled to execute the contract specifically: *Hawkes v. Eastern Counties Railway Co.* (1853), 1 De G. M. & G. 733.

Exceptions to the doctrine of mutuality are:—

- (1) Contracts for the sale of land signed by one party only are enforceable against him, although by reason of the Statute of Frauds they cannot be enforced against the other party. See cases cited in the argument of the principal case.
- (2) Where the vendor has not the whole of the interest contracted to be conveyed, and he cannot enforce specific performance; but the purchaser can compel him to convey his interest and to give compensation for the deficiency: *Cleaton v. Gower*, Finch, 164; *Barnes v. Wood* (1869), L. R., 8 Eq. 424, 38 L. J. Ch. 683; *Hooper v. Smart* (1874), L. R., 18 Eq. 683; *Horrocks v. Rigby* (1878), 9 Ch. D. 180, 47 L. J. Ch. 800. If the purchaser was aware of the defect or absence of title, the contract is enforceable against him; *Wylson v. Dunn* (1887), 34 Ch. D. 569, 56 L. J. Ch. 855.
- (3) Want of mutuality may have been waived by the defendant; then it is no defence; *Salisbury v. Hatcher* (1842), 2 Y. & C. C. C. 54.

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AMERICAN NOTES.

This doctrine is accepted in *Lawson on Contracts*, § 172, (1), citing *Martin Co. v. Ripley*, 10 Wallace (U. S. Supr. Ct.), 339; *Havratty v. Warren*, 18 New Jersey Equity, 124; 90 Am. Dec. 613; *Bodine v. Glading*, 21 Pennsylvania State, 50; 59 Am. Dec. 749; *Hutchinson v. Heirs of McNutt*, 1 Ohio, 14; *Benedict v. Lynch*, 1 Johnson Chancery (New York), 370; 7 Am. Dec. 484; *Watts v. Kinney*, 3 Leigh (Virginia), 272; 23 Am. Dec. 266. So a woman disabled by marriage from contracting may not demand specific performance, *Tarr v. Scott*, 4 Brewster (Penn.), 49; and so an unacknowledged contract of a married woman to convey her separate real estate may not be enforced against the grantee because it cannot be enforced against her, *Bamberg v. Arnold*, 91 California, 606; nor an insolvent or bankrupt, *McFarlane v. Williams*, 107 Illinois, 33. See also *Iron Age Pub. Co. v. West. Un. Tel. Co.*, 83 Alabama, 498; 3 Am. St. Rep. 758, and cases cited. This doctrine receives Mr. Pomeroy's approval (*Equity Jurisprudence*, §§ 162-165).

"But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey or renew a lease, without any covenant to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." *Havratty v. Warren*, *supra*. Mr. Beach says (*Equity Jurisprudence*, § 637): "But in this country the English doctrine of mutuality has not been carried out in its fullest extent. In a late case in New Hampshire (*Bekstein v. Downing*, 64 New Hampshire, 248; 10 Am. St. Rep. 104), in which the subject was carefully considered, it was laid down that when payment is to be made in money, mutuality of remedy is not the test for the right to this remedy; and when the exchange on one side differs neither in purpose nor reason from a sale for money, the remedy of specific performance need not be mutual; that the mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by specific performance." Citing the principal case, *Jones v. Newhall*, 115 Massachusetts, 244; *Kauffman's Appeal*, 55 Pennsylvania St. 383.

Mr. Pomeroy says of mutuality: "This doctrine is constantly stated by the Courts, but there are so many exceptions, especially with respect to the obligation, that the rule is far from universal. See *Green v. Richards*, 23 New Jersey Equity, 32, 35. It may be said however as a general proposition that where a contract was intended to bind both the parties, and for any reason one of them is not bound, he cannot compel performance by the other; *Reiman v. Porter*, 100 Massachusetts, 337. Unilateral contracts, in the form of bonds and the like, are constantly enforced. *Ewins v. Gordon*, 19 New Hampshire, 444; *Jones v. Robbins*, 29 Maine, 351; 50 Am. Dec. 593; *Barnes v. Lee*, 97 Massachusetts, 92."

Mr. Lawson puts it: "In the case of a contract between A and B, equity will not order the contract to be performed by B, if it should appear that if A had been the one in default it would not have been able to make a similar decree against A." (*Contracts*, § 172) [1].

 No. 68. — *Twining v. Morrice*, 2 Bro. C. C. 326. — Rule.

The principal case is cited by Mr. Pomeroy in his treatise on Specific Performance, which may usefully be consulted on the entire subject.

The principal case is cited in *Rogers v. Saunders*, 16 Maine, 92; 33 Am. Dec. 635, to the doctrine that "where the contract is binding at law, the want of mutuality is no objection." That case arose under the Statute of Frauds.

The Court will never enforce specific performance of a contract in which a right of revocation exists. "But the Court will also refuse to interfere in any case, where if it were to do so one of the parties might nullify its action through the exercise of a discretion which the contract on the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing upon the Judge the labour, and on the public the expense of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No Court can with reason be called upon to do a vain thing." *Rust v. Conrad*, 47 Michigan, 449; 41 Am. Rep. 720. "A Court of equity never interferes where the power of revocation exists." *Express Co. v. Railroad Co.*, 99 United States, 191.

 No. 68. — *TWINING v. MORRICE*.

(CH. 1788.)

 No. 69. — *BEDFORD (DUKE OF) v. TRUSTEES OF BRITISH MUSEUM*.

(CH. 1822.)

RULE.

The Court will refuse to order specific performance of a contract which is not fair, or which would impose unnecessary hardship on either of the parties to it.

Twining v. Morrice.
Taggart v. Twining.

2 Bro. C. C. 326-331.

Contract. — Unfairness. — Specific Performance refused.

[326] At a public auction the seller's agent bade for the plaintiff. Specific performance refused on that account.

James Whitchurch, Esq., being seised of a copyhold estate, consisting of a mansion called York House and lands, situate at

No. 68. — *Twining v. Morrice*, 2 Bro. C. C. 326, 327.

Twickenham Com., Middlesex, held of the manor of Isleworth Sion (except a small part which lay in the manor of Twickenham), and having surrendered them to the uses of his will, made his will dated the 21st of December, 1782, and afterwards a codicil dated 1st of March, 1785, and thereby devised the premises to the defendants, Morrice, Taggart, and Addison, in trust to sell the same and to apply the money arising from the sale as therein directed, under which the defendant Taggart was beneficially interested; and appointed them executors. The testator died in February, 1786, and the executors, being desirous of selling the estates in pursuance of the directions of the will, employed Messrs. Skinner and Co. as the auctioneers, who advertised the same for sale. Lot one, which was the mansion-house, was in the conditions of sale described as copyhold of inheritance, held of the manor of Sion at a small quit-rent and fine certain, which renders it equal in value to freehold.

Previous to the sale, it was agreed among the vendors that the first lot should not be sold for less than £2000, and, if that should be sold for that price, the others should go for what they * could fetch. Mr. Blake, who was concerned as solicitor [* 327] for the sellers, was present at that meeting, and knew what was settled with respect to the price, but was not employed by the vendors to bid for them, but other persons were employed for that purpose. Afterwards, at the place of sale, the plaintiff, Mr. Twining, seeing Mr. Blake, held some conversation with him, and desired him to bid for the estate for him, Mr. Twining. The lots were put up to sale, and Mr. Blake bid £1500 for lot one, and afterwards, in consequence of one of the vendor's bidders bidding against him, he bid £2000, at which price the lot was knocked down to him, and he afterwards bid for lot two £170, and for lot three £280, at which prices these lots were also knocked down to him, and he paid the deposit, according to the conditions of sale. No person bid at the sale but Mr. Blake, and the bidders for the vendors.

After the sale, the defendant Addison, one of the executors, found, among the testator's papers, deeds and writings, by which it was discovered that the mansion called York House, and the lands thereto belonging, which were the principal part of the estates sold, were freehold, and particularly the conveyance thereof to the testator as such, by lease and release of 15th

and 16th July, 1746, and that only a small part was copyhold held of the manor of Siou upon which the defendant Taggart wrote to Mr. Blake, as attorney for Mr. Twining, desiring Mr. Twining would relinquish his purchase, on two grounds: 1st, that the defendants had been deceived by Mr. Blake, whom they considered as their agent, bidding for Mr. Twining; 2ndly, that the estates had been sold under a mistake as to their tenure; and upon Mr. Twining declining to relinquish the purchase, the defendant Taggart refused to execute conveyances of the premises; upon which the plaintiff filed the present bill for a specific performance.

The defendants Taggart and Addison, by their answers, swore, that at the time of the sale they believed that Mr. Blake was bidding for the vendors, and Taggart filed a cross-bill against Twining and Blake, stating the same thing, and praying that the biddings might be set aside as fraudulent and void against him; or, if the Court should be of opinion that the biddings were fairly made by Blake on behalf of Twining, that Blake [* 328] might answer to *him (Taggart) for the difference between the sums of money at which the premises were knocked down to him at the sale, and their real value at the time, and an account, or issue, directed for that purpose.

Mr. Twining, by his answer to the cross-bill, stated his meeting with Blake as accidental, and that, not choosing to bid himself, he desired him to bid for him, and that Blake actually did so, and that he knew nothing of Blake's acting as attorney for the vendors.¹

Mr. Blake, by his answer to the cross-bill, stated that he bid for Mr. Twining, and not as the agent of the vendors.

The defendants read evidence to prove that Blake was considered at the sale as the agent of the vendors; particularly Thomas Southcombe, who swore that he did not believe that the persons present considered the estates as sold, but that they had been bought in by the defendant Blake on behalf of the vendors, and that he attended as attorney for them; and George Adney, who swore to the same effect, and that he believed that the bidding of the defendant Blake was prejudicial to the sale, for that Southcombe had informed him he would have bid a larger sum at the

¹ Lord REDESDALE'S notes mention this part of the report not to be as above stated.

sale, if he had believed that the defendant Blake had bid for himself or any other person save the vendors.¹

After argument,

The MASTER OF THE ROLLS (Sir LLOYD KENYON). — [330] These are two bills, the first filed by Mr. Twining for a specific performance of the contract for the sale. The second by Mr. Taggart impeaching the sale, and praying that it may be set aside; or if not so, praying a remedy against Mr. Blake. The principal question, on the first bill, is with respect to the specific performance; and it is admitted, on all hands, that it is not every contract which is entered into that a Court of equity will carry into execution. Several points have been made whether this is such a contract as should be *carried into execution; [*331] the first is with respect to value; but I think the evidence is not conclusive on that subject; it is not such as to assist the vendor, a great deal, as to the transaction. Neither do I think any blame is to be imputed to Mr. Blake. With respect to the intelligence communicated to Shynner, I think that would not afford a ground for successfully resisting the specific performance; the estate seems pretty nearly equal in value whether it be freehold or copyhold. Perhaps in the converse, if represented as freehold and turning out copyhold, it might not hold; because the party buying might particularly wish for a freehold estate, but, on the vendor's side, it does not hold — *nil operator*. The ground I shall go upon leaves the character of all parties unimpeached. The sale intended was a sale by auction, where every one who would might bid; if anything therefore happened that would cast a damp upon the sale, it must be hurtful to the vendor. With respect to bidders being employed for the vendors, I do not say the doctrine in *Beawell v. Christie*, Cowp. 395, is wrong; but everybody knows that such persons are constantly employed. It is said, if those persons were known it would be inconvenient and

¹ Lord ELDON, C., said, it would be a wholesome rule that the solicitor in a cause should have nothing to do with a sale, as the certain effect of a bidding by the solicitor in a cause is, that the sale is immediately chilled. *Vide Neithorpe v. Pennyman*, 14 Ves. 517. So also in the case of assignees of a bankrupt who bought in an estate, ordered to be sold by the Court. Sugden, Vend. & Purch. 59, 60, and Appendix, xi. p. 13, 5th ed. It were

desirable that a rule had been laid down; for Lord C. Baron RICHARDS ordered, that persons who had bidden at the instance of a solicitor who conducted a sale which had been directed by the Court, should, at their instance, be discharged from their purchases; although the above cases were cited and the point strongly pressed on their authority. In *Noel v. Lord Henley*, 19 January, 1819. (Daniell, Ex. Eq. 211, 7 Price, 241.)

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detrimental, because it would deter fair bidders; but if it was the idea of the persons present at this sale that Mr. Blake was such a bidder, it was detrimental to the vendor. Here he was known to be the agent of the vendor, he began early as a bidder, and, in fact, was the only real bidder. It is likely that he should be thought, by the persons present, to bid for the vendor, and, if I believe the witnesses, I must believe that it did chill the sale. Into this situation he was brought by the conference with Mr. Twining: the fair consequence is, that the sale did not proceed with so much advantage as it otherwise would have done. Mr. Scott said, if I thought the persons in the room thought him a puffer, it was thinking him what the law would not allow him to be: I cannot say I think so, as they knew the practice to be to employ such persons. By an inadvertent act, Mr. Blake was in a situation which hurt the sale, and was put into that situation by Mr. Twining; it is therefore not such a case that I can decree a specific performance. I will not set the contract aside, but will leave the plaintiff to his remedy at law.

Both bills dismissed.

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2 My. & K. 552-575.

Conveyance. — Injunction to restrain Breach of Covenant. — Hardship.

[552] Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract; a Court of equity will not interpose to enforce the covenant, but will leave the parties to law.

Whether upon such a covenant there could be any remedy at law against the assigns of the covenantor, *quære*.

By a settlement made in the year 1669, on the marriage of the Lady Rachel Vaughan with the Honourable William Russell, afterwards Lord RUSSELL, a messuage called Southampton House, and the appurtenances, together with some fields adjoining,

¹The reporters are indebted for the statement of this case to the kindness of Mr. Jacob.

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situate at Bloomsbury in the parish of St. Giles, in the County of Middlesex, and then the property of Lady R. Vaughan, were conveyed to trustees, upon such trusts as she alone should, in manner therein mentioned, appoint.

By indenture of feoffment of the 19th of June, 1675, made between the Honourable William Russell and Lady Rachel Vaughan, his wife, of the first part, the trustees of the settlement of the second part, and the Right Honourable Ralph Montagu of the third part, it was witnessed, that in consideration of £2600 to the said William Russell and his wife paid by the said Ralph Montagu, and of the covenants thereafter mentioned, on his part to be performed, and of 5s. paid to the trustees (which sums were acknowledged to have been received for the absolute purchase of the piece of ground thereafter mentioned), they, the said William Russell and his wife, and by their direction and appointment * the trustees, granted, bargained, sold, [* 553] aliened, released, enfeoffed, and confirmed unto the said Ralph Montagu, his heirs and assigns, a piece of land lying in a field called Baber's Field, in St. Giles's, containing seven acres and twenty-five perches, described in a map annexed, and abutting eastward in part upon the messuages lately erected by Mary Hudson, and in other part upon other part of Baber's Field, northwards on Baber's Field aforesaid, westward in part upon the messuage then in the occupation of John Morris, and in other part upon Baber's Field aforesaid, southward upon Great Russell Street in Bloomsbury aforesaid; and also the wall encompassing the said parcel of ground; and also five feet and four inches of ground in breadth, extending the whole front of the said ground abutting upon Great Russell Street, and lying without the south wall, to be pallisaded, and as a security for the said wall; and also a way and free passage for foot, horses, coaches, carts, and all manner of carriages in, by, through, and over the grounds of the said William Russell and Lady Rachel Vaughan, then used, or which thereafter should or might be used, in lieu of those that were then used for or as streets in the said parish unto the said piece of ground, or any part thereof, in case there should be any alteration thereof, and other ways belonging to the said premises, or then used with the same; and also free liberty and authority to make or open two doors or passages out of and through the wall on the north part of the premises, and to continue the same; and

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also full power and free liberty to make all such sewers, water-courses, sinks, gutters, drains, sewers, conveyances, for bringing in of water, and other easements as should be fit or necessary for the accommodation of the messuages and outbuildings intended to be built upon the said piece of land, under ground, and southwards unto the said places then used for streets, and unto [* 554] and *into the common sewer belonging to the buildings in Bloomsbury, commonly called Southampton Buildings, and to continue the same, closing up the ground and making up the pavements that should be broken for doing the same; to hold the same to the use of the said Ralph Montagu, and his heirs and assigns forever, subject to a rent of £5 per annum to Lady R. Vaughan, her heirs and assigns, which he covenanted to pay, and for the recovery of which a power of distress was given. The deed then contained a covenant to levy a fine, and covenants for title.

In consideration of the premises, Ralph Montagu then covenanted with Lady R. Vaughan, her heirs, executors, administrators, and assigns, that in case he, his heirs or assigns, should erect any building upon the said ground, or any part thereof, he or they should erect and new-build upon the said piece of ground one fair and large messuage and dwelling-house, fit for him and his family to inhabit, composed of an uniform building, together with all convenient stables, coach-houses, and other out-offices suitable to the said mansion or dwelling-house; and further should also keep fenced in with a brick wall the residue of the said piece of ground, and should make thereout a convenient courtyard, and on the back part thereof should leave space sufficient for convenient gardens and walks, and should not make any public or other way out of the said piece of ground unto the fields lying northwards of the same, save only two doors out of the said garden to be made for the accommodation of the inhabitants in the said chief mansion-house for walking into and taking the air in the said fields, nor should erect any public brewhouse on the said piece of ground, nor make any buildings on the said ground, save only convenient offices for the said chief messuage, and ornaments and conveniences [* 555] for the *said garden, the walls of those to be of brick or stone, and not of timber; and further should pave, and make, repair, and amend the pavement from the outward wall of the said messuage to the middle of the street there, and should

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fix posts and pales in the street next to the said wall, to range even with the rest of the street; and should not make any watercourse, drain, or sewer out of the said piece of ground backwards northward unto the said field, nor erect any building on the outermost wall of the said ground next to the said field. He further covenanted with Lady R. Vaughan, her heirs and assigns, that if he, his heirs or assigns, or any of them, should at any time thereafter erect any buildings, of what nature soever, on the north end of the said piece of ground, and which should extend northward beyond the range and building of Southampton House, situate near thereunto, other than one or more summer house or houses, banqueting house or houses, for the accommodation of the garden to be made in the said ground, or what should be for the enlargement of the great mansion-house, or should make, or cause or permit to be made, any watercourse, drain, or sewer out of the said ground, into the said fields backwards northward, or should build or make any public brewhouse upon the said piece of ground, then he, his heirs and assigns, should forfeit and pay to the said Lady R. Vaughan, her heirs and assigns, £3 per day so long as the said building or brewhouse, watercourse, drain, or sewer, should continue, and until the said building or brewhouse should be taken down, and such watercourse, drain, or sewer should be stopped up, and the ground made in the same plight as it was in before the making such watercourse, drain, or sewer. The deed then contained a power of distress for recovering this rent, and, lastly, a covenant on the part of William Russell and Lady R. Vaughan, that they, or the heirs or assigns of the latter, should not make any drain, watercourse, *standing ditch, [* 556] or sewer within 500 feet northward of the wall which encompassed the ground thereby granted, which should be any annoyance or be offensive to the said Ralph Montagu, his heirs or assigns, owners of the said ground.

By indentures dated in 1682, new trustees were appointed of the settlement of 1669; and in the year 1685, William Lord Russell being dead, the trustees reconveyed the legal estate to Lady R. Vaughan, then Lady Russell.

In pursuance of the covenants, a mansion-house, with offices, was built by Montagu upon the ground conveyed to him; and that mansion-house having been destroyed by fire, another was subsequently erected on the same site. Soon after the establish-

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ment of the British Museum under the authority of an Act of Parliament passed in the 26th year of the reign of his Majesty George II., this house and premises, known by the name of Montagu House, were purchased, and were vested in trustees for the purposes of that institution.

The estates of Lady Russell in Bloomsbury had become vested in the plaintiff in fee, subject to leases of some parts of them; and houses had been erected and streets formed on the north, east, and west sides, adjacent to the Museum, and some of them overlooking the gardens. The yearly rent of £5 was paid to the plaintiff, who claimed under Lady Russell, not by descent, but as a purchaser. The mansion-house, originally called Southampton House, and afterwards Bedford House, stood formerly on the north side of Bloomsbury Square; it was pulled down in the year 1800, to make way for streets and buildings which were erected on its site.

The bill was filed for the purpose of obtaining an injunction [* 557] to restrain the defendants, the trustees of the * British

Museum, from proceeding to raise in the gardens certain additional buildings which they had it then in contemplation to erect. The intended additions were designed for the reception of the statues and other monuments of ancient art brought from Greece by the Earl of Elgin. They were to consist of a wing sixty feet in height, joining the principal building at the eastern extremity, and extending from it into the garden northwards to the distance of two hundred and ninety feet. On the western side a similar wing had been built about the year 1805, extending northwards about one hundred and forty feet; it was designed to lengthen the latter, so as to correspond with that to be built on the east. These wings, if erected, would extend northward considerably beyond what had been the line of the range and building of Southampton House.

A motion was made for an injunction before the VICE-CHANCELLOR, Sir J. LEACH, who ordered a case to be stated for the opinion of a Court of law upon the question whether the plaintiff could maintain an action of covenant to recover damages in respect of the erection of buildings to the northward of the line of Southampton House; directing that it should be stated in the case that the covenant in the deed of 1675 was made with the trustees, and the rent reserved to them, and not to Lady R. Vaughan.

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From this order the plaintiff appealed, and renewed his motion for an injunction; and as the defendants were equally dissatisfied with the VICE-CHANCELLOR's order, and had intended also to appeal, it was arranged between the parties that the question should be considered as if it were before the Court upon cross-motions of appeal.

The motion was heard by Lord Chancellor ELDON, assisted by Sir T. PLUMER, the MASTER OF THE ROLLS.

[After argument.]

Lord ELDON, C.

[562]

I think it right for myself to say I have formed no opinion, nor do I mean to pronounce any opinion, whether any action could or could not be maintained by the Duke of Bedford against the trustees of the British Museum if they proceed with the proposed building. That is not the subject of this day's consideration. Neither am I disposed to meddle with another question, as to which also I disclaim saying one word judicially — whether now or heretofore the trustees of the British Museum, upon anything that appears in this instrument, could have applied to the Court to restrain the Bedford family from doing that which they have done. The point to which I have confined my attention, and upon which I am anxious to have the opinion of the MASTER OF THE ROLLS, is, taking it for granted that an action could be brought by the Duke of Bedford under the deed of 1675, whether, under all the circumstances of this case, his Grace must be content with his legal remedy for the purpose of obtaining compensation for any injury he * may have sustained, or [* 563] whether he has a right to the better mode of relief which a Court of equity affords by injunction.

When Bedford Square was built, it is impossible to doubt that the owners of houses on the east side of that square thought that an increased value attached to them, because the residents in those houses would have the Museum on one side and the square on the other. So, with respect to Gower Street, every one remembers that the houses on the east side were always advertised as much more valuable than those on the west; and why? Because from the former there was a prospect of the country, extending to Islington, and because also their inhabitants could have a refreshing walk from their own homes through the fields as far as Queen Square, which was then the northern extremity of

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that part of the metropolis. It was no doubt imagined that the Duke of Bedford could never be advised to cover this land with buildings, and that all the property between Gower Street and what is called Brunswick Square would remain open as long as the leases of the houses in Gower Street should endure; nor was it to be expected that if the Duke of Bedford had a right to tell the trustees of the British Museum that they should not build further without his consent, the tenants on the east side of Bedford Square might not ask of his Grace to insist upon that right for their sakes.

This subject may be illustrated by what has happened with respect to Gower Street. From time to time buildings were raised by the lessees in that street contrary to the covenants in their leases, but with the consent of the Duke of Bedford, until the covenant against the tenant erecting buildings behind his house became, with reference to the situation of his [* 564] neighbours, an oppressive, though *not an unjust restriction. Suppose, for example, there were ninety houses on the east side of Gower Street, and the Duke had allowed the tenants of eighty of them to raise their back buildings to a height extremely inconvenient to the others, from whom he withheld that permission, it could not be said that he was acting illegally or improperly in so doing; but it becomes quite a different question, if, under such circumstances, he files a bill to prevent those others from raising their washhouses or outbuildings. If such a bill were filed, it is questionable whether the Court would not say it was clear, from all the circumstances, that each of those tenants thought he was entitled to the benefit which his Grace, by declining to enforce the covenant, had allowed to the rest. The question, therefore, is, not whether the party can bring an action, but whether he can come into equity for relief, and thereby render an action for compensation unnecessary — whether, under all the circumstances of the case, the Duke of Bedford can be heard to say “I can or I cannot maintain an action at law; but be that as it may, I will not seek relief in that mode, but will come into a Court of equity, and insist upon having the extraordinary relief which that Court gives beyond what is afforded by Courts of law. I will have an injunction, to prevent the necessity of my consulting any law Courts whatever as to my relative situation with regard to these trustees.”

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Consider how the matter stands upon the deed of 1675. It appears that, from the year 1675 to the year 1800, buildings in the neighbourhood of Bedford House have been erected to the eastward; that there has been a prolongation of streets from Bedford House to the New Road, and that buildings also have been erected on the westward through Bedford Square: that there were no buildings at all in the space between Brunswick

* Square and Gower Street, but that the large mansion, to [* 565] which the terms of this instrument refer, and which now forms the Museum, had stood upon its present site up to the year 1800. The deed is for considerations, partly pecuniary and partly to be found in covenants; the pecuniary considerations being £2600 and a rent of £5 a year, and the covenants contained in that instrument being expressly stated to be part of the consideration. A grant is then made, and (what is not immaterial) in the description of the premises it appears that at the time the grant was made there was, at least, one messuage on the east side of Montagu House, one messuage on the west side, but no messuages whatever on the north side. There is, further, the usual covenant to pay the rent, and then follows this covenant:—"And in consideration of the premises, the said Ralph Montagu, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and grants, to and with the said Lady Rachel Vaughan, her heirs, executors, administrators, and assigns, that in case the said Ralph Montagu, his heirs or assigns, shall erect any building upon the said ground and premises, or any part thereof, he, the said Ralph Montagu, his heirs or assigns, shall and will erect and new-build upon the said piece of ground hereby granted, or mentioned to be granted, one fair and large messuage and dwelling-house." The construction put upon these words is not only a construction to be found in a subsequent part of this instrument, but is the construction which the Duke of Bedford himself gives to it, — namely, that the grantee is to build a chief messuage fit for the dwelling-house of a large and noble family, with the necessary conveniences and ornamental appendages. The instrument goes on to covenant, that the house is to be fit for the said Ralph Montagu and his family to inhabit, composed of an uniform building, together with *all con- [* 566] venient stables, coach-houses, and other offices suitable to the said mansion or dwelling-house; and, further, that the said

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Ralph Montagu, &c., shall keep fenced in with a brick wall the residue of the said piece of ground, and shall make thereout a convenient courtyard, and, on the back part thereof, shall leave space sufficient for convenient gardens and walks, and shall not make any public or other way out of the said piece of ground into the fields lying northwards of the same, save only two doors out of the same garden, to be made for the accommodation of the inhabitants of the said chief mansion-house for walking into and taking the air of the said fields, which fields are before stated to be on the north side of the house. So that the grantee is to have two doors towards the north, which was open ground, but not on the east or the west, nor is he to erect any buildings on the ground save only for convenient offices for the chief messuage, and ornaments and conveniences for the garden, "the walls of those to be of brick or stone, and not of timber;" and, further, it is covenanted, that he and they shall not make any water-course, drain, or sewer out of the said piece of ground backwards northward into the said fields, nor erect any buildings on the outermost wall of the said ground next to the said field:—all this again showing care and attention to what was, or what was not, to be done northward, and carrying that care to this extent that the grantee was not to raise any structure upon the wall to the northward of the garden.

Now in determining how a Court of equity ought to proceed, it is proper to consider not only what would be done in the actual matter before it, but what the Court would do in other cases falling within the same principle. Suppose that after Mr. Montagu

· had built this house ranging with all the surrounding [* 567] buildings that belonged * to the Duke of Bedford, and ranging with Powis House and other large mansions standing in Great Russell Street; suppose that after the summer house and banqueting house had been erected (which clearly would not have affected the prospect from Bedford House), and after the garden wall (on which the feoffee was not to place three additional bricks) had been built, the Duke of Bedford had said "there is nothing to restrain me; I will place a sugar house on one side and a soap house or gas works on the other side;" or rather, suppose, which is a handsomer way of putting it, that the Duke had built a row of houses close to the wall, and afterwards Mr. Montagu had said he did not like to have his gardens overlooked by his

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neighbours' servants, and he would therefore, notwithstanding the covenant, build this wall twice as high as it was before; though I admit that the Duke of Bedford might have had a proper ground of action, would this Court have granted an injunction? My answer is no: for, upon looking to authority, I find the law to be as Lord KENYON has laid it down. If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot under such circumstances come into a Court of equity for a remedy which the Court never grants, except in cases where it would be strictly equitable to grant it. It is impossible to state, as the doctrine of a Court of equity, that the Court will carry into execution a specific covenant in all cases where the legal intention of the deed is found. A doctrine like that would be widely inconsistent with general practice, and would directly contradict the daily and hourly experience of us all.

The deed proceeds further, and states as a distinct covenant that if the said Ralph Montagu, his heirs or * assigns, [* 568] or any of them, shall at any time thereafter erect any building of what nature soever on the north end of the said piece of ground, and which shall extend northward beyond the range and building of Southampton House, situate near thereunto, other than one or more summer house or other houses for the accommodation of the garden, he and they shall forfeit and pay &c. —. Now what would it have signified as between these parties, in the consideration of such a case as this, whether a house was or was not built in the range of Southampton House, if there were placed between this house and Southampton House three or four streets excluding the smallest possible view from Southampton House of anything north of this mansion, and by the acts of the Bedford family themselves destroying the very purpose for which this covenant was here inserted?

Suppose again that the moment after Mr. Montagu had in discharge of the original engagement built this great mansion fit for the pleasurable residence of a nobleman or gentleman of fortune, and had also, according to the covenants, erected suitable offices and the ornamental banqueting house and summer house, the Duke of Bedford had then put a public brewhouse in the vicinity of the garden, what would the Montagu family have said? And yet

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there is nothing here from which it can be pretended that there is an express prohibition of such a proceeding. Neither do I say whether the Bedford family could have built a public brewhouse to the north of this mansion; but suppose such a thing had been done, and the Duke of Montagu had then said, "You have spoilt my banqueting house and summer house unless I am to drink nothing but porter; I must therefore build a wall which will likewise prevent the smoke of the engines of the brewhouse coming from the north." Will it be contended that in such a case the [* 569] * Bedford family could come to a Court of equity for protection on the ground that the Duke of Montagu was going to build a wall higher than the covenants permitted, or even, we will suppose, an immense brewhouse, they having on their part religiously kept their covenant by making two archways through which his grace might go and take the salubrious air which it was intended he should have?

If the parties have so dealt with regard to the legal rights, that the object of the one party is defeated, is the other to do what he pleases, while the first is not at liberty to call upon that other to account for doing that which he himself is by the deed prohibited from doing? I do not think that a Court of equity is to act by reciprocity of covenant; I rather mistake what has been held to be the doctrine of Courts of equity during the whole course and practice of my life, if this Court does not say to parties who are so circumstanced, "Confine yourselves to your legal remedies if you have any, and do not come here in cases of this description to ask of the Court to give you more relief than could be obtained in a Court of law."

Upon this point I am anxious to have the opinion of the MASTER OF THE ROLLS, first making most respectfully this single observation, upon a subject which calls for vigilant attention, that if there be a question in a Court of equity, the decision of which will render the consideration of it in Courts of law unnecessary, it is then the duty of the Court of equity first to decide that question. If, for example, it should happen in this case, that after the parties had gone to trial, and the defendant had obtained a verdict at law, this Court would nevertheless have given no relief; then it is for the interest of the suitors that they should be told so [* 570] * in the first instance, and not in the last stage of the proceedings. Why is the Court to send them to law, and

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afterwards to tell them when they come back that nothing can be done for them here? If that is to be the course, it is better to dismiss them out of Court at once and in the first instance, let the result of the application to a Court of law be what it may.

I do confess myself unable to say that this is one of the cases in which the Court ought to give relief by injunction. The difficulties I have stated are difficulties I am unable to get over, and I state them without prejudice. Having done so, I must request the MASTER OF THE ROLLS to state what view he has taken of the case.

Sir T. PLUMER, M. R.

The single question now before the Court is one which respects the exercise of the jurisdiction; and this Court, while it determines that question upon principles peculiar to itself, cautiously abstains from deciding whether either party has a remedy at law against the other, leaving each of them as, in my opinion, it ought to leave them, to agitate that question in a Court of law.

Now, if this were a case in which the plaintiff had not a legal, but had only an equitable remedy, as was attempted to be argued by his counsel, on the assumption that, by reason of certain technical forms, he was debarred from obtaining any redress at law; if the case was reduced to that point, it would become extremely material to consider whether the party had any claim at all to come into a Court of equity for its equitable assistance. That, however, is not the present question. On the contrary, those who support the application for the injunction also insist that the Duke of Bedford has a clear legal right; that upon the true construction of * the contract, and upon all that has [* 571] happened between the parties, it is competent to the Duke, as representing the original vendor, to assert his legal right. Undoubtedly it is perfectly open to him to take that course; and nothing which this Court shall determine will, in the least, abridge his right.

Again, in considering whether the plaintiff is precluded from having the equitable assistance of this Court, it must not be supposed that the slightest imputation is cast upon his conduct. It is not on the ground that the party applying for relief has conducted himself improperly, — so contrary to the agreement as to deprive himself of that remedy, that the assistance by injunction may be refused; but the question is, whether, from the altered state of the property, altered by the acts of the party himself, he has not

No. 69. — *Bedford (Duke of) v. Trustees of British Museum*, 2 My. & K. 571, 572.

thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state. It was perfectly competent to the plaintiff to make what use he pleased of his contiguous lands; he was not fettered in so doing by any previous obligation to the contrary; and when he took upon himself to act in the manner in which he has acted, and to cover the vacant ground with buildings, the question is, whether, having regard to the mutual dealings between the parties with respect to the property as it stood both originally and afterwards, it is consonant with the principles of equity to interpose at this time of day.

In that point of view, it appears to be a consideration of great importance, more especially with reference to property in the metropolis, how far parties shall now be permitted to go back, and revive all the objections arising out of long antecedent covenants and engagements, and to give them such an application [* 572] to the * buildings of the metropolis in its present rapidly increasing state, that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land. The question is not to be determined on the letter of the contract. By the letter of the contract, the Duke is under no positive engagement to leave the northern boundary open; but the question is, whether, according to good faith, and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state. There were, here, two large mansions, — one erected, the other to be erected, contiguous to each other, — to be enjoyed by two noble families, with their appendages of gardens and offices; and the question is, whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from everything which could contribute reciprocally to their beauty, ornament, and use.

It is to be recollected that the piece of ground in question was bought for the very purpose; and it is an obligation cast upon the purchaser, if he builds at all, that he shall erect one mansion only, — one large fair mansion, with suitable gardens and offices attached to it, — his understanding being that he should have all

the advantages which the site then possessed; unless, indeed, it is to be presumed that he could undertake to erect a mansion in such a situation, and on so magnificent a scale, with all the obligations thrown upon himself, and none on the contrary, expressed or implied, imposed upon the other party who had subjected him to those obligations.

* This understanding between the parties results from [* 573] every part of the agreement. The party whom the Duke represents covenants that Mr. Montagu shall have the unlimited enjoyment of the property conveyed, with all that belonged to it. It is quite evident, from the expression with respect to the opening into the fields, that it was in the contemplation of the parties that the land to the north should remain fields or open ground; and in the parts of the deed referring to the streets to the southward and the contiguous buildings to the east and west, there is not a syllable which indicates an intention that the northern boundary was not to remain open. It was that which principally induced Mr. Montagu to build. If the subject-matter of the contract is changed, if, from the alterations which take place in the lapse of time, both noble families quit their residences, and the mansion which had been built ceases to be a place of residence for a family of this description, and becomes appropriated to other purposes, a new set of interests and rights would be applicable to it in its altered state. Who is it that has created this alteration? The party who now seeks to enforce the obligation which applied to the property in its former state. It was perfectly competent to the Duke of Bedford to build to the northward all the streets he has built, and to surround and enclose Montagu House with buildings for trade and commerce, or in any way he thought proper; but, having so done, can it be said to be equitable or consonant with justice, after having induced a man to build a suitable mansion, after having surrounded him with buildings, and blocked up all that tempted him to build, and precluded him from the pleasurable or profitable enjoyment of his mansion, to insist on its remaining in the state in which, by the letter of the deed, the party is bound to preserve it? At law such conduct may be no defence. Notwithstanding * his having [* 574] altered the state of the property, the Duke may still be entitled to the benefit of the covenant, and if so, let him take his legal remedy; but the question is, whether a Court of equity must

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not consider how far it is reasonable to permit a party who has so dealt with the property, and so altered its condition, to obtain his remedy by the interposition of this Court.

The case made by the bill, therefore, is not that which was contemplated by the deed. The case made by the bill is, that this erection will obstruct the view of the lessees of the new houses which have been built on the adjoining land. Was that the design of the obligation? The very circumstance of the Bedford family having surrounded Montagu House with streets and buildings, after having become parties to this contract (the intention being, that the two contiguous mansions should be inhabited by noble families), is made the ground on which the equitable relief is sought, because, otherwise, it is said, these lessees will be prevented from enjoying the view into the gardens and grounds of the Museum. Would not that be to apply all the covenants of the deed to a different state of things from that which was the object and design of both parties?

The question, then, is, whether a Court of equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable, and unjust to enforce the covenants specifically in the existing state of the property; and considering it in that view, I entertain a strong opinion

that this is not a case in which the Court ought to interfere.

[* 575] * Upon these grounds, therefore, and without the least

imputation upon the Duke, or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should be enforced.

At the close of the judgment, the plaintiff's counsel stated that, as the sole object of the Duke of Bedford, in instituting the suit, was to obtain the opinion of the Court upon the question of right, it became unnecessary to prosecute the cause further. An order was accordingly taken, by arrangement between the parties, dismissing the bill.

ENGLISH NOTES.

The principal case of *Twining v. Morrice* was approved of in *Mortlock v. Buller* (1804), 10 Ves. 292, at p. 313, 7 R. R. 417, at p. 428, and its principle applied in *Hesse v. Briant* (1857), 6 De G. M. & G. 623.

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Fairness or unfairness of a contract is judged at the time it is entered into. For instance, in contracts the beneficial character of which to the defendant depends on a contingency, the contract will be enforced, provided the contingency was really such to both the parties and was in their contemplation. The fact that the contingency did not turn out as the defendant expected will not stay the hands of the Court in decreeing specific performance; *Parker v. Palmer* (1663), 1 Cas. in Ch. 42; *Ex parte Peake* (1816), 1 Madd. 355, 16 R. R. 233; *Lawton v. Campion* (1854), 18 Beav. 87, 23 L. J. Ch. 505; *Stapilton v. Stapilton* (1739), 1 Atk. 2; *Heap v. Tongue* (1851), 9 Hare, 90. In the last-mentioned case there was a family arrangement for the division of the property of A., who died intestate, between his sister B., her husband C., and their illegitimate child D. The agreement was made under a supposition that A. had made a will bequeathing a great portion of his property to D., but the will was not found. It afterwards transpired that A. had died intestate, and B. and C. refused to recognise D.'s rights under the family arrangement. On a bill filed by D. to enforce the arrangement, the Court decreed specific performance against B. and C.

The contract is unfair and not specifically enforceable if one of the parties knows of the non-existence of the subject-matter of the contract, and the other does not, though the terms of the contract may be such as to put the ignorant party on his guard; *Smith v. Harrison* (1857), 26 L. J. Ch. 412. So where the terms of a contract express an uncertainty, and that uncertainty was not understood by the parties to comprise the event which actually happened; *Baxendale v. Seale* (1854), 19 Beav. 601, 24 L. J. Ch. 385; *Davis v. Shepherd* (1866), L. R. 1 Ch. 410, 35 L. J. Ch. 581. In the last-mentioned case the owners of certain lands agreed to let the minerals under that portion of the lands which lay to the eastward of a supposed upthrow fault running east, describing it as about 98 acres or thereabouts; and leased the remaining portion of the lands to the westward of the fault to another person, B., describing it as about 83 acres. The fault was afterwards found to run so as to leave 173 acres to the east and 8 acres to the west of it. It was held on a bill filed by A. to restrain B. from working the mine to the east of the fault, that the Court would not, in an action by A. for specific performance against the owners, have decreed a demise of all the minerals to the east of the fault, and therefore would not grant the injunction. Compare with this the case of *Jeffreys v. Fairs* (1876), 4 Ch. D. 448, 46 L. J. Ch. 113, 36 L. T. 10, 25 W. R. 227. There, on the application of two persons, B. and C., A. agreed to grant them a lease of a vein of coal called the X vein, describing it as "about two feet thick, with the overlying and under-

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lying beds of clay," on and under a farm, Y. On a bill for specific performance filed by A., the case made by the defendants was that no coal existed in the vein under the farm. It was held that A. was entitled to the relief sought, as he had not warranted that the coal existed.

The principal case of *The Duke of Bedford v. The Trustees of the British Museum* has often been cited in questions of breaches of covenants attached to freeholds by the assignees of the freeholds from the original covenantors. The law is that if the assignees had notice of the covenant, they are bound to observe it; and an injunction will be issued to restrain its breach; *Whatman v. Gibson* (1838), 9 Sim. 196; *Mann v. Stephens* (1846), 15 Sim. 377. A purchaser of a freehold to which such a covenant is attached may refuse to complete the purchase if he was at the time of the contract unaware of the existence of the covenant. *Bristowe v. Wood* (1844), 1 Coll. C. C. 480. The principal case was forcibly pressed on the attention of the Court in *Sayers v. Collyer* (1884), 28 Ch. D. 103, 54 L. J. Ch. 1, 51 L. T. 723, 33 W. R. 91. There a building estate was cut up in plots, the purchaser of each plot covenanting with the vendors and with the purchasers of the other lots not to build a shop on the plot, and not to use his plot as a shop or to carry on any trade thereon. The purchaser of one of the lots having brought an action to restrain the purchaser of another lot from using his premises as a beer-shop, it was proved that, in spite of the covenants, some of the purchasers had used the buildings on their lands for shops and for lodging-houses, and that the other purchasers had taken no steps to enforce the covenants. It further appeared that the plaintiff had known for three years before the action that the defendant's house was used as a beer-shop, and that the plaintiff himself had bought beer there. It was held that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the plaintiff, as the change was not caused by his conduct; but that he, the plaintiff, through his acquiescence in the proceedings of the defendant, had lost his right to enforce the covenant either by injunction or damages.

Hardship may consist in a forfeiture, penalty, heavy outlay of money, or any other loss not in the contemplation of the party at the time he entered into the contract; *Faine v. Brown*, cited in *Ramsden v. Hyllton* (1751), 2 Ves. Sen. 307; *Peacock v. Pension* (1848), 11 Beav. 355, 18 L. J. Ch. 57. In *Tildesley v. Clarkson* (1862), 30 Beav. 419, 31 L. J. Ch. 362, it was decided that a tenant under an agreement to take a lease is not bound to accept it if the house, upon a complete survey, is found defective and would entail a heavy outlay on him to keep it in repair under the usual covenant of repair. *Secus*, if the defendant had entered into the contract with full knowledge of the state of the premises; *Cook v. Waugh* (1860), 2 Giff. 201. For other cases

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see *Dean of Ely v. Stewart* (1740), 2 Atk. 44; *Hamilton v. Grant* (1815), 3 Dow. 33, 15 R. R. 5; *Kimberley v. Jennings* (1833), 6 Sim. 340; *Talbot v. Ford* (1843), 13 Sim. 173; *Wedgewood v. Adams* (1845), 6 Beav. 600; *Moxhay v. Loderwick* (1849), 1 De G. & Sm. 708; *Lukey v. Higgs* (1855), 24 L. J. Ch. 495; *Denne v. Light* (1857), 26 L. J. Ch. 459; *Shrewsbury and Birmingham Railway Co. v. London and North-Western Railway Co.* (1857), 6 H. L. C. 113, 26 L. J. Ch. 482.

Where there is no hardship at the date of the contract, its subsequent interposition is generally no defence to an action for specific performance; *Haywood v. Cope* (1858), 25 Beav. 140, 27 L. J. Ch. 468. There it was held that a lessor of mines, by delivering the draft of a lease in accordance with an agreement made in 1855, and not insisting on the execution of the lease until 1857, after the mines had been tried and abandoned as valueless, does not lose his right of specific performance. The case is stronger where the hardship is caused by the subsequent act of the defendant; *Helling v. Lumley* (1859), 3 De G. & J. 493, 28 L. J. Ch. 249. For other cases see *Wood v. Griffith* (1818), 1 Swanst. 43, 1 Wilson, 34, 18 R. R. 18; *Evans v. Walsh* (1805), 2 Sch. & Lef. 419 (cited in *Berell v. Hussey*); *Berell v. Hussey* (1813), 2 Ball & Beatty, 280, 12 R. R. 87; *Hawkes v. Eastern Counties Railway Co.* (1852), 1 De G. M. & G. 737, 5 H. L. Cas. 331; *Nickels v. Hancock* (1858), 7 De G. M. & G. 300.

Where the hardship is caused by subsequent acts of the plaintiff, the defendant may resist specific performance. This is shown by the principal case of *The Duke of Bedford v. The Trustees of the British Museum*. In *Darson v. Solomon* (1860), 1 Dr. & Sm. 1, 29 L. J. Ch. 129, the agreement was for the assignment of a lease which was forfeitable on breach of covenant to keep insured. The contract was to be completed on the 20th of July; the insurance expired on the 24th of June, and was renewed for a month by the intending assignor. The parties met on the 26th of August to complete the contract, when it was discovered that owing to the lapse of the insurance the lease was liable to forfeiture. The intended assignee refused to complete, and a suit by the intending assignor for specific performance of the agreement was dismissed.

On grounds somewhat similar to hardship or unfairness a purchaser is not bound to complete a contract, if by so doing he may probably be exposed to litigation in respect of the subject-matter of the contract; *Pegler v. White* (1864), 33 Beav. 403, 33 L. J. Ch. 569. So the Court has frequently refused specific performance where the title of the vendor to the lands is doubtful, either because a Court of co-ordinate jurisdiction has rightly or wrongly pronounced against it; or because it

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depends on the construction of some ill-expressed and improperly drawn up instrument; or because it depends on the presumption of a doubtful fact: *Lowes v. Lush* (1808), 14 Ves. 547, 9 R. R. 344; *Eyton v. Dicken* (1817), 4 Price, 303; *Freer v. Hesse* (1856), 4 De G. M. & G. 495; *Mullings v. Trinder* (1870), L. R., 10 Eq. 449, at p. 454, 39 L. J. Ch. 833; *Alexander v. Mills* (1871), L. R., 6 Ch. 124, at p. 132, 40 L. J. Ch. 73.

AMERICAN NOTES.

This doctrine is elementary and thoroughly accepted in this country. Both principal cases are cited by Mr. Pomeroy (Equity Jurisprudence, pp. 960, 1190). Mr. Lawson says (Contracts, § 472, (2)) : " It will not decree specific performance where it would operate unreasonably hard on the defendant (*Johnson v. Hubbell*, 10 New Jersey Equity, 332; 66 Am. Dec. 773; *Swint v. Carr*, 76 Georgia, 322; 2 Am. St. Rep. 41; *Bryan v. Loftus*, 1 Robinson (Virginia), 12; 39 Am. Dec. 242; *Marble Co. v. Ripley*, 10 Wallace (U. S. Supr. Ct.), 339; *Weise's Appeal*, 72 Pennsylvania State, 351; *Starnes v. Newsom*, 1 Tennessee Chancery, 239); or where the agreement itself is unreasonable (*Higgins v. Butler*, 78 Maine, 520); or where its decree would produce injustice or would be inequitable under all the circumstances (*Margraf v. Muir*, 57 New York, 158; *Chicago, &c. R. Co. v. Schoeneman*, 90 Illinois, 258)." See collection of cases, Pomeroy's Equity Jurisprudence, § 400; *Datz v. Phillips*, 137 Pennsylvania State, 203; 21 Am. St. Rep. 864; *Brown v. Pitcairn*, 118 Pennsylvania State, 387; 33 Am. St. Rep. 834; *Gotthelf v. Stranahan*, 138 New York, 345; 20 Lawyers' Rep. Annotated, 455.

From the countless number of cases illustrating this principle two may suffice. A woman and her husband, in consideration of the satisfaction of a demand of \$600 against the husband, and the payment to them of \$275, absolutely assigned to A. and B. a policy in favour of the defendant on her husband's life; A. paid the subsequent premiums until maturity, when the amount due was \$1477.73; the insurers refused to pay it without the defendant's receipt on the back of the policy; the defendant refused to sign her name without receiving \$477.73, when the policy was collected; accordingly A. executed a written agreement to pay her that sum on the payment of the policy; she signed her name, and A. and B. received the full amount; in an action against them on the agreement, held, that it was unconscionable, and not enforceable beyond an amount fairly due for her service and inconvenience in writing her name. *Kelley v. Caplice*, 23 Kansas, 474; 33 Am. Rep. 179, and note, 182. The plaintiff contracted to sell and the defendant to buy a leasehold interest in land to commence in the future. Before the day an ocean storm washed away a part of the land. Held, that specific performance should not be decreed. *Huquenin v. Courtenay*, 21 South Carolina, 403; 53 Am. Rep. 688.

In *Prospect Park, &c. R. Co. v. Coney Island, &c. R. Co.* 144 New York, 152; 26 Lawyers' Rep. Annotated, 610, it was held that the fact that a contract fair when made, has become a hard one by the force of changing circumstances or subsequent events, will not necessarily prevent its specific performance;

No. 70. — *Clinan v. Cooke*, 1 Sch. & Lef. 22. — Rule.

and so active competition between a street railway company, after it has adopted electricity as a motive power, and another company which has a steam line, will not relieve the former from a contract to run cars over the other's track to its depot, although it was made when the use of horse-cars on its own line made such competition impossible. The Court said: "It may very well be that under a contract having twenty-one years to run, there may be such a change of conditions as will affect unfavourably the one party or the other; but this offers no reason for refusing specific performance, unless subsequent events have made performance by the defendant so onerous that the enforcement would impose great hardship and cause little or no benefit to the plaintiff. *Trustees of Columbia College v. Thacher*, 87 N. Y. 316, 317; 41 Am. Rep. 365; *Murdfieldt v. New York W. S. & B. R. Co.*, 102 N. Y. 703. While it may be somewhat to the disadvantage of defendant to perform its contract, under the present circumstances, when active competition exists between plaintiff and defendant, yet that fact presents no legal reason for discharging it from the obligation of its contract."

No. 70. — CLINAN *v.* COOKE.

(1802.)

No. 71. — SUTHERLAND *v.* BRIGGS.

(1841.)

RULE.

SPECIFIC performance may be ordered of a contract for sale of land, under which the plaintiff has altered his position (by making improvements on the land or otherwise), although the contract is not in writing and signed by the party to be charged within the 4th section of the Statute of Frauds.

Clinan v. Cooke.

1 Sch. & Lef. 22-43 (s. c. 9 R. R. 3).

Contract. — Interest in Land. — Statute of Frauds. — Part Performance. — Specific Performance.

* A., by public advertisement, offers lands to be let for three lives, or [^{*} 22] thirty-one years; and proposals having been made by B. and accepted, an agreement is executed between B. and the agent of A. authorized to contract for him for a lease of the lands, in which agreement the term for which the lease is to be made is not mentioned. A is not bound to perform this contract, there being no evidence in writing of the term to be demised. There being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other so as to ascertain the term.

 No. 70. — Clinan v. Cooke, 1 Sch. & Lef. 22, 23.

Such an agreement might be supported as a ground of action if there were part performance; but the mere payment of money is not part performance for this purpose.

The bill was filed by two persons named Clinan against Cooke, and Cahill; and prayed a specific performance of an agreement for a lease for three lives of the lands mentioned, entered into between the Clinans and Cooke, and in case it should appear by Mr. Cooke's answer that he had put it out of his power to make a lease pursuant to the agreement, the bill prayed that he should be decreed to make compensation to the plaintiffs.

In the year 1798, Mr. Cooke caused an advertisement to be inserted in the public papers in the following words: "To be let for three lives or thirty-one years from the first day of May next, the lands of Purcell's Garden, containing, &c. [then followed a description of the lands.] Application to be made to William Cooke, Esq., or Edmund Meagher, of, &c., dated October 23rd, 1798." In consequence of this advertisement the plaintiffs applied to Meagher, and entered into a treaty with him for a lease of the lands, and on the 15th of February, 1799, the following article was executed: "Memorandum of an agreement concluded by and between William Cooke, Esq., of, &c., and Patrick Clinan and Michael Clinan, both of, &c., hath demised set and to farm let unto the said P. and M. Clinan all that and those that part of the lands of Purcell's Garden, now in the possession of Michael and Martin Cahill, containing, &c., at the yearly rent of two guineas per annum for the first year commencing from the first of May next, and £2 8s. 0*d.* annually for the remainder of the term: the said William Cooke is to give the said P. and M. Clinan peaceable possession, in case the said Martin, and Michael Cahill dispute giving the possession, according to a notice served them in writing, [* 23] on the first day of May next; otherwise the said P. * and M. Clinan are to have lawful interest on the money they deposited; which sum a receipt specifies; same leases to be perfected at the requisition of either party. — Given under our hands and seals this 25th day of February, 1799."

Attested by two	}	E. MEAGHER.	(Seal.)
Witnesses.		P. CLINAN.	(Seal.)

The money alluded to in the memorandum was a sum of fifty guineas which Cooke had received from the plaintiffs in considera-

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tion of the lease, at the recommendation of Meagher, who also appeared to have received a sum of twenty guineas from the plaintiffs for which no receipt was given. The plaintiffs had prepared and tendered a lease for three lives; Mr. Cooke, however, refused to perform the agreement, and in May, 1799, granted a new term of the lands to the defendants, the Cahills, who knew of the agreement made with the plaintiffs. The bill alleged that Meagher was a general agent for Mr. Cooke, and as such was authorized to let the lands for him, to this fact there was no evidence; but the answer of Cooke admitted that he had caused the advertisement to be inserted and referred to it, and believed the lands were advertised to be set for three lives or thirty-one years, that being the limits of his power of demise under his marriage settlement; it admitted that there was a reference to Meagher in the advertisement; but denied that he did, either by power of attorney or by any other means, authorize Meagher to set the lands; but that he had a great reliance on the honesty of Meagher, that he would not impose on him; and then it stated a conversation with Meagher concerning the proposal of the plaintiffs, and that Meagher knowing that defendant had some occasion for some ready money, advised him to accept the fifty guineas which as he told him the plaintiffs had offered; and admitted that he did accept the money and did thereupon order and direct Meagher to go to the defendants, the Cahills, and to the plaintiffs, and if he * was satisfied [* 24] that he could give peaceable possession with the concurrence of the Cahills, that then the plaintiffs should have said lands agreeable to their proposal, but not otherwise; and that Meagher, without being satisfied on that subject, entered into the agreement stated. It appeared that shortly before the bill was filed, Cooke tendered the fifty guineas to the plaintiffs, who refused to accept it. As to the term, the answer did not state whether Mr. Cooke considered the proposal as a proposal for three lives or thirty-one years, but said that the parties were mutually to determine whether it should be for three lives or thirty-one years. Parol evidence was offered also, that defendant acknowledged Meagher as his agent, and said he would abide by his bargains, and referred persons to him on matters respecting the lands.

The case was argued by Mr. O'Grady, Mr. J. Ball, and Mr. C. Ball, for the plaintiff, and by Mr. Burston, Mr. Plunket, Mr. Lockington, and Mr. Bushe, for the defendant.

[31] LORD CHANCELLOR (LORD REDESDALE).

(After stating the facts;) It is insisted, that wherever an authority is given to another to enter into a contract of this description, it must be in writing. There is no foundation for this position; the words of the Statute of Frauds do not import any such thing, and there are decided cases to the contrary, particularly the case¹ furnished by Mr. Fitzgerald from Mr. Malone's notes, which is a precise determination in point, and I think was decided in perfect conformity to the statute. Therefore the authority in this case is a sufficient authority as far as it is admitted, — that is, it is an authority to conclude an agreement with the plaintiff for a term either of three lives or thirty-one years, but that was unquestionably to be expressed in any agreement to be made between the parties, and it cannot be taken to be an authority otherwise than as so expressed. It has been questioned, whether an authority was given to conclude this agreement. I think Mr. Cooke cannot contend, that an authority to conclude the agreement was not intended to be given, because fifty guineas were paid to him in consideration of it, which he accepted, and therefore he must have understood, that Meagher had gone beyond merely informing these persons that they might have an agreement, provided the Cahills agreed to give up the possession; he must have understood that they had come to an agreement, and therefore I must presume that the agreement was made, and made pursuant to an authority.

The next question is, whether this agreement was made according to the authority. The words of Cooke's answer are "that [* 32] if he was satisfied that he could give peaceable * possession, &c.," he was authorized. It depended entirely on the mind of Meagher, and I think we must take it, that he was satisfied as far as the nature of the thing admitted of it; he could not know with absolute certainty whether the Cahills would quit or not. It is indeed clear, that he was not perfectly satisfied on that subject, because in the agreement which he signed, he has introduced a provision, which shows he was still apprehensive that the Cahills would hold out; but this apprehension did not weigh so far as to prevent the agreement, else it would have been absurd to have entered into the agreement at all until the Cahills had quitted. Besides, Cooke himself having accepted fifty guineas, was bound to satisfy himself on that subject. I do not therefore think

¹ *Barry v. Lord Barrymore*, before Lord LIFFORD, Ch. Mich. 1770.

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that that is a ground for objecting to the performance of this agreement.

Then comes the question, whether there is an agreement in writing sufficiently expressed; now, whenever an act is done under an authority, it must be in pursuance of that authority. If you suppose that Meagher was authorized to make an agreement with these persons, and to sign it in the name of Cooke, it must be a perfect agreement that is to be made; it must be an agreement which is to contain that which is to bind Cooke. Now if there was in the agreement any fraudulent omission on the part of Meagher, to which Cooke was not privy, he would not be bound by it, as he had not authorized Meagher to commit a fraud. However there is no suggestion of fraud in Meagher; the utmost that can be said is, that the not inserting the term in the agreement was ignorance, mistake, or blunder; but the agreement is therefore imperfect, and being so, it is not an agreement according to the authority, and on that ground I think it would be extremely difficult to decree what the bill seeks.

* It is contended that this omission may be supplied by [* 33] parol evidence, and particularly by reference to the advertisement. The plaintiffs have taken it to be a contract for a lease of three lives; therefore the contract they propose to perform is a contract at the rent expressed in the paper for three lives. Now a reference to the advertisement will not serve their purpose, because the ambiguity remains, for in the advertisement it is "three lives or thirty-one years;" there is nothing in the advertisement that gives a choice to the tenant. Cooke's answer says, that it should be either the one or the other, as the parties should agree, and the case is perfectly silent as to the fact of any agreement on the point, except as to the plaintiffs having prepared a lease for three lives, for it is not stated in their bill that they meant the agreement to be for three lives, or that Meagher signed it meaning it to be so; for this reason, therefore, it is impossible to connect this agreement with the advertisement. But suppose there were no uncertainty in this particular, and that the advertisement had expressed three lives only, you then are to connect these two transactions; how? by parol evidence. Now, if the agreement had referred to the advertisement, I agree parol evidence might have been admitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant

for so much time as was expressed in the advertisement, and then the identity of the advertisement might be proved by parol evidence; but there is no reference whatever to the advertisement in this agreement.

The case of *Tawney v. Crowther*, 3 Bro. C. C. 318, was mentioned in argument: there the agreement was prepared in writing; the defendant declined to sign it, but he wrote a letter, which Lord THURLOW said he relied on as referring to the written paper containing the terms of the agreement, and he thought [* 34] that letter was tantamount to *signing the written agreement, which written agreement, by the bye, was in the defendant's own hands. It is a misfortune, that persons publishing reports of cases in equity, do not take the trouble of looking into the decrees; in that case Lord THURLOW, though he pronounced that decree, yet he gave the defendant his costs, provided he consented to deliver up possession within a certain time: his Lordship was diffident of his opinion, and intimated that he did so to secure against an appeal, the property being but small; and this shows that he did consider that as a doubtful case, otherwise it would be extraordinary that the defendant should have his costs where he was wrong. However, Mr. Brown has not taken any notice of that circumstance, which I am sure was as I have stated it. I have often discussed that case, and I never could bring my mind to agree with Lord THURLOW's decision, for this reason; he considered the letter tantamount to a signing of the agreement; I thought the true meaning of it was, "I will not bind myself, but you shall rely on my word." The case is not very accurately reported; however it appears to me strong in favour of the opinion I entertain in this case, supposing Lord THURLOW to be right; because Lord THURLOW considered a reference to the written agreement essentially necessary; he considered the letter and the agreement one and the same thing, and the letter as a recognition of the agreement, as of a paper referred to in the possession of the defendant, and as a thing in which parol evidence was no otherwise necessary than to identify the thing produced.

There is a case, *Binstead v. Colman*, in Bunb. 65; the position there is a mere general assertion; "where there is an agreement by writing executed, you cannot come by evidence to supply any defect in that agreement which was intended to be part of that agreement, but not inserted in it; for that would be to

evade the Statute * of Frauds, and introduce more per- [* 35] jury." This is stated as having been said by the CHIEF BARON, and it is added that the whole Court were of the same opinion; but whether said in the case before the Court, whether said judicially, we cannot learn, and there is therefore no great dependence to be had on that case.

In *Purteriche v. Powlett*, 2 Atk. 383, Lord HARDWICKE is made to say, "To add anything to an agreement in writing by admitting parol evidence which would affect lands, is not only contrary to the Statute of Frauds and perjuries, but to the rule of the common law before that statute was in being." That appears to be a mere *dictum* when you look into the circumstances of that case, which I have reason to know is most imperfectly stated by Atkyns; because I have a collection taken from the register's books by Mr. Hollist, a gentleman of the English bar, who has been very accurate, and it appears from his note that this was said incidentally by Lord HARDWICKE, and that it does not apply to the case; however, these expressions do tend to show a general opinion on the subject.

In the case of *Brodie v. St. Paul*, 1 Ves. Jun. 326, Mr. Justice BULLER came to a decision of the point, though it is extremely difficult to collect that from the report of the case, for I observe that the reporter has omitted to state the fact on which the question turned; he does not state the agreement, and you only discover from the argument what was really the question between the parties. The agreement was signed on the second of February, 1787; it referred to certain covenants which had been read, contained in a described paper; it was clear that all the covenants contained in that paper had not been read, and which of them had been read and which had not was the difficulty. I recollect that one way by which we attempted to get out of the difficulty was, that everything in dispute was to be left to Mr. Askew, and we insisted * that he was to determine what [* 36] had been read, and what had not; but Mr. Justice BULLER thought that was a matter of mere evidence, and not a thing that was meant to be left to Mr. Askew's determination. In the course of the argument of that case, *Allan v. Bower* was mentioned, and Mr. Justice BULLER, speaking of that case, says, if that case was right it depended on part-performance, — that the agreement being partly performed opened the case to parol evidence: and there the whole agreement was by parol; there was

no agreement in writing, there was an instrument under the hand of Bower, which was produced for the purpose of showing that he had made some parol agreement with the tenant. But in *Brodie v. St. Paul*, Mr. Justice BULLER says he was clear that the agreement was not sufficient to sustain an action at law, for that nobody could tell, except by parol testimony, what covenants had been read, and what not; that part-performance takes a case out of the statute, but that in that case there was nothing that could do so. "The question here is, what is the agreement? the whole depends upon parol. If the agreement is certain, and explained in writing, signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it, would effectually break in upon the statute, and introduce all the mischief, inconvenience, and uncertainty, the statute was designed to prevent." Now I must confess, I feel this to be perfectly right, and I am convinced that though the counsel for Mr. Brodie felt that he was very ill used, yet they felt also that it was impossible that relief could be afforded him, and that this blunder had made the agreement so imperfect that the statute forbid its execution.

The case of *Allan v. Bower* appears in 3 Bro. C. C. 149, to have come on again on a re-hearing, and upon that re-hearing, it appeared that the proceeding was in itself irregular; that [† 37] it was a decree made, not when the cause was * at hearing, but upon a motion for an injunction, and therefore Lord THURLOW was under the necessity of setting it aside, as being irregularly made. I know it never came on again. Whether the decision would have been the same if it had, I cannot venture to say, but that must at all events have depended on its being, or not being, considered a part execution of a parol agreement, for Lord THURLOW thought that the paper left behind by Mr. Bower showed that he had come to some parol agreement, and having done so, had let the plaintiff into possession, that the plaintiff had laid out great sums of money on the farm. This he considered as proved by that paper, which he considered as a confession by Bower of that fact; and this he thought sufficient ground for directing an inquiry what was the agreement entered into, to which that paper referred. That is, he considered that paper, not as an agreement to be supplied by parol evidence, but as evidence of a parol agreement. There were very great doubts whether

No. 70. — *Clinan v. Cooke*, 1 Sch. & Lef. 37, 38.

that was a solid opinion; though Lord THURLOW took it up very strongly, and his decisions were very seldom unsatisfactory. Any person who reads his decision in 3 Bro. will find that he did not feel himself very strong when he delivered his opinion. There was something of the same impression as was on his mind in the case of *Towney v. Crowther*, 3 Bro. C. C. 318. In the first of those cases, where a man said he would not sign a paper, Lord THURLOW considered this tantamount to a signature; and in the latter, when the expressions of the party were, "that he had not given his tenant a lease because he was not willing to grant leases," his Lordship held this as an agreement to grant a lease. I confess my mind could never follow these two cases, and there was great doubt amongst the bar on both of them. However, I think neither of these cases decides the present. So far as they touch it, they rather confirm the opinion I have formed, and particularly *Towney v. Crowther*, for there Lord THURLOW considered the letter as referring distinctly to the other paper.

* A case was also mentioned from 3 Atk. 388 (*Joyces v. Statham*), where a bill was filed for a specific performance of an agreement for a lease. The defendant alleged that there was a mistake in the agreement with respect to the rent: that the rent was to be clear of taxes, and that that was not inserted in the agreement; and on that ground he resisted performance, and he offered to read parol evidence to show that that was part of the agreement. Now, that was admitted on a ground which I take to be perfectly clear: the bill was filed to compel performance of an agreement; the defendant says, "The agreement you have got signed was not the agreement I entered into, and I therefore am not bound to perform it." Suppose the omission fraudulent: the plaintiff might have proved a case of fraud to avoid it; and it is quite equal whether it is insisted on as a mistake or a fraud, so says Lord HARDWICKE.

It is true Mr. Atkyns makes Lord HARDWICKE say, "Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement. I do not see but he might have been allowed the benefit of disclosing this to the Court." This passage was cited for the purpose of showing that Lord HARDWICKE thought there might be an addition to the agreement by parol. I have found a reference to a note of the same case by Mr. Brown, who was King's Counsel in Lord

HARDWICKE's time, and in great business; and the manner in which he has put this case is thus, — "But Query, if on a bill for performance of an agreement, and an attempt to add to the agreement by parol, whether plaintiff can do it in that case?" Therefore Mr. Brown certainly did not understand Lord HARDWICKE as saying that it could be done; and looking attentively at the words used by Atkyns, I do not think they import anything positive.

[* 39] * There is a prior case, *Walker v. Walker*, 2 Atk. 98, where Lord HARDWICKE is made to say something similar; and there seems to have been somewhat of a floating idea in the mind of his Lordship, that by possibility a case might be made, in which even a plaintiff might be permitted to show an omission in a written agreement, either by mistake or fraud. However, I can find no decision except the contrary way. The admission of such evidence as matter of defence is frequent. *Legal v. Millar*, 2 Ves. Sen. 299. And the same doctrine is stated in *Pitcarne v. Ogbourne*, 2 Ves. Sen. 375, and in an older case, 1 Vern. 240. It is used to rebut an equity: the defendant says, "The agreement you seek is not the agreement I mean to enter into;" and then he is let in to prove fraud or mistake. It should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, &c., unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agreement who has not either by himself or his agent signed a written agreement, but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was, by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind.

Under these circumstances, if it be not possible to make this a case of part-performance, it is impossible to make such a decree as is sought by the plaintiff.

* I should have great difficulty if there were evidence [* 40] of a part-performance. I must have directed a further inquiry, for the party has not suggested by his bill that the agreement was for three lives, or for any specific time, and the case stands, both on the pleadings and evidence, imperfect on that head. As to the fact that leases were tendered to Mr. Cooke, and what passed on that occasion; it is not said that he had read them, or that he knew the contents, and at most it amounts only to evidence of this, that if he found the leases not improper, and that the Cahills would give up possession, he agreed to execute them.

But I think this is not a case in which part-performance appears; the only circumstance that can be considered as amounting to part-performance is the payment of the sum of fifty guineas to Mr. Cooke. Now, it has always been considered that the payment of money is not to be deemed part-performance to take a case out of the statute. *Seagood v. Meale*, Prec. Chan. 560, is the leading case on that subject; there, a guinea was paid by way of earnest, and it was agreed clearly that that was of no consequence, in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part-payment, and no distinction can be *drawn. [* 41] But the great reason, as I think, why part-payment does not take such agreement out of the statute is, that the statute has said, sect. 13, that in another case, namely, with respect to goods, it shall operate as part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands.

But I take another reason also to prevail on the subject. I take it that nothing is considered as a part-performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcroft v. Lister*, cited, Prec. Ch. 519; 2 Vern. 456; Vid. Colles's Parl. C. 108; there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to

account for the rents and profits; and why? because he entered in pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which Courts of equity have proceeded, in permitting part-performance of an agreement to be a ground for avoiding the statute; and I take it therefore that nothing is to be considered as part-performance which is not of that nature. Payment of money is not part-performance, for it may be repaid; and then the parties

will be just as they were before, especially if re-
[* 42] paid with interest. It does not put a man *who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foccraft v. Lister*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent.

On this ground, therefore, I think this is not a case in which I can consider that there is a part-performance to warrant my decreeing performance of an agreement, the terms of which are left thus imperfect, and must be supplied by parol evidence, which would be contrary to the statute; there is no sufficient ground to consider this case out of the statute, and I am of opinion that the bill must be dismissed.

There is another part of the case which requires a little notice; the plaintiff does appear in the light of a person who at least offered some money to Meagher; though that fact is not distinctly alleged by the answer, yet it is alleged that Meagher entered into this agreement with the plaintiffs in consequence of some money which he received from them, and that he did it to the prejudice of the defendant: it also appears that the sum of twenty guineas was paid by the plaintiffs to Meagher, and that it was paid without a receipt. These are suspicious circumstances; the bill insists that this money was paid on account of rent: if so, why was not some receipt given for it as well as for other payments of the same kind? I think the case on the part of the plaintiff very suspicious, and not at all favourable. But I think the conduct of the defendant also very unjustifiable, — quite unwarrantable, after retaining the fifty guineas, as he has done;

No. 71. — *Sutherland v. Briggs*, 1 Hare, 26.

he receives fifty guineas in February in consequence of an agreement which was to be executed in May; he takes advantage of the imperfection of the agreement; but with the impression on his mind * that it was imperfect, he retains the money [* 43] in his hands without even tendering it, until a bill is on the point of being filed.

Although I dismiss this bill as to the performance of the agreement for a lease, yet there is one part of the agreement clear and distinct, that in case of failure, the fifty guineas was to be repaid with interest, and therefore I shall direct the register to compute what is due on the foot of the fifty guineas and interest. I have a great inclination to give the plaintiffs costs on that part of the case; and I shall dismiss the bill, so far as it seeks a lease, without costs. As to the Cahills, they have acted a dishonest part; they knew of the agreement; and I shall dismiss the bill as against them, without costs.

Sutherland v. Briggs.

1 Hare, 26-40 (s. c. 11 L. J. Ch. 36).

Contract. — Interest in Land. — Statute of Frauds. — Part Performance. — Specific Performance.

The plaintiff was the lessee of a house and other premises for a term [* 26] of thirty-one years, at a rent of £60, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of £9. The lessor of the house became the purchaser of the meadow, and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of £80 a year for the consolidated property.

Held, that the extension of the house into the meadow by the plaintiff, with the concurrence of his landlord, was evidence of, and was sufficient consideration for, a contract to demise the meadow.

That the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon.

That the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises.

That the doctrine with regard to the mutuality of contracts had no application to such a case.

No. 71. — *Sutherland v. Briggs*, 1 Hare, 26, 27.

By an indenture of lease, dated the 10th of October, 1831, James Alexander Frampton demised to the plaintiff a house, with some cottages adjoining, situate at Hayes, in the County of Middlesex, for the term of thirty-one years, from the 25th of December, 1830, at the yearly rent of £60. By a covenant in the lease, the plaintiff was to take down two of the cottages and build a house upon the site, with suitable offices, at an expense of not less than £300, of which £100 was to be allowed him out of his rent. The house stood upon the verge of the demised premises, and was separated from a meadow, the property of a Mr. Lock, only by a ditch, of about six feet wide, which was admitted to be comprised in the lease. Lock's meadow had for many years previously been occupied with the house by the former tenant thereof, at a yearly rent of £9; and, upon the lease of the house and premises being made to the plaintiff, he became a tenant from year to year of the meadow to Mr. Lock, at the same rent of £9.

In 1834, it was thought advisable that the house should [*27] undergo thorough repair, and that alterations *and improvements should also be made in it; but before these repairs or improvements were commenced, Mr. Frampton purchased the meadow of Lock. A treaty then proceeded between Frampton and the plaintiff with regard to the projected repairs and alterations in the house; and it was proposed to extend the alterations and improvements into Lock's meadow. The house was ultimately altered by carrying the whole of it back to the very edge, if not over the boundary line by which it was separated from the meadow. The principal room was improved by the addition of a bow, the whole of which projected into Lock's meadow; the garden-fence was thrown back about eighteen feet; and a belt of trees was planted in the same meadow. The cost of these works, amounting to about £660, was paid by the plaintiff and Mr. Frampton nearly in moieties. A memorandum was then drawn up in the handwriting of Mr. Frampton, and signed by the plaintiff in the following words: "Mr. Frampton having advanced me the sum of £350 towards the additions and improvements lately made by me to the house and preniises at Hayes in my occupation, in addition to £150 previously allowed me for rebuilding the adjoining cottage, it is agreed that the rent of £69 now paid for the house, &c., and field, shall be increased to £80 a year, clear of all deductions whatsoever, commencing from Christmas last, dated the 3rd day of February, 1836. — A. Sutherland."

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Mr. Frampton died in September, 1836, having devised his real estates, including Lock's meadow, to trustees upon certain trusts for sale. From the time of the agreement of the 3rd of February, 1836, until the 10th of June, 1840, the plaintiff held the two properties as one tenement, and paid an entire rent of £80 to Frampton during his life, and after his death to his devisees.

* In a suit which was instituted for the administration of [* 28] the estate of Frampton, Lock's meadow was ordered to be sold, and was described in the particulars of sale, as in the occupation of the plaintiff as tenant from year to year at a rent of £9. The plaintiff, by his solicitor, attended at the auction, and stated to the effect that the meadow was held by the plaintiff under the circumstances for the residue of the term of thirty-one years, and that it could not be sold otherwise than subject to the right of the plaintiff. The sale was proceeded with, and the defendant, who was in the room and heard the statement of the plaintiff's solicitor, became the purchaser.

On the 10th of June, 1840, the plaintiff was served by the devisees of Frampton with a notice that Lock's meadow was conveyed to the defendant, and that he was entitled to the rent of £9 per annum from the preceding midsummer. On the 11th of June, 1840, he was served by the defendant with notice to quit Lock's meadow, which was followed by an action of ejectment.

The bill prayed a declaration by the Court that the plaintiff was entitled to the tenancy and occupation of Lock's meadow for the residue of the term of the lease of the 10th of October, 1831, and that the proceedings in ejectment might be restrained by injunction. The defendant, by his answer, denied that the plaintiff had acquired any title to the meadow, otherwise than as tenant from year to year; and said, that if any part of the meadow had been built upon, he did not consider such part to have been included in his purchase, and he made no claim thereto. He also alleged that Frampton held the house as a trustee, and held the meadow only * in his own right, and that he had no power to annex [* 29] the house to the meadow; and a deed was produced in evidence for the purpose of showing the existence of the trust.

Mr. Temple and Mr. Kenyon Parker for the plaintiff.

Mr. Simpkinton and Mr. Faber for the defendant.

The arguments are stated and severally considered by the VICE-CHANCELLOR in his judgment.

Vice-Chancellor WIGRAM, —

In order to bring the real question in this cause at once to issue I may observe, that the defendant cannot be in a better position than Frampton would have been if living. The plaintiff being in the occupation of the meadow in question at the time of the defendant's purchase, he must be affected with notice of the interest, whatever it may be, which the plaintiff had in it. *Allen v. Anthony*, 1 Mer. 282, 15 R. R. 113. But independently of this rule of law, it is proved, and indeed admitted, that the defendant at the time of his purchase had notice of the very claim which the plaintiff makes in this suit. No observation has, in fact, been addressed to the court on the part of the defendant, tending to show that the defendant stands in a different position from Frampton. The whole argument has proceeded upon the supposition that the defendant must stand or fall by the case made against Frampton.

[* 30] * I proceed, therefore, to inquire whether, if Frampton were living the plaintiff could, as against him, have established the right he now claims against the defendant, and the answer to this question will determine the defendant's liability.

The equity upon which the plaintiff rests his case is the expenditure of money by him upon the house and premises and on Lock's meadow, upon the faith of an alleged agreement with Frampton, that, in consideration of that expenditure the plaintiff should have a lease of the meadow commensurate with his interest in the house and premises.

The defendant says that no such agreement is sufficiently alleged in the bill or proved in the cause. And further, that if both of these points should be decided against him, there are other grounds upon which he may successfully rest his defence to the bill, and every argument which ingenuity could suggest has been urged in support of the defendant's case.

The plaintiff has gone into evidence both oral and documentary. The defendant has given no evidence except by calling the attesting witness to a deed, which I shall hereafter notice, who proves his own handwriting upon the deed as such attesting witness.

Now there are parts of this case which are free from all doubt. It is clear that the specific repairs, alterations, and improvements which were made, both upon the house and premises, and upon Lock's meadow, were determined upon by Frampton and the

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plaintiff together; that the plaintiff was to be and was the actor in executing these works; that a surveyor, appointed on the part of Frampton superintended the works when in * pro- [* 31] gress; and that ultimately the expense was borne by both parties in nearly equal proportions.

Taking these facts as established, I shall begin by assuming that the agreement upon which the plaintiff rests his case is sufficiently alleged in the pleadings and proved in evidence, and upon this hypothesis I shall first consider the points which have been urged at the bar on behalf on the defendant.

The first point, suggested rather than pressed, was, that the plaintiff being in possession of Lock's meadow as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly it is, in general, necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. *Morphett v. Jones*, 1 Swanst. 172; 1 Wilson, 100; 18 R. R. 48. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow with the landlord's consent be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient. Sugden, Vend. & Pur., Vol. I. p. 20, 10th ed. And if the case of *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, in which Lord COTTENHAM differed from the VICE-CHANCELLOR OF ENGLAND, may be considered as correctly illustrating the rule of this Court as to the acts of part performance which will take a case out of the statute, the alterations of the garden fence and making the plantation in the meadow, would be * sufficient. In that case, the expendi- [* 32] ture by the tenant was in draining the land, and the Court decreed Mr. Jolliffe to grant him a lease, upon the promise of which it was said the expense of draining had been incurred.

It was next said that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion that justice would be satisfied by doing this I cannot accede; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this Court, however,

will not permit me to so consider the case. If the acts done by the plaintiff are to be considered as acts of part performance, taking the case out of the operation of the statute, the rules of the Court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement; namely, Lock's meadow, and not that part of it only upon which the house stands. The case of *Mundy v. Jolliffe* will apply also to this part of the present case.

A third point taken by the defendant was, that the time for which the plaintiff was to hold and occupy the meadow was not proved. The memorandum of the 3rd of February, 1836, which is in Frampton's handwriting, does not mention the term during which the plaintiff is to hold the meadow, for which, in conjunction with the house and premises in the lease, the rent of £80 is to be paid, and no other evidence is given specifically applicable to that point. But I cannot, for that reason, consider that the plaintiff has not proved enough to support the allegation in his bill that the time for which he was to hold the meadow was to be [* 33] commensurate with his * lease of the house. His interest in every part of the meadow must have been intended to be the same. It could not have been intended that he should hold that part of the meadow upon which the house stood for one term and the residue of the meadow for another. And about the term for which he was to hold so much of the meadow as the house stood on there can be no doubt. But the reservation of one entire rent of £80 for the entire property, consisting of the house and premises in the lease of October, 1831, and of the meadow, are sufficient to determine the question. The £80 was to be paid for the whole and every part of the consolidated property and was to endure for the same period as to each part of that property. There is nothing to justify an apportionment of the rent, nor any guide for such apportionment. The whole must continue for the same time.

The next point, and one which was strongly urged upon me, was, that it appeared by the answer and by the deed, as to which the defendant had examined his only witness, that Frampton was not beneficial owner of the house and premises comprised in the lease; but only a trustee for others, and (to use Mr. Faber's expression) there was a want of mutuality in the agreement which this

No. 71. — *Sutherland v. Briggs*, 1 Hare, 33-35.

bill seeks to enforce. It was insisted that Frampton could not have compelled the plaintiff to accept a lease of the meadow, and therefore Frampton could not be compelled to grant such a lease to the plaintiff. I must observe, in the first place, that it is nowhere suggested that the plaintiff had notice of the trust character which it is now said that Frampton filled at the time of the agreement. Nor does it appear, even from the deed produced, that Frampton, in his character of trustee, could not lawfully have granted the lease of October, 1831. Nor does the deed appear necessarily to identify *the property comprised in it with the [* 34] house and premises in question in this cause. The objection in my opinion is not well taken. Frampton had clearly power to grant a lease of the meadow, for of that he was owner in fee, and he could not have been heard to say that he would not grant such lease only because he could not make a title to the rest of the property. The doctrine of this Court, which is commonly expressed by saying "contracts must be mutual," has no application to a case like this. A vendor cannot make a purchaser take an estate with a bad title, but the purchaser may compel the vendor to give him the estate with such title as he has. A party who has not signed an agreement relating to lands may enforce it against one who has signed it, although from want of his own signature he could not himself have been compelled to execute it.

The only remaining point in the defence, except that which I reserved at the outset, was, that the agreement between the parties was reduced into writing, and is contained in the memorandum of the 3rd February, 1836; and that, as the duration of the tenancy is not specified therein, the Court cannot introduce it into the agreement between the parties, for that would be to add a term by parol to a written agreement, which the Court cannot do. From what I have already said it will have been seen that I am of opinion that the memorandum of the 3rd of February, 1836, taken in connection with the facts of the case, to which I consider myself clearly at liberty to refer, does itself ascertain the intended duration of the plaintiff's tenancy of the meadow, although it does not mention it. Independently of this, although the bill is not very conveniently framed for the purpose, I think myself at liberty to read the bill as alleging a substantive agreement by parol on the part of Frampton to grant a lease of the * meadow for a term [* 35] commensurate with the plaintiff's interest in the house, at

an entire rent of £80 for the whole property. If the pleadings may be so read, there is nothing in law to prevent a plaintiff (who has proved an act of part performance taking the case out of the statute) from proving the parol agreement he has alleged, only because some of the terms of that agreement are in writing, and signed by the party charged. He may use the memorandum of the 3rd of February, 1836, in conjunction with the other evidence in the cause, for the purpose of proving the terms of the substantive parol agreement alleged in the bill. But for the reasons already stated it is unnecessary to go into that point, the memorandum being, in my opinion, sufficient in itself to ascertain all the terms of the agreement, including the term for which the lease of the meadow was to endure.

The only question which remains for consideration is that which I have hitherto supposed to have no place in the cause. Has the plaintiff sufficiently alleged in his bill and proved in the cause such an agreement as will entitle him to the decree he asks by his bill? I reserved this point for the last, because it was the point most strongly insisted upon by the defendant's counsel at the bar, and because I was unable at the hearing of the cause to satisfy myself what the agreement was which the bill alleged. I have since read the bill, and I will now state the two grounds, upon either of which I think the plaintiff's case sustainable.

The first ground is, that the bill does sufficiently allege an agreement by Frampton, before the plaintiff expended his money, to grant to the plaintiff a lease of the meadow, commensurate with

his interest in the house, as an inducement to, and consideration for, his doing * the repairs, alterations, and improve-

ments proposed by Frampton. The second ground is, that there was a sufficient consideration to support the agreement which was come to between the parties after the expenditure. I do not say that either of these propositions is alleged in the bill with the precision of which the case is capable, and which would have relieved the Court from all difficulty upon the subject. But I think the whole tenor of the bill bears out the construction I put upon it.

The bill, after noticing Mr. Frampton's proposal to the plaintiff as to the repairs, alterations, and improvements referred to, and stating the arrangement made between the plaintiff and Frampton, upon the plaintiff's suggestion, that the plaintiff should apply to

Lock to sell the meadow to Frampton, proceeds as follows: "That J. A. Frampton expressed his assent to such suggestion, and inquired if plaintiff thought that the said Mr. Lock would be disposed to sell the meadow, as if so he, J. A. Frampton, would certainly purchase it and attach it to the other premises; and J. A. Frampton ultimately requested plaintiff to see Mr. Lock, and to endeavour to effect an arrangement with him for the purchase of the meadow, and which plaintiff undertook to do; and it was then arranged between plaintiff and J. A. Frampton that the aforesaid projected alterations and improvements should not be commenced until the result of the negotiations with Mr. Lock should be known, he J. A. Frampton observing that, if he became the purchaser of the meadow, it might be desirable to take in part thereof as a garden, and also to increase the house by extending a part of the proposed new buildings beyond the boundary-line between the two properties, in which case the part so extended would necessarily project into, and be erected on, the meadow or some part thereof."

* Now, what sense am I here to put upon the word [*37] "*attach*." The plaintiff had the possession of the field at the time as tenant from year to year, and had suggested to Frampton, as a reason for purchasing the field, the improved value it would confer upon the house. The promise to attach the meadow to the house, when addressed to the lessee of the house and meadow, who was about to spend money upon the house, can have no rational interpretation but this, that the meadow should be so attached to the house that the two should be enjoyed together.

The bill then alleges, that, on the 18th of October, 1834, Frampton informed the plaintiff that the purchase of the meadow was completed, and in that letter he treated the meadow as part of the premises to be occupied by the plaintiff for the residue of the term of his lease. The bill further alleges, that the alterations and improvements in question could not have been made, unless it was contemplated and intended, as the fact was, that the meadow was thenceforth to be united to the house, and to be held and enjoyed therewith by the plaintiff for the residue of the term of his lease. The bill, then, after stating a meeting between the plaintiff and Frampton, at which the then projected alterations and improvements were discussed, proceeds as follows: "That, in so pointing out the said alterations and improvements to Mr. Dent, it was

distinctly stated and understood, that the same were to be made with reference to the field being attached to, and forming one occupancy with, the house and premises, and in such comprehensive and substantial a manner as that the same might be permanently beneficial thereto; and, accordingly, it was arranged, among other things, that, besides a part of the house being converted into a dining-room or parlour extending into the field as aforesaid, [* 38] * the whole of the said back part of the said house, forming a range of building, comprising the kitchen, wash-house, stable, and coach-house, should be entirely taken down and rebuilt on an enlarged scale, by extending the same along the whole length thereof into the said field."

There are numerous other passages in the bill to the same effect as those I have cited. Those, however, are sufficient to illustrate the grounds I go upon, in holding that this bill sufficiently alleges an agreement between the parties, that the meadow should be annexed to the house, for a term commensurate with the plaintiff's interest therein, before the plaintiff agreed to expend his money upon the premises.

Whether this be so or not, I am clearly of opinion that there was a sufficient consideration for the agreement, which is evidenced by the memorandum of the 3rd February, 1836.

In the course of the argument, the correspondence between the parties, which is in evidence, was much commented upon by the defendant's counsel. Now, without saying that that correspondence proves the plaintiff's case, I am safe in saying that it nowhere contradicts it. In fact, I think it strongly supports the plaintiff's case; for it manifestly treats the meadow and house as one concern, when the subject of the alterations and repairs is under discussion. But it is not in that point of view that I consider that correspondence as important; that importance principally consists in showing that it was upon Frampton's invitation that the plaintiff expended his money upon the premises.

The plaintiff is therefore entitled to a decree, according [* 39] to the prayer of his bill; but if the defendant * requires it,

I shall further declare, that a deed shall be executed for carrying into effect the agreement of the parties, and refer it to the Master to settle the same, in case the parties differ. The defendant must pay the costs of the suit to, and including, the hearing. I make no order now as to subsequent costs, because the conduct of the parties may influence the right to those costs.

Nos. 70, 71. — *Clinan v. Cooke*; *Sutherland v. Briggs*. — Notes.

Declare that the plaintiff, his executors, administrators, and assigns, is and are entitled to the tenancy and occupation of the field or piece of meadow land in the pleadings mentioned, until the expiration of the lease, dated the 10th of October, 1831; or the sooner determination thereof, by any act done or committed by the plaintiff, his executors, administrators, or assigns. And the defendant is to execute to the plaintiff, at the plaintiff's expense, a lease of the said field or piece of meadow land, for the term during which he is hereby declared entitled to the tenancy and occupation thereof. And the plaintiff is to execute, at his expense, a counterpart of such lease for the defendant. And by the consent of the defendant, it is ordered, that the rent to be reserved in respect of the said field or piece of meadow land shall be £9 per annum. And let it be referred to the Master in rotation, to settle the said lease of &c., in case the parties differ about the same; and in settling the said lease, the Master is to have regard to the lease of the 10th of October, 1831. And let the injunction be continued, and let the Master take an account of what is due from the plaintiff to the defendant, in respect of the arrears of rent of the said field, &c., after the rate of £9 per annum. And let the Master tax the plaintiff his costs of this suit up to, and including, the hearing of the same. And let what the Master shall find to be the amount of such arrears of rent, together with the * expenses [* 40] of the said lease and counterpart, be deducted from the plaintiff's costs of this suit, when so taxed; and (providing for the costs being less than the arrears of rent and expenses of the lease) let the residue of such costs be paid by the defendant to the plaintiff. And any of the parties are to be at liberty to apply.

ENGLISH NOTES.

Acts done preparatory to but not strictly in performance of the contract are not acts of part performance. For instance, admeasurement of the lands, preparation of a draft lease, are not such acts; *Hawkins v. Holmes* (1721), 1 P. Wms. 770; *Pembroke v. Thorpe* (1740), 2 Swanst. 437, n.; *Whaley v. Baguel* (1765), 1 Bro. P. C. 345; *Phillips v. Edwards* (1864), 33 Beav. 440. In the last-mentioned case, land was vested in a trustee for the separate use of Mrs. Edwards, and the deed gave the trustee a power to lease at the request in writing of Mrs. Edwards. She and the trustee agreed by parol to let the property to Phillips, and a lease was prepared, approved of and executed by the trustee and Mrs. Edwards; but before their solicitor had parted with it and before

Phillips had executed it, Mrs. Edwards recalled her assent to it. It was held that, in absence of her request to grant a lease in writing, she was not bound, and that no acts had been done in part performance which would take the case out of the Statute of Frauds. With this may be contrasted the case of *Parker v. Smith* (1845), 1 Coll. 608. There the lease of a colliery was in the name of a firm consisting of four partners, two of whom were the sons of the lessor. The lessor agreed to grant a new lease on reduced terms on condition that the old lease was surrendered; and one of his sons and another partner retired from the business. The two partners retired and the old lease was surrendered. It was held that this was sufficient part performance in order to obtain specific performance of the parol contract for the new lease at a reduced rent.

Acts of part performance are evidence of a preceding parol contract; but they cannot create a contractual obligation where none existed before; *Maddison v. Alderson* (1883), 8 App. Cas. 476, 52 L. J. Q. B. 737, 49 L. T. 303, 31 W. R. 820. There an intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land. He signed a will carrying out this promise, but it was not attested. After his death, the woman brought an action against the heir of the intestate for a declaration that she was entitled to a life estate in the land. It was decided that there was no contract; and even if there was, her service was not unequivocally referable to any contract, and was not such a part performance as to take the case out of the Statute of Frauds.

The acts relied upon as part performance must without mistake or doubt refer to a contract, and must not be inconsistent with the contract sought to be enforced. For instance, mere continuance in possession by a lessee is equivocal as evidence of an agreement for a new lease, and is not considered as an act of part performance; *Wills v. Stradling* (1797), 3 Ves. 378, 4 R. R. 26; *Frame v. Dawson* (1808), 14 Ves. 386, 9 R. R. 304. But continuance in possession with expenditure of money or payment of an increased rent is an act of part performance of a contract for a new lease; *Wills v. Stradling* (*supra*), *Nunn v. Fabian* (1866), L. R., 1 Ch. 35, 35 L. J. Ch. 140. This last-mentioned case was followed in *Conner v. Fitzgerald* (1883), 11 L. R. (Ir.) 106.

The contract allowed to be proved by acts of part performance must be such as the Court can specifically enforce; *Kirk v. Bromley Union* (1848), 2 Phil. 640. There a builder agreed by a written contract under seal, with a board of guardians, to build a workhouse according to a defined plan for a fixed sum. It was expressly provided that no

 Nos. 70, 71. — *Clinan v. Cooke* : *Sutherland v. Briggs*. — Notes.

allowance was to be made to the builder for additional work, unless the same should be ordered in writing. On a bill to compel payment for some additional works done without any written order, but with the knowledge of the board, it was held that the subject-matter of the claim was not within the jurisdiction of the Court, and therefore the doctrine of part performance had no application. In *Crompton v. Varna Railway Co.* (1872), L. R., 7 Ch. 562, 41 L. J. Ch. 817, the agent of a railway company made a contract with the contractor for the line, that he would build on the land of the company certain cottages more substantial than would be required for his own purposes, and would leave them for the use of the company, and the company would pay him £5000. The cottages were built and left, and the agent of the company agreed with the contractor that he should be paid £500 a year for the cottages by way of rent, with an option to the company to purchase them for £5000. This agreement was not under seal, although by the enabling act all contracts above £500 were required to be under seal. The rent was paid for some years, and then the company refused to pay. It was held that the Court of Chancery had no jurisdiction to entertain a suit for specific performance of such a contract; and therefore that the doctrine of part performance had no application.

The act of part performance must be such as to render it fraudulent for the defendant to screen himself behind the Statute of Frauds; *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167, *per* Lord COTTENHAM at p. 177; *Caton v. Caton* (1867), L. R., 2 H. L. 127, No. 24, p. 256, *ante*.

Payment of money is not an act of part performance; *Clinan v. Cooke* (No. 70, *supra*); *Buckmaster v. Harrop* (1803), 7 Ves. 341, 6 R. R. 132. Nor is marriage an act of part performance of a contract to make a settlement upon marriage, so as to take the case out of the section relating to "an agreement made upon consideration of marriage;" *Lassence v. Tierney* (1849), 1 Mac. & G. 551; *Caton v. Caton* (*supra*).

Though marriage itself is not part performance, acts connected with marriage, such as execution of a settlement by the husband in pursuance of a parol agreement with the wife's relatives (*Hammersley v. De Biel* (1845), 12 Cl. & Fin. 45), or letting the husband into the possession of the lands intended to be settled (*Sarcome v. Pinniger*, (1855), 3 De G. M. & G. 571, *Ungley v. Ungley* (1877), 5 Ch. D. 887, 46 L. J. Ch. 854), are acts of part performance.

Expenditure of money on lands is part performance of an agreement for a lease or for purchase; *Lester v. Forcroft* (1701), 1 Colles's P. C. 108, 2 White & Tudor Lead. Cas.; *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167; *Sutherland v. Briggs* (No. 71, *supra*); *Farrall v. Davenport* (1863), 3 Giff. 363; *Norris v. Jackson* (1863), 3 Giff. 396.

 No. 72. — *Flight v. Booth.* — Rule.

Taking possession is an act of part performance; *Shillibeer v. Jarvis* (1859), 8 De G. M. & G. 79; *Powell v. Lovegrove* (1859), 8 De G. M. & G. 357; *Flanagan v. Great Western Railway Co.* (1869), L. R., 7 Eq. 116, 38 L. J. Ch. 117; *Coles v. Pilkington* (1875), L. R., 19 Eq. 175, 44 L. J. Ch. 381; *Shepherd v. Walker* (1875), L. R., 20 Eq. 659, 44 L. J. Ch. 648.

AMERICAN NOTES.

This doctrine is nearly universal in this country. Pomeroy's Equity Jurisprudence, § 1409; Lawson on Contracts, § 475; *Glass v. Hulburt*, 102 Massachusetts, 24; 3 Am. Rep. 418; *Neale v. Neales*, 9 Wallace (U. S. Supr. Ct.), 1; *Bigelow v. Armes*, 108 United States, 10; *Wetmore v. White*, 2 Caines' Cases (New York), 87; 2 Am. Dec. 323; *Ryan v. Dox*, 34 New York, 307; 90 Am. Dec. 696; *Overstreet v. Rice*, 4 Bush (Kentucky), 1; 96 Am. Dec. 279; and cases cited by Mr. Lawson from Maryland, Michigan, New Jersey, Georgia. See also *Emanuel v. Hayes*, 102 Missouri, 186; 22 Am. St. Rep. 769; *Welch v. Whelpley*, 62 Michigan, 15; 4 Am. St. Rep. 810; *Shahan v. Swan*, 48 Ohio State, 25; 29 Am. St. Rep. 517; *Cutler v. Babcock*, 81 Wisconsin, 195; 29 Am. St. Rep. 882; *Grant v. Grant*, 63 Connecticut, 530; 38 Am. St. Rep. 379.

The contrary rule has been adopted in *Bor v. Stanford*, 13 Smedes & Marshall (Mississippi), 93; 51 Am. Dec. 142; *Dunn v. Moore*, 3 Iredell Equity (Nor. Car.), 364; *Ridley v. McNairy*, 2 Humphrey (Tennessee), 174, which seem to disregard the maxim that the Statute of Frauds shall not be wielded to work a fraud. In the *Mississippi case* the Court observe: "The doctrine which lets in one equitable exception opens the door for the whole innumerable series. There is no consistent medium course. Either all the equitable exceptions introduced by the English Courts must be admitted, or we must adhere to the plain provisions of the statute."

SECTION XI. — *Rescission of Contracts on ground of Misrepresentation, etc.*

No. 72. — *FLIGHT v. BOOTH.*

(1834.)

RULE.

MISREPRESENTATION by one party of a fact essentially entering into the inducement upon which the other party enters into the contract, is a ground on which the latter may avoid or rescind the contract.

Flight v. Booth.

1 Bing N. C. 370-379.

Contract. — Sale of Interest in Land. — Misrepresentation. — Rescission.

The particulars of sale of certain leasehold premises in Covent Garden [379] stated that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter."

The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter, and many others, and the sale of coals, potatoes, or any provisions: *Held*, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract.

This cause having, by consent of parties, been referred to arbitration under an order of *nisi prius*, the arbitrator found, in a special award —

That the declaration in this action was for money paid by the plaintiff for the defendant's use, and for money received by the defendant to the plaintiff's use, to which the general issue was pleaded; and the action * was brought to recover the [*371] sum of £100, paid by the plaintiff as a deposit on the purchase by auction of certain premises situated in the Piazza, Covent Garden, and held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale, on the back of which the plaintiff had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease, "the lessee is to insure the premises for £3000, and no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or working hatter." Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. By the last condition it was, among other things, provided, that

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if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor. The sale took place, and the contract was signed, on the 16th of May, 1833. On the 10th of June an abstract of title was delivered by the vendor's solicitor to the plaintiff's, which contained the following note of the proviso hereinafter set out: "Proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a license for that purpose under the hand of the Duke of Bedford first had and obtained." At the [* 372] date * of the sale and contract the lease was a valid and subsisting one. The plaintiff's solicitor made several objections upon the abstract to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves, or satisfactorily removed: but the plaintiff's solicitor never required to see the lease. And on the 15th of July the plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought the action in question.

At the trial of the cause the lease was produced, and appeared to contain the following proviso: "Provided always, that if the yearly rent hereby reserved, or any part thereof, shall be unpaid for fifteen days next after any of the said days of payment; or if, at any time during the continuance of the said term, the trades or businesses of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be used or exercised in or upon the said demised premises, or any part thereof; or any auctions or public sales of household goods, or other things, be made in or upon the said premises, or any part thereof; or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatever; or if the lessees, their executors, administrators, or assigns, shall, at any time during the last seven years of the said term, assign or set over this indenture, or any part of the premises, and their estate and interest therein, without a license for that purpose under the hand of the said duke, his heirs or assigns; or on breach or non-performance of any or either of the covenants and agreements hereinbefore contained; then and thence-

forth, and in either of *such cases, it shall be lawful for [* 373] the said duke, his heirs and assigns, to re-enter."

It was not proved before the arbitrator that the plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the plaintiff's counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease; and found that none such was proved against him. No claim was made by the defendant, before the arbitrator, for damages for the non-performance of the plaintiff's contract, nor any attempt to compel a specific performance.

Upon these facts, the arbitrator found that the plaintiff had good cause of action against the defendant, and ordered that the verdict should be reduced to the sum of £100; for which sum, and the costs of the cause when taxed, he directed that the plaintiff should be at liberty to sign judgment on the sixth day of Trinity Term then next ensuing, and not before. And if the facts above set out did not authorize the plaintiff, in the opinion of the Court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the defendant, and that he should be at liberty to enter up the judgment for himself.

Taddy, Serjt., obtained a rule *nisi* to enter up judgment for the defendant under this award, contending, that if there had been any misdescription of the premises at the auction, it was a misdescription originating from inadvertence, and not from fraud or any intention to *mislead; and that, under such circum- [* 374] stances, though the plaintiff might require compensation for any difference in value between the representation and the reality, yet he could not rescind the contract. *Duke of Norfolk v. Worthy*, 1 Camp. 337; 10 R. R. 749; *Wright v. Wilson*, 1 Mood. & Rob. 207; *Stewart v. Alliston*, 1 Mer. 26; 15 R. R. 81; *Trower v. Newcome*, 3 Mer. 704; 17 R. R. 171.

Wilde, Serjt., showed cause. Where the misdescription, whether proceeding from intention or inadvertence, is such that the purchaser finds himself in possession of a thing materially differing from that which he proposed to buy, he is at liberty to rescind the

contract. *Jones v. Edney*, 3 Camp. 285; 13 R. R. 803; *Waring v. Hoggart*, 1 Ry. & Mood. 39; *Coverley v. Burrell*, 5 B. & Ald. 257; *Brealey v. Collins*, 1 Young. 317. Here the plaintiff could never have inferred from the particulars prohibiting offensive trades and the business of coffee-house keeper and latter, that he should be prevented from selling fruit or vegetables in a district devoted to that line of business. There is no principle upon which, in such a case, compensation can be calculated. *Sherwood v. Robins*, 1 M. & M. 194. The object of the purchaser is entirely defeated, and he can only be indemnified by rescinding the contract. In *Tomkins v. White*, 3 Smith, 439; 8 R. R. 735, Lord ELLENBOROUGH said, "A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected of them." [* 375] * In *The Duke of Norfolk v. Worthy* the jury found that the misdescription was wilful. *Trower v. Newcome* only decided that *bona fides* is not to be impeached by the mere babble of an auction room. But *Stewart v. Alliston* is in favour of the plaintiff.

Taddy and Cresswell in support of the rule. As to the possibility of the plaintiff's intending to deal in vegetables, the alleged misdescription could not have misled him, for the house is not described as situated in the market, but in the piazza; and the rule, *caveat emptor*, applies. The lease was read by the auctioneer, and the plaintiff might have required to inspect it. Even where property is held under a lease containing covenants contrary to custom, a purchaser is not entitled to compensation if he knew of the existence of the lease. *Hall v. Smith*, 14 Ves. 426; 9 R. R. 313; *Walter v. Maunde*, 1 Jac. & Walk. 181. 21 R. R. 141. The arbitrator having found that there was no fraud, the plaintiff could not rescind the contract. *Oldfield v. Round*, 5 Ves. 508; 5 R. R. 107; *Scott v. Hanson*, 1 Sim. 13. If there be any misdescription, the conditions of sale expressly entitle him to compensation, and *Drewe v. Hanson*, 6 Ves. 675, shows the principle on which it may be estimated.

Cur. adv. vult.

TINDAL, C. J. The question in this case arises upon the special facts found by the arbitrator on his award, and it is this, whether the plaintiff was at liberty under the circumstances stated in the award to consider the contract of sale to be rescinded. For if rescinded, the plaintiff is entitled to recover the deposit as money had and received to his use; but if the contract is still *unrescinded and open, the present action is not maintain- [* 376] able, but whatever injury the plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale.

Now the arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated either from ignorance, inadvertence, or accident.

The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether, or whether it was such as was contemplated by the sixth condition of the printed particulars of sale, by which it was provided, that "if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way."

It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, *how- [* 377] ever gross, shall avoid the contract, but shall form the subject of compensation only, *Duke of Norfolk v. Worthy, Wright v. Wilson*; whilst other cases lay down the rule that a misdescrip-

tion in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, *Waring v. Hoggart*, and *Stewart v. Alliston*. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale, as in *Jones v. Edney*, where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added, "that no offensive trades are to be carried on; the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude [* 378] that he was not prevented by the terms of the * lease from carrying on any trade in it, except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or a herb-seller, in a house situated in the piazza of Covent Garden market, much less that the lease was to become void if the house so situated was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us, that a lease which is described as containing a restriction against offensive trades, and a lease con-

No. 72. — *Flight v. Booth*, 1 Bing. N. C. 378, 379.

taining restrictions not only against offensive trades, but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract; and that where a man purchases by the former description it may very well be supposed that he would not have become the purchaser whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had contained the larger and more extensive restrictions; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case. The condition that the parties are to pay or allow a proportionate value according to the average, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature; but how will it govern such a misstatement as the present? What *action at law can [*379] be framed upon it? It would at least involve the purchasers in great difficulties. The lease being in the hands of the vendor he had peculiarly and indeed exclusively the means of knowledge of the exact restrictions contained in it; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale. *Jones v. Edney*, 3 Camp. 285; 13 R. R. 803. And as to any laches on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered, and then the suspicion would come too late; for the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different; but a waiver should have been found by the arbitrator; and so far as can be inferred from the facts found upon the award the lease was never seen by the purchaser nor the objection ever taken until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

Upon the whole, we see no reason to be dissatisfied with the arbitrator's award, and therefore the rule for entering the verdict for the defendant must be discharged. *Rule discharged.*

ENGLISH NOTES.

Lord BRAMWELL in *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 349, 58 L. J. Ch. 864, 61 L. T. 265, 38 W. R. 33, speaking of the rights of a person injured by an incorrect statement inducing a contract, observes, "To these may now be added the equitable rule that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission." The *dicta* of Lord ELDON in *Mortlock v. Buller* (1804), 10 Ves. 292, 306, 7 R. R. 417, 422, and of Lord ERSKINE in *Halsey v. Grant* (1806), 13 Ves. 73, 76, 9 R. R. 143, 145, put the doctrine of specific performance with compensation on a clear basis. In the former case Lord ELDON referred to an observation of Lord THURLOW upon the ground of the doctrine, namely, that there may be some small mistake or inaccuracy, — as that a leasehold interest represented to be for twenty-one years may be for twenty years and nine months, — that would defeat an action at law; and yet lie so closely in compensation that it ought not prevent the execution of the contract. But Lord ELDON further observed, "That has been extended to a great length in this Court." In the latter case Lord ERSKINE said: "If a Court of Equity can compel a party to perform a contract, substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that, from which he stipulated, without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain. . . . Equity does not permit the forms of law to be made instruments of injustice, and will interpose against parties, attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where therefore advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-nine years, he must be nonsuited in an action: but equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation."

The following are some of the cases in which specific performance with compensation has been ordered or refused:—

In *Fordyce v. Ford* (1794), 4 Bro. C. C. 494, the vendor sued upon a contract for the sale of "freehold estate with leasehold adjoining." The fact was that out of the seventy acres contracted for, only eight

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were freehold, and the rest leasehold. The Court refused to order specific performance with compensation. In *Calcraft v. Roebuck* (1790), 1 Ves. Jr. 221, 1 R. R. 126, specific performance with compensation was ordered of a contract for the sale of 186 acres described as freehold, out of which two acres were held under a yearly tenancy. In *re Fawcett and Holmes* (1889), 42 Ch. D. 150, 58 L. J. Ch. 763, 61 L. T. 105, there was a contract for the sale of a house and builder's yard described as containing 1372 square yards and a clause for compensation in the event of misdescription. The contents of the property were only 1033 square yards. Specific performance with compensation was ordered.

An express condition for compensation in case of misdescription will not make the contract good if the misdescription is essential. In *Dobell v. Hutchinson* (Ex. Ch. 1835), 3 Ad. & El. 355, there was a contract for the sale of leaseholds with such a condition. The property was described as held for a term of twenty-three years, at a rent of £55 and as comprising a yard, which was in fact not comprehended in the property held for the term at £55, but was held by the vendor on a yearly tenancy at an additional rent. The yard was essential to the enjoyment of the leasehold property. It was held that, the yard being proved to be an essential part of the premises and being held only from year to year, instead of a term of twenty-three years as stated in the particulars, and at a separate rent, the defect was clearly not matter of compensation. So a right of way, which rendered useless a close advertised for building purposes has been held to be outside the condition for compensation; *Dykes v. Blake* (1838), 4 Bing. N. C. 463. So, in *Shackleton v. Sutcliffe* (1849), 1 De G. & S. 609, where land was contracted to be sold under a particular describing it as fit for building, whereas it was subject to easements which would have materially interfered with its use as building land, it was held, notwithstanding a clause providing for compensation, that specific performance subject to compensation could not be enforced on the purchaser. In *Madeley v. Booth* (1852), 4 De G. & S. 718, where the contract was for sale of a lease, it was held, notwithstanding a clause providing for compensation, that the purchaser could not be compelled to take an underlease with compensation. The same point has been similarly decided by the Court of Appeal, affirming the decision of KAY, J., in *Re Beyfus and Master's contract* (1888), 39 Ch. D. 110, 59 L. T. 740, 37 W. R. 261. In *Price v. Macaulay* (1854), 2 De G. M. & G. 339, one of the lots sold by auction was described as to be sold with a reservoir and waterworks yielding an income of £60 per annum; and it appeared that this income was made by conveying the water to certain houses over a piece of land belonging to strangers and over which the vendor had only a license from year to year at a rent so as to convey the water. It was held, notwithstanding

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a clause providing for compensation, that the misdescription barred the vendor's right of enforcing specific performance.

Misrepresentation, in order to avoid a contract, must be an untrue representation or statement of facts made by a party to the contract or by his agent, and not by a stranger. For instance, if the directors of a company issue false reports, and a third person contracts with shareholders, the contract remains good; *Ex parte Worth* (1859), 4 Drew. 529; *Peek v. Gurney* (1871), L. R., 6 H. L. 377.

In order to obtain rescission of the contract on the ground of misrepresentation it is not necessary to show knowledge by the party making the representation that the fact represented was untrue. There are numerous illustrations of this statement in the cases where an action is brought against a company for rescission of the plaintiff's contract of membership, on the ground of misrepresentations in the prospectus. A simple instance is the case of *Reese River Silver Mining Co. v. Smith* (1869), L. R., 4 H. L. 64, 39 L. J. Ch. 849. It is to be observed that this class of cases admits *concealment* as well as *misstatement* as a ground of rescission, for the reason mentioned in the next rule (p. 759, *post*). In *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 51 L. J. Ch. 113, the plaintiff, by misrepresentations as to the value of his practice as a solicitor, had induced the defendant to buy his house, together with the goodwill of his business as a solicitor. The plaintiff claimed specific performance of the contract. The defendant put in a counterclaim for rescission of the contract and for damages on the ground of the misrepresentation. It was not pleaded or proved that the plaintiff knew that the representations were untrue. The Court of Appeal held that the defendant was entitled to have the contract rescinded, but not to damages. The same principle was followed in *Adams v. Newbigging* (*Newbigging v. Adams*, 1888), 13 App. Cas. 308, 57 L. J. Ch. 1066, 59 L. T. 267, 37 W. R. 97.

It must be shown that the misrepresentation was made by the one party with the intention of inducing the other party to act upon it; and that he did act upon it; *National Exchange Co. v. Drew* (1855), 2 Macq. 103; *Peek v. Gurney* (1871), L. R., 6 H. L. 377, 43 L. J. Ch. 19, 22 W. R. 29. And if the party setting up misrepresentation as defence to an action on the contract, has relied on his own knowledge or resorted to other means of knowledge, and did not contract on the sole strength of the misrepresentation, he must fail in his defence; *Attwood v. Small* (1841), 6 Cl. & Fin. 232; *Jennings v. Broughton* (1858), 5 De G. M. & G. 126.

A case very similar to the principal case is that of *Re Davis & Currey* (1889), 40 Ch. D. 608, 58 L. J. Ch. 143, 60 L. T. 100, 37 W. R. 217. The plaintiff had purchased at an auction property described as "leasehold business premises." After the sale he discovered that the lease

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contained a restriction against the premises being used as a public house. It was held by STIRLING, J., that the plaintiff was entitled to a declaration that the title was not such as he could accept. The learned Judge cited at length the principles laid down in the judgment of TINDAL, C. J., p. 751, *supra*.

AMERICAN NOTES.

The principal case is cited by Mr. Lawson as adjudging that "a misdescription of the premises sold, or of the liens to which they are subject, though made without any fraudulent intent, will vitiate the contract." But he observes: "But in the United States the subject-matter of the contract for the sale of land does not require any greater degree of good-faith on the part of the vendor than is required on the sale of any other class of property. 'The rule excusing parties from making disclosures in personalty applies equally in sales of real estate.'" Citing *Bigelow on Fraud*, 33; *Williams v. Spurr*, 24 Michigan, 335. See *Drake v. Collins*, 5 Howard (Mississippi), 253.

In *Williams v. Spurr*, *supra*, it was held that a Court of equity would not set aside a sale of lands, at the instance of the plaintiff, who was a dealer and speculator in iron lands, and had discovered iron ore upon the lands in question, and had entered and bought them for iron lands, and during the negotiations for sale had mentioned that there was a very good show of iron upon them, to enhance the price, and finally sold them on that basis at a price largely in excess of their value as timbered lands, and against defendant, who falsely pretended, after examination of the lands and discovery of their value for iron, that he wished to buy them for the timber, and concealed his discovery of the iron, and finally bought them at a price below their value as iron lands. The Court said: "They were not only at liberty to conceal from complainant any opinion they might have formed of the value of the ores, but any discoveries they might have made, so long as they did nothing to prevent him from making any examination he should choose to make, or from adopting his own course to obtain such information as he might choose to obtain at his own expense and in his own way."

The principal case is cited in *Kerr on Fraud*, pp. 63, 92, 243. Dr. Bigelow (*Fraud*, § 2), says: "The rule excusing parties from making disclosures on sales of personalty applies equally in sales of real estate."

This doctrine was applied in *Harris v. Tyson*, 21 Pennsylvania State, 317; 64 Am. Dec. 661, in the case of one who bought lands on which he knew there were mines, without disclosing that fact. "The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself." By BLACK, J.

In *Williams v. Beazley*, 3 J. J. Marshall (Kentucky), 578, it was said *obiter*, after admitting the general doctrine: "This doctrine however will not justify the purchaser in withholding from the seller knowledge of advantages, or value possessed by the property, owing to any recent discovery, as a valuable mine of mineral, of which the purchaser is informed, and the seller ignorant at the time of the contract."

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In *Law v. Grant*, 37 Wisconsin, 548, the seller of land knew that the purchaser was led to offer an extravagant price for it based on the mistaken opinions of persons who had walked over it, and from that observation deemed it rich in minerals, but the purchaser was held to his contract.

In *Smith v. Beatty*, 2 Iredell Equity (Nor. Car.), 456; 40 Am. Dec. 435, it was held that "a vendee, who knows that there is a gold mine on the land, is not compelled to disclose that fact to the vendor."

In *Livingston v. Peru Iron Co.*, 2 Paige Chancery (New York), 390, the vendee applied to the vendor to purchase a lot of wild land, representing that it was worth nothing except for a sheep pasture, while in fact he knew there was a valuable mine on it, of which the vendor was ignorant. This was held such a fraud as would avoid the sale. WALWORTH, Chancellor, observed: "I am not aware of any case in our own Courts or in England, where the simple suppression by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale on the ground of fraud. The rule is different where the purchaser applies to a Court of equity to enforce the specific performance of an agreement. In such a case this Court will not enforce the specific performance of a contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law. It has even been questioned by many whether the suppression of a material fact by the one party, of which fact he knew the other party to be ignorant, was not of itself sufficient to avoid the contract on the ground of fraud. Thus in *Perkins v. McGarock*, Cooke, 417, the Court of Errors and Appeals in Tennessee, say it is a sound principle of equity that each party to a contract is bound to disclose to the other all he knows respecting the subject-matter materially affecting a correct view of it, unless common observation would have furnished the information. They also say that neglect to disclose facts within the knowledge of one party and not of the other would in equity be a concealment, which is both immoral and unjust. Although our Courts have not gone that length, yet even in this State, very slight circumstances, in addition to the intentional concealment of a fact, have been considered sufficient to constitute a fraud upon the other party."

In *Bowman v. Bates*, 2 Bibb (Kentucky), 47; 4 Am. Dec. 677, a person discovered a valuable salt spring on another's land, and bought the tract from him at an ordinary price, concealing his discovery. The sale was set aside for that reason. Of this case Mr. Pomeroy says: "One cannot help admiring the stern morality of this decision, even if it be not sustained by the current of authority." But in this case there was proof of artifice on the part of the vendee to prevent the vendor's agent from giving his principal information of the discovery, amounting to an attempt to bribe or corrupt him, and false and fraudulent declarations that the salt "was not worth anything." One Judge dissented.

 No. 73. — *Venezuela Ry. Co. v. Kisch*, L. R., 2 H. L. 90. — Rule.

No. 73. — VENEZUELA RAILWAY COMPANY *v.* KISCH.KISCH *v.* VENEZUELA RAILWAY COMPANY.

(1867.)

No. 74. — ERLANGER *v.* NEW SOMBRERO PHOSPHATE COMPANY.NEW SOMBRERO PHOSPHATE COMPANY *v.* ERLANGER

(1870.)

RULE.

A duty to disclose material facts may arise by reason of a fiduciary relation between the parties. Where there is such a duty on the one party the contract may be avoided or rescinded by the other on the ground of concealment of a material fact.

A company issuing a prospectus on the faith of which persons are invited to join the company, lies under the duty of disclosing all material facts within the knowledge of their agents, the authors of the prospectus, which might reasonably have deterred those persons from taking shares.

Promoters of a company stand in a fiduciary relation to the company, and when promoters (as vendors or otherwise) make a contract with the company, they are bound to disclose all facts which could reasonably influence a party contracting with them (as purchasers or otherwise) in making the contract.

Venezuela Railway Company (Appellants) v. Kisch (Respondent).**Kisch v. Venezuela Railway Company.**

L. R. 2 H. L. 99-126 (s. c. 36 L. J. Ch. 849, 16 L. T. 500, 15 W. R. 821).

Company — Prospectus — Misrepresentation.

99]

No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company.

The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.

Where there has been fraudulent misrepresentation or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry.

But he must apply for relief without delay when the true character of the statements in the prospectus has been disclosed to him.

[100] Where a prospectus described a contract for the construction of a line of railway as entered into at "a price considerably within the available capital of the company," and the facts were that from the nominal capital of £500,000 were to be deducted £50,000 as the price of purchasing the concession to make the railway, and the contract price for making it was £420,000, the representation was held to be untrue and deceptive.

This was an appeal against a decision of the LORDS JUSTICES, by which an order of Vice-Chancellor Sir JOHN STUART had been reversed.¹

In the year 1856, the Legislature of Venezuela, with a view to establish railways there by the aid of foreign adventurers passed a law authorizing the executive government to conclude contracts for the construction of certain lines of railway to be called "The Central Railroad of Venezuela," giving, of course, certain advantages to those who should enter into such contracts. On the 18th of January, 1857, a contract was entered into between the secretaries for the interior, for justice, for the treasury, and for foreign relations, of the one part, and certain persons forming a financial company, and called "concessionaries," on the other, by which the latter bound themselves to construct certain railways on the terms mentioned in the contract. The construction of the railways was at first prevented by the existence of a war, which, having come to an end, the period for commencing the works was fixed for the 31st of July, 1864. One of the terms of the

contract required the deposit of £20,000 as "caution [* 101] money" for the commencement of *the works within twelve months after that date. The original concessionaries ultimately sold the concession, such of the works as had been commenced, and the plant thereof, to the appellants, the promoters of the present company, the Central Railway Company of Venezuela, Limited, for the sum of £50,000. The company

¹ For report of case in the Court below see 3 De G. J. & S. 122.

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formed by the appellants was, in July, 1864, registered under the Companies Act, 1862, and the memorandum of association stated that the objects of the company were the constructing, maintaining, managing, and working railways in Venezuela, the first section of which was to be from Puerto Cabello to San Felipe, a distance of fifty-four miles, the supplying the plant, acquiring concessions from the government, &c., and the capital was stated to be £500,000 in 10,000 shares of £50 each. The prospectus issued by the appellants set forth that, among other advantages enjoyed by the company, there was a government guarantee to the shareholders of 9 per cent. per annum, for twenty years, on the capital employed, amply secured by a mortgage of 10 per cent. on the import duties of La Guayra and Puerto Cabello, together with $2\frac{1}{2}$ per cent. guaranteed by the contractor during the construction of the line, and that the interest would run from the commencement of the works. The prospectus represented that Venezuela possessed perhaps the most prolific soil in the world; that tens of thousands of acres awaited occupation; that the railway would pass through a district most productive in coffee, cocoa, cotton, hides, indigo, &c., and richly agricultural; so that "a large and permanent traffic will be at once secured to the company," and that the government of the republic had bound itself not to grant, for a period of twenty-five years, any other concession for the construction of a railway in the direction of the Central Railway. The prospectus went on thus to describe the privileges secured to the company:—

1. "A guarantee of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of La Guayra and Puerto Cabello."

4. "A free grant of all lands required for the construction of the railways, and for the stations and other buildings required to be executed."

5. "A free grant of 30,000 acres of land, in addition to the above, * in the provinces through which the rail- [*102] way will pass, and for which land warrants will be issued to the company on the completion of the line."

As to the contractor, the prospectus set forth: "A contract has been entered into by the company with a responsible contractor, based upon surveys, plans, and sections approved by the govern-

ment, for the completion of the line from Puerto Cabello to San Felipe, including stations and rolling stock, at a price considerably within the available capital, and the works will be commenced forthwith. Security has been taken for the due fulfilment of the contract. The contractor, also, in consideration of receiving a large quantity of timber along the line for his use, guarantees $2\frac{1}{2}$ per cent. on the paid-up capital during the construction of the works."

The respondent received a copy of the prospectus in the ordinary way by post. Attached to it was the common form of application for shares, containing the usual words, "I agree to be bound by all the conditions and regulations contained in the memorandum and articles of association." He paid, on the 13th of July, the sum of £100 into the bankers of the appellants, and then signed the form of application for 100 shares, and forwarded it. The shares were allotted to him at once. With this letter of allotment, dated 14th of July, came a demand on him to pay the farther sum of £2 per share. On the 20th of July he paid that call, but before doing so, called at the office of the company, had an interview with the secretary, and asked that the number of shares allotted him might be reduced to twenty. On the 25th of July the secretary wrote to say that the directors could not comply with his request, adding, "but there will be no difficulty in your disposing of them on the Stock Exchange." In September a farther call of £2 per share was made on the respondent, which, however, he did not answer, and the solicitors for the appellants applied to him on the subject by letter on the 11th of November. On the following day, the respondent's solicitor applied for permission to inspect the concessions and contracts referred to in the prospectus. This application was granted, and he and the respondent examined these documents on the 22nd of November. The call was not paid, and on the 15th of [* 103] December, 1864, the respondent owed for * unpaid calls, and for interest thereon, the sum of £707 18s. 2d., and an action was brought against him in the Court of Common Pleas to recover the amount. The declaration was delivered on the 26th of January, 1865, and on the 28th of January the respondent filed his bill in Chancery, in which he set forth the circumstances of his becoming a shareholder in the company, alleged untruthfulness in the representations made in the prospectus, the discovery

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of certain facts of which he was ignorant when he applied for shares, and that he would not have taken the shares if he had known these facts; and he prayed, therefore, that he might be released from the contract on account of the fraudulent misrepresentations of the directors, that they might be ordered to repay to him the deposit and the calls paid by him, with interest and expenses, and he offered to return them the said shares; and he farther prayed that they might be restrained from proceeding in the action.

The representations of which he especially complained were the statements as to the capital of the company, from which all mention of the £50,000 for the purchase of the concession was omitted, while the contract for the construction of the line was made for £420,000, thus leaving no more than a possible balance of £30,000 for all contingencies; the statements as to the grants of land, as to the guarantie of 9 per cent., and as to the way in which that amount of interest was secured on the imports of Puerto Cabello and La Guayra. He also insisted that there had been great and material misrepresentations as to the contractor, his duties and liabilities.

Evidence was taken on both sides, and the various documents were produced.¹ The authority given by the Legislature to the government of Venezuela, of April, 1856, was thus set forth: — “The executive power is authorized, in order that, in the name of the nation, and as far as ten years, it guarantees the interest up to 7 per cent. on the capital which, during this time, may be employed in railroads; but, in case that the roads shall not be producing any interest on account of any causes imputable to the company, the nation shall not be obliged to pay the said interest.” * Article 17 of the contract (made in January, [* 104] 1857) was in these terms: “The executive power, in the name of the nation, guarantees, for ten years, as a minimum, the interest of 7 per cent. annually, in favour of the capital which, during this time, may be employed in the railroads, while these do not produce it from a cause not imputable to the company; and, it being understood that, from the time when they may produce any, the nation shall not be bound to pay in this

¹ The documents are quoted as given in the printed papers laid before the House. The originals were not printed. The translations are very unsatisfactory, and in some instances hardly intelligible.

time, except what may be wanting to complete the 7 per cent. guaranteed."

By an authoritative article of October, 1858, called "An Explanation of the last-mentioned Contract," it was declared (Article 7), "That the interest of which Article 17 speaks shall not be paid except upon the sums really and actually laid out upon the railroads; . . . and, whatever may be the amount of the sum employed in them, the assistance of the government for the payment of the 7 per cent. aforesaid, shall not exceed the 10 per cent. of the import and export duties which may be collected by the Custom House of Puerto Cabello; that as soon as the proceeds of the Central Railroad exceed 7 per cent. of the sums expended upon it, the excess shall be applied to the reimbursement of that which the government may have paid in virtue of this article, unless the company decides to make the reimbursement with shares of the said undertaking." The article went on to declare the appointment, by the government, of a director, who was, even though he might have no shares in the company, to be a controller of the company, and who was to have a salary paid by the company, "and that the payment of the 7 per cent. offered by this article shall not commence but when the company has a capital of 200,000 dollars at least, beyond the privileged shares mentioned in the Article 13."

In September, 1863, the government passed some resolutions, one of which (Article 3) was as follows: "The government agrees to guarantee, as a minimum, for the term of 20 years, interest at 9 per cent. per annum, in favour of the capitals which may enter into the coffers of the company, from the day on which the government receives the official intimation that the works of the railway have been commenced, and the amount of the sum which this interest is to gain will be verified by the representative of the *government, who, for this and other purposes, will have a seat in the direction of the company at London. This interest is guaranteed so long as the said capital does not produce 9 per cent. for a reason not imputable to the company, and this being understood in the same terms which Article 17 of the contract of January, 1857, and its only paragraph, express. For the payment of this interest there is set apart, specially and signally, during the first year, the 5 per cent., and in the rest, the 10 per cent. of the import duties of the Custom Houses of La Guayra and Puerto Cabello."

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A decree of the 28th of January, 1864, contained the following article: "The government will guarantee as dividend on the capital employed as far as 9 per cent. per annum, while, for causes not imputable to the company, what the line may produce do not reach so much; but this guarantee shall never be for more than 20 years."

With regard to the granting of lands to the company, the Articles 3 and 7 of the decree of April, 1856, were these: "Art. 3. For fixing in the contract the rules necessary for obtaining private property when it may be necessary for the railway line or its dependencies, there being previously the just indemnification on the part of the undertaking: the work being considered as one of public convenience. The waste lands,¹ which, according to the present decree, it is agreed to give to the company, shall only be able to be taken from the provinces benefited by the railroad, and in case there be not such in these, the concession remains without effect, which cannot be a subject for claim. In the grounds ceded by the present decree, those are not included which with any title the Venezuelans possess at the time of the publication of this decree."

In the contract of the 18th of January, 1857, Article 4 provided that — "The executive power, making use of the authorization which the legislative decree already mentioned gives to it, grants to the Senor Lorenzo Jose and his associates, and their heirs and successors, the ownership of 500 fanegadas of waste lands *for each mile of railway which they may [*106] construct, in addition to 30 varas of width for the line of road, throughout all its extent, and to those which may be necessary for forming the depôts or offices which the service of the railway may require; provided that the said lands are in the provinces benefited without being owned by Venezuelans at the date of this contract." "In case the lands necessary for the line of the road, its depôts and offices, are private property, the executive power shall intervene (if the company and the owner do not arrange between themselves) to cause them to be ceded to the company, the just indemnification having previously been made by the latter for their actual value, determined by skilled persons to be

¹ There was much discussion about the meaning of this expression — the respondent insisted that it meant waste lands, the appellants that it meant uncultivated or unappropriated lands.

named by the company and the proprietor, one by each party, and an umpire whom the government shall name, without their entering into the estimate the greater value which the railway itself will give them."

Art. 5. "Each time the company presents constructed a part of the railway which can be made use of by the public, there shall be given to it the titles of the waste land corresponding to the extension of that part."

As to the contractor, — the real arrangement with him was as follows: "That the contractor shall pay to the company interest at the rate of $2\frac{1}{2}$ per cent. per annum on all capital which should from time to time be paid up in the company, during the time of the construction of the railway and works, and until such railway and works are delivered up to the company entirely completed, and fit for traffic in accordance with the plan, section, and specification: Provided that the liability of the contractor to pay such interest should cease when, and so soon as he should have paid the company for such interest sums of money amounting in the aggregate to £20,000. That in order to provide a fund for the payment of such interest, it should be lawful for the company to deduct and retain £5 per cent. interest out of every payment to be made to the contractor until the sums so deducted and retained shall amount to £20,000, when the sums so deducted and retained should be passed to the credit of the contractor in interest account with the company, and such account should be debited at the end of every six months at the rate of $2\frac{1}{2}$ per cent. per annum [* 107] on the paid-up capital of the company for the * time being until such debt should amount to the sum of £20,000, and until the completion and delivery up to traffic of the entire line." It was also alleged that he had been in pecuniary embarrassment, and so was not what the prospectus described him.

The cause was heard before Vice-Chancellor STUART, upon interlocutory motion for an injunction; and on the 21st of March, 1865, the respondent's bill was ordered to be dismissed with costs. On appeal to the LORDS JUSTICES, an injunction was granted, and the order of the VICE-CHANCELLOR, dismissing the bill, was reversed. The defendants appealed to the House of Lords.

The appeal having been argued,

[111] May 14. THE LORD CHANCELLOR (Lord CHELMSFORD) having stated the facts of the case, said:—

The respondent alleges that the prospectus which induced him to purchase the shares contains fraudulent representations, which *entitle him to have the purchase declared void. [*112] The appellants, denying that there are any false representations in the prospectus, contend that the respondent's delay in instituting his suit as soon as he had knowledge, or means of knowledge, of all the facts, is fatal to his claim to relief.

There is some little uncertainty as to the exact time when the respondent made the discovery that the representations in the prospectus were not *bonâ fide*. He at first said that it was within three days after receiving his letter of allotment, which would be as early as the 16th of July; then, that it was after he had paid the £1 and the £2, the latter being the call on his 100 shares, which was paid on the 25th of July.

In his bill, the respondent states, that "it was in or about September, 1864, he heard rumours that the statements in the prospectus were, to a great degree, false; that on the 22nd of November he went to the office of the company, when certain documents were produced, and from them he, for the first time, learnt with certainty that the statements contained in the prospectus issued by the company were false in many particulars."

The fair result of these statements appears to me to be, that although the respondent might have heard unfavourable rumours, and conceived suspicions of the company, at an early period after he obtained his shares, yet that he received no certain information upon which he could act until the month of November, and he did nothing between that day and the 28th of January, 1865 (when he filed his bill), which amounted to acquiescence. This case differs in this respect from that of *Ex parte Briggs*, L. R. 1 Eq. 483, 35 L. J. Ch. 320, which was mainly relied upon in support of the objection of delay; for there, Mr. Briggs, after he discovered that the representations in a prospectus, on the faith of which he was induced to take shares, were false, dealt with the shares as owner by instructing his broker to sell them. The respondent, therefore, has not precluded himself by laches from his right to have the contract for the purchase of shares in the company rescinded, provided he has clearly and distinctly alleged in his bill the fraudulent representations (or any of them) upon which he relies, and has established them by satisfactory evidence.

[+ 113] * The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects, which are always held out by the originators of every new scheme, without considerable abatement.

But although, in its introduction to the public, some high colouring, and even exaggeration in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice-Chancellor KINDERSLEY, in the case of the *New Brunswick and Canada Railway Company v. Muggeridge*, 1 Dr. & Sm. 381; 30 L. J. Ch. 242, "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

Applying these principles to the prospectus in question, I proceed to consider the grounds upon which it is impeached by the bill of the respondent. Although the LORDS JUSTICES decided in favour of the respondent upon two only of the alleged misrepresentations, or, rather, concealments of facts, in the prospectus, and * expressed an opinion against him upon the

[+ 114]

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others, it is quite open to him to maintain the decree upon any of the grounds laid in his bill, and accordingly the argument on his behalf has been extended to every misstatement in the prospectus, which he has attributed to the company.

I will pass lightly over those misstatements in, or omissions from, the prospectus, which in my opinion do not establish a case against the appellants; agreeing, however, with the remark made in the course of the argument for the respondent, that the suppression of a fact will often amount to a misrepresentation.

I do not think that there is anything in the omission from the prospectus of all mention of the deposit of £20,000 which the company was to make, and which was to be forfeited if the construction of the railway was not commenced by a certain day. The respondent alleges, in his bill, that the appellants, by undertaking only one line of the railway, and neglecting to commence or undertake another, are liable to forfeit the £20,000. It appears to me that the omission to mention this required deposit would be no evidence of wilful suppression of the truth, even if the liability to its being forfeited existed. The effect of the deposit would be to quicken the diligence of the company to commence the works, in order to obtain its return. And if the fact of the deposit being in jeopardy by anything which occurred after the issuing of the prospectus can have any bearing upon the statements it contains (which I think it cannot), the evidence shows that the railway has been commenced within the time limited, so as to entitle the company to have the deposit restored.

The next allegation of fraudulent concealment which I will deal with relates to certain shares which, under the contract with the Venezuelan government, the original concessionaries were to have a right to reserve to themselves, as privileged shares, to indemnify them for costs incurred by them up to the date on which they should open the subscriptions to the public. By a document, called "Explanations of the Contract," these shares were not to exceed 2075; 575 to be considered as paid by anticipation for the preliminary expenses, and 1500 as a compensation to the promoters of the undertaking. The plaintiff alleges, that if these privileged shares had been mentioned in the prospectus, *he would not have purchased his shares. The truth of [*115] this assertion cannot, of course, be ascertained. But the answer to this charge is, that although the benefit of these priv-

ileged shares passed to the company under the purchase of the concession, there never has been any intention to act upon this clause in the contract, nor any provision in reference to it stated by the appellants, and, therefore, there was no occasion to mention the privilege in the prospectus.

The next charge to be considered is one of alleged misstatement : — that, amongst other privileges secured to the company, is one of “ a free grant of 30,000 acres in the provinces through which the railway is to pass.” This the respondent asserts in his bill to be untrue, for that it was expressly provided that the land to be granted should be 30,000 acres only, which were to be nowhere but in the provinces to be benefited by the railway, and that, too, with this condition annexed, that no land should be granted which was owned by Venezuelans. Another ground of misrepresentation was urged in argument, — namely, that the prospectus states that the country through which the railway is to pass is a most productive one for produce of various kinds, besides being a rich agricultural district, leading (as it was said) to the belief that the 30,000 acres were to be of land of this quality, instead of which it was expressly stipulated in the decree which authorizes the executive power of Venezuela to arrange the contract for the Central Railroad, that the lands were to be “ waste lands.”

It seems to me, however, to be clear, that this description refers, not to the quality of the soil, but to the lands being unoccupied; a view which is confirmed by the qualification annexed to the proposed grant, that in the grounds ceded these “ are not included, which, with any title, the Venezuelans ” (extended afterwards to foreigners) possess at the time of the publication of the decree. The appellants were, in my opinion, warranted in stating that the grant was a free grant of 30,000 acres, without mentioning the qualification of its not extending to private property (which would, of course, be implied), or that the 30,000 acres were to be granted only out of the provinces to be benefited by the railway; and in case there should be none such, the concession was to remain without effect.

[* 116] There is no reason to suspect that the appellants had * any doubt that the quantity of land conceded could be found within the limited district, and the Venezuelan government bound itself to apply to the convention, or constitutional congresses, “ in order that it might prevent the alienation of waste

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lands in the provinces through which the railroad was to pass, until, the plans of the latter being presented, and its extension determined, they might designate those which, according to the contract, were to belong to the company."

I now proceed to consider an alleged misrepresentation upon which the LORDS JUSTICES thought that the respondent had established a case against the appellants. This relates to the statement in the prospectus, that there was secured to the company the privilege of a guarantie of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of La Guayra and Puerto Cabello.

The respondent charges in his bill that this statement is entirely untrue, and that the import duties are already mortgaged for their full value to other persons. The proof of the mortgage of the duties to their full value fails, as it appears that they were previously mortgaged only to the extent of 55 per cent.

But it is said by the respondent that the statement of the prospectus is untrue, because the government of Venezuela was not to pay the 9 per cent. in case the railroads were not producing any interest on account of any cause imputable to the company. I doubt whether the allegation in the bill places the untruth of the statement upon this ground. But, admitting that it does, I do not see how the omission of the qualification can be regarded as a fraudulent suppression of the truth. Even if no mention of it had been made in the agreement for the guarantie, I should suppose it would necessarily be implied; for no party can claim the benefit of a contract the right to the performance of which arises from his own default; and no one could possibly suppose that such an absolute and unqualified guarantie would ever be given. At all events, the omission to notice such a qualification does not appear to me (with great respect to the LORDS JUSTICES) to be a ground for attributing to the appellants a fraudulent intention to conceal the truth.

* Thus far I have examined the various allegations of [*117] fraudulent misrepresentations and concealment in the prospectus of the appellants, and have been unable to discover anything upon which, if they had stood alone, the respondent could claim to have his purchase of shares set aside; but I pro-

ceed to a part of the case which not only leads to a different conclusion, but also reflects upon the general fairness of the prospectus, even in the particulars which I have been considering.

The portions of the prospectus to which I am about to refer appear to me to be more or less connected with each other, and all of them bear upon the important question of the ability of the appellants to perform the contract into which they have entered, with the means at their disposal, and by the contractor with whom they had engaged.

The misrepresentations and concealment alleged in the bill under these heads relate, —

1. To the omission from the prospectus of all mention of the purchase of the concession by the appellants for £50,000.

2. To the statement that the contract was entered into with a responsible contractor.

3. To the contract being considerably within the available capital.

4. To the liability of the contractor upon his guarantee of 2½ per cent. being limited to £20,000.

The respondent alleges in his bill that the purchase of the concession by the company for £50,000 was fraudulently concealed. It is difficult to understand how such an important fact can have been honestly omitted from the prospectus. It cannot be said that the amount of the capital of a company is an insignificant matter for the judgment of those who are invited to become shareholders. The prospectus states the capital to be £500,000, whilst it was well known to those who prepared it that the company was established upon the footing of a payment of £50,000, which necessarily reduced the capital by that amount.

It was said by the counsel for the appellants that when the prospectus stated that the railway was to be constructed and worked under a concession and important guarantees from the government of Venezuela every one would understand [*118] that such a *valuable privilege was not likely to be granted gratuitously. But I see no reason why it is to be assumed that persons reading the prospectus would take for granted that the Venezuelan government would not make a gratuitous concession for the construction of a railway which might prove highly beneficial to the country. At all events, the

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terms of the prospectus import a direct concession and guaranties from the Venezuelan government, which might or might not be gratuitous, instead of stating the fact, that the appellants had acquired the concession by purchase from the original concessionaries.

The appellants also rely upon the fact that the respondent was expressly referred by the form of the letter of application for shares to the memorandum or articles of association, the latter of which documents expressly mentioned the agreement for the purchase of the concession. But the respondent applied for shares upon the faith of the prospectus, a copy of which was sent to him, and when the allotment of the 100 shares was made to him he was, in the opinion of the appellants, fixed as a shareholder, as appears from a letter from their secretary in answer to an application from the respondent to have the number of shares allotted to him reduced. In that letter he was told that this was not in the power of the appellants, "as it would make the allotment illegal." It appears to me that there was an intentional and improper suppression as to the extent of the capital of the company by the description in the prospectus.

The next statement in the prospectus to be considered is that which represents that a contract had been entered into with a responsible contractor for the completion of the line from Puerto Cabello to San Felipe. A responsible contractor of course must be one who has the means at least of commencing the performance of his contract, though he may rely upon the money to be received in the progress of the works to enable him to complete it.

Now it appears to me that Croskey was a person who ought to have been known by the directors not to be a responsible contractor in this sense. I do not rely upon the fact of his insolvency in four months after the date of the contract, as that does not necessarily prove that he might not have been in a *position to carry out the contract when he entered into [*119] it. Coupled with other circumstances, however, it is a significant fact. If Croskey had no means of his own, the payment of part of the contract price by 4000 shares, upon which he was to pay a deposit, would rather disable him from performing his contract. And the mode in which that deposit was paid, by an advance from the financial company, to be repaid out of the moneys Croskey would receive under the contract, ought to have raised a serious doubt as to his responsibility. This would

hardly be removed by the security which he gave of a bond for £10,000 with two sureties, which is quite insignificant in comparison with his engagements. I do not think that the directors were justified in holding Croskey out to the world as a responsible contractor, and whether this was carelessly or designedly done seems to me to be immaterial.

The next alleged misrepresentation is of a serious character, and, as it appears to me, is completely established. The prospectus states that the contract entered into with the responsible contractor is "at a price considerably within the available capital." This statement connects itself with the representation of the amount of the capital. The respondent, believing the capital to be £500,000, even if he had known that the contract price was £420,000, would no doubt have been satisfied that, a sum of £80,000 being left, the statement that the contract was for a price considerably within the available capital was well founded; but if he had known, as the directors knew, that what remained after providing for the contract was only £30,000, he might have entertained a different opinion. I do not think that the £20,000 deposit ought to be deducted, because, although it was tied up until the commencement of the works, yet at that period it would be released, and would then form part of the available capital. Nor, on the other hand, ought the borrowing powers given to the directors by the articles of association to be taken into account, as suggested in argument, for no one would understand a power to borrow as intended by the term "available capital" of a company. It certainly was an exaggeration, to say the least of it, to describe a contract which would absorb the whole of a capital of £450,000, except £30,000, as being considerably within the available capital.

[*120] *It appears to me that this was not a fair and honest representation, but was calculated, if not intended, to deceive the public, who were invited by the prospectus to take part in the undertaking.

The last ground upon which the bill charges fraud on the prospectus is the omission to state the limitation to £20,000 of the contractor's guarantee of $2\frac{1}{2}$ per cent. Lord Justice TURNER thinks that in common honesty this limitation should have been mentioned, and I agree with him. But I should have hesitated, if the prospectus had been unimpeachable in every other respect,

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to have decided against the company upon this alleged concealment alone. That it ought to have been mentioned, so as to allow those who were asked to join in the undertaking to form a judgment upon it, there can be no doubt; and, looking to the other instances of suppression of facts material to be known, I cannot avoid the conclusion, that this, amongst the rest, was designed for the purpose of deception, by concealing whatever would make the scheme less attractive, and so prevent persons from becoming purchasers of shares.

But the appellants say that even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that "the engineer's report, together with maps, plans, and surveys of the line, might be inspected, and any farther information obtained, on application at the temporary offices of the company;" and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus.

But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right *to retort upon his objector, "You, at least, who [*121] have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord LYNDBURST, in the case of *Attwood v. Small*, 6 Cl. & F. 395, that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting

aside the contract which was founded upon that basis." And in the case of *Dobell v. Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89, to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper.

Upon the whole case I think the decree of the LORDS JUSTICES ought to be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH concurred. He observed that in the matters referred to in the prospectus, there had been both *suppressio veri* and *suggestio falsi*. He then stated his opinion that, at the time when the respondent took the shares, he could not be charged with notice of what is contained in the articles of association.

[123] The Act of 1862 (he continued) provides (sect. 16), that the articles of association shall bind every member of the company as if he had subscribed and sealed the same, and had covenanted to conform to all the articles thereof. If the respondent had actually subscribed and sealed these articles, he certainly could not have alleged want of notice as to the purchase of the concession out of the £500,000 capital. But he never did subscribe or seal them; and in order to make them binding on the respondent, under the provisions of the statute, it is necessary to show that he had become a member of the company. The case of the respondent is, that he never was a member; that all which he did was to act on the faith of the prospectus; and if the prospectus stated what was untrue he is entitled to treat all which he did in reliance on its being true as absolutely null and void. The result is that the appeal ought to be dismissed with costs.

LORD ROMILLY and LORD COLONSAY concurred.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, May 14, 1867.

No. 74. — *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1219.

Erlanger v. New Sombrero Phosphate Company.

New Sombrero Phosphate Company v. Erlanger.

3 App. Cas. 1218-1286 (s. c. 48 L. J. Ch. 73; 39 L. T. 269; 27 W. R. 65).

*Company. — Promoters as Vendors. — Fiduciary Position. — Conceal- [1218]
ment of Material Facts.*

Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it.

A "syndicate" (or partnership) of persons, of which one E. was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. E., who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for E.; the other was a private friend of E. The sale of the island was made, nominally, by a person who had really no interest in the island, and was made to the director who was the business agent of E., and who appeared as the purchaser for the company. The two directors, with whom, through E.'s arrangement, a third person, D. (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted on its behalf the purchase. A prospectus was issued, giving a very favourable account of the scheme. Many persons took shares. At the first meeting of shareholders D. took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price on the first sale, and then on its resale to the company, D. avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February, 1872. In June, 1872, there was a general meeting of the shareholders. The rumours before referred to had become stronger, and a committee of investigation was appointed; on the receipt of whose report in August, 1872, the original directors were at a public meeting removed, and a new set of directors appointed, with power to take measures, etc., for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which *terminated in nothing, and a bill [* 1219] was in December, 1872, filed to rescind the contract :—

Held, that the contract could not be sustained, but

Dub. The LORD CHANCELLOR (Lord CAIRNS), whether there had not been

No. 74. — *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1219, 1220.

on the part of the company such delay in coming for relief as to constitute laches that deprived the company of the title to obtain it.

Observations on the duty of promoters of a company.

This was an appeal against a decision of the Court of Appeal which had reversed a decree of Vice-Chancellor MALINS, 5 Ch. D. 73; 46 L. J. Ch. 425.

Sombrero is a small island in the West Indies, which was the property of the Crown, but had been leased out by the Crown for twenty-one years from March, 1865, at a rent of £1000 a year. The lease had been assigned to a company called "The Sombrero Company," the business of which was to work the beds of phosphate of lime with which the island abounded. The company got into difficulties, and was ordered to be wound up; and the lease, constituting the most valuable part of the assets, was ordered to be sold. Mr. Chatteris was the official liquidator, and he fixed the price of £55,000 for it. The appellants, together with one Thomas Westall, formed what was called a syndicate (in this instance meaning a special partnership), for the purpose of purchasing it. It was purchased at the price put on it by Mr. Chatteris, after the syndicate had offered, but in vain, a smaller price for it. The purchase was affected by a provisional contract on the 30th of August, 1871, though, in consequence of the sale being made under the order of the Court of Chancery, it could not be, as a matter of form, concluded at that time. The appellants having thus become the purchasers of the lease desired to sell it again and obtain a profit on the resale; and with that view to get up a company to purchase it and work the mines.

Erlanger, a Paris banker, was the chief of the syndicate, and his firm managed its pecuniary transactions. On the 16th of September, 1871, the following circular letter was written to the different members of that body, "We have formed a syndicate for the amount of £60,000, for the purchase of the island of Sombrero, including the stores. You are interested in the transaction for £ , for which we beg you will send us a cheque, [*1220] as we *have to pay the money into Court." This note was signed "Emile Erlanger & Co." The cheques were sent, and the money paid into Court, the banking firm being stated on the list as holding an interest in the purchase for "£18,430." The qualification of a director was to be the possession of fifty shares in the company.

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A memorandum of association was prepared, and articles and a prospectus were also issued. The memorandum stated, in the usual way, the objects of the company, which were to purchase the lease and work the mines. The articles (among other things), stated that, in the first instance, the number of directors should not be less than four, nor more than seven, but that number might be changed at any general meeting. Two directors were to "form a quorum for the transaction of business." The directors were empowered to adopt and carry into effect the contract for the purchase by the company of the island. The contract for the purchase and the articles of association were both dated on the same day, the 20th of September, 1871, and the company was registered on that day. The contract for the purchase by the company purported to be made between John Marsh Evans, as the vendor, and Francis Pavy, as the purchaser on behalf of the company. This contract recited the purchase by the syndicate of the 30th of August, but did not name the price then given. The price to the company was to be £110,000, of which £80,000 were to be paid down, and the remaining £30,000 to be satisfied by fully paid-up shares in the new company. The money was to be obtained by the subscriptions for the shares, which were to be 13,000 in number, of £10 each. Evans was intimate with Baron Erlanger, and appeared to act on his behalf; Pavy was a person who had visited the island, and whose name was introduced into the business to represent the company until the contract should be submitted to the directors and adopted by them. The directors were in the first instance named by the syndicate. The first name on the list of directors was that of M. Drouyn de Lhuys (who was resident in France, occupied with the political affairs of that country), the second that of Mr. Eastwick, M. P. (then about to start on a voyage to Canada), the third was that of J. Marsh Evans (the person named in the contract as the vendor), the fourth was that of Alderman Dakin, then Lord Mayor of London, and

*the last that of Rear-Admiral Macdonald. Westall, a [*1221] solicitor, acted in the matter; he was himself one of the syndicate, but he claimed to act in the character of agent, and demanded, and received, the sum of £500 for his services.

There was no distinct account of any shares having ever been held by M. Drouyn de Lhuys, nor did he appear to have attended any meeting of the directors of the company, or to have taken any

part whatever in the business. Mr. Eastwick was stated to have received, as a loan, from Erlanger's house the requisite number of shares to constitute him a director; these he afterwards returned, and in Erlanger's affidavit it was left doubtful whether he ever took his seat at the board. He resigned his directorship at an early period. Alderman Dakin appeared to have paid for his shares and attended the board. Evans attended, as did also Macdonald; both appeared to have held shares given or lent them by Erlanger. The first meeting of directors took place on the 29th of September, 1871. Three were present, Dakin (who sat as chairman), Evans, and Macdonald. Westall attended in the character of solicitor, and produced the deed for incorporating the company, and also the contract of purchase for £110,000, and it was resolved "that the said contract be approved and confirmed." A prospectus of the intended company was produced. It was intended to be issued to the public. It began by a statement that the contract for the purchase of the island had been made by the directors; it set forth, in the usual way, the advantages of the concern, and gave the names of the directors, and contained some calculations assuming the form of a statement of past, and also of anticipated, profits. After the publication of the prospectus, the number of applications for shares became considerable.

The first ordinary general meeting of the company took place on the 2nd of February, 1872. At that meeting, presided over by Sir T. Dakin, a Mr. Stephenson stated that he had heard a rumour that what the company was to buy at £110,000, had, but a few days before, been sold to the persons who were now the vendors to the company, for £55,000, and he alluded to a person, one of the directors for the company, as one of the persons who had made the original purchase, observing, "I think it was an improper transaction that one of the directors should be both the [*1222] buyer and *the seller of the property. That requires a little explanation on the part of the board." Sir T. Dakin said that he had heard some such rumours; that he was told that Mr. Evans, with other gentlemen, had bought this fully a month before the company was thought of or projected; that it appeared to him that the contract between Evans and Pavy was fully stated in the prospectus, and all those persons who joined the company were invited to look at them; that whether it cost £50,000 or £100,000 was not material to the question; that "it was not

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bought by one of our members. The gentleman was not a director then, but bought in concert with other people," adding that what it was bought for, he, Sir T. Dakin, did not know.

The annual general meeting was held on the 19th of June, 1872: Mr. Evans was in the chair. The company had not been successful, and the shareholders passed resolutions appointing a committee of investigation, and adjourned the meeting to a period, at first, of six weeks. The committee reported, recommending the removal of the original directors and the appointment of others, with authority to take such proceedings as they might be advised for the purpose of recovering back the difference between the sums given on the first and on the second purchase. New directors were accordingly appointed at a meeting of the 29th of August, 1872. A correspondence then ensued with Baron Erlanger and the other members of the syndicate. Baron Erlanger denied all legal liability, but offered to give the company the benefit of the full amount of profit which his firm derived in cash and shares from the transaction. The other members of the syndicate did not answer.

On the 24th of December, 1872, the bill in this suit was filed against Erlanger, Evans, Dakin, Macdonald, and others (afterwards amended by the addition of all the members of the syndicate, and others representing interests therein), and prayed that the contract of the 20th of September, 1871, might be set aside; that such of the defendants as were members of the syndicate might repay to the company the £110,000 with interest, the company delivering up the island and accounting for profits made by working it; or that the members of the syndicate might be ordered to repay the difference, £55,000, between the sum paid by the syndicate and that paid by the company.

*The answer of Sir T. Dakin was directed to exonerate [*1223] himself from any imputation of having known the real facts and having in any way misled the company by misrepresenting them; he had approved the contract without making any independent inquiry as to the value or productiveness of the island, and had merely said what he had heard from others.

The answers of the members of the syndicate denied that they stood in any way in a fiduciary position towards the company, insisted on the fairness of the transaction, and imputed the failure of the concern to causes over which they had no control, such as

the conduct of the company in working the mines on the island. The delay of the company in claiming relief was also insisted on.

The cause was heard before Vice-Chancellor MALINS in March and April, 1876, and the bill was ordered to be dismissed, but without costs. On appeal (the notice of appeal being served only on the members of the syndicate or their representatives) the contract was ordered to be rescinded as to all who were members, or representatives of members, of the syndicate, the purchase-money paid by the company repaid, and, on payment of the money so ordered to be repaid to the company, the island was to be restored by the company to the syndicate. 5 Ch. D. 73-125.

This appeal was then brought.

The case was twice argued, first before the LORD CHANCELLOR (Lord CAIRNS), Lord PENZANCE, Lord O'HAGAN, Lord BLACKBURN, and Lord GORLON, and afterwards before the LORD CHANCELLOR (Lord CAIRNS), Lord HATHERLEY, Lord PENZANCE, Lord O'HAGAN, Lord SELBORNE, Lord BLACKBURN, and Lord GORDON.

Mr. Southgate, Q. C., and Mr. Benjamin, Q. C. (Mr. Ingle Joyce was with them), for the appellants, contended that the members of the syndicate stood in no fiduciary position to the company, but were ordinary vendors, who having purchased a property were entitled to sell it again at a profit; that the company had ample means to inquire into and ascertain the value of the property, for that it was well known that the island had been sold under the order of the Court of Chancery, so that consequently

the needful information was open to all who chose to take [*1224] the *trouble to acquire it; that no fraud whatever had

been practised; that the bill was founded on charges of fraud, which not being proved, the bill had been in the first instance rightly dismissed; and that, under the circumstances of this case, the Court could not properly adjudge the rescission of the contract.

The persons representing the company had been guilty of laches, which entirely disentitled the company to the relief sought by the bill. The cases cited in the Courts below were again cited, and in addition, *Hickson v. Lombard*, L. R., 1 H. L. 324; *Hegmann v. The European Central Railway Company*, L. R., 7 Eq. 154; *Parker v. McKenna*, L. R., 10 Ch. 96; 44 L. J. Ch. 425; *Dent's and Forbes' Cases*, L. R., 8 Ch. 768; *Bagnall v. Carlton*, 6 Ch. D. 371; 47 L. J. Ch. 30; *Overend & Gurney Co. v. Gibb*, L. R., 5

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H. L. 480; 42 L. J. Ch. 67; *Gorer's Case*, 1 Ch. D. 182; 45 L. J. Ch. 83, and *Vigers v. Pike*, 8 Cl. & F. 562, were referred to and commented on.

Mr. J. C. Whitehorne appeared for an individual defendant, but was not heard.

Mr. J. Napier Higgins, Q. C., and Mr. Davey, Q. C. (Mr. Alexander Young was with them), for the respondents:—

The members of the syndicate were the purchasers of the island from the official liquidator; they knew its history and its value; they bought it for £55,000, and almost immediately afterwards got up a company and sold it to that company for £110,000, and they sold it without giving any information whatever to the persons whom they induced to become the buyers. Had they been strangers to the company, they might have been entitled to get as much profit as they could on their purchase. But the reverse was the fact; they were the originators and promoters of the company, and, even more, they were, in fact, its managers. They stood in the most undoubted manner in a fiduciary position towards the company which they created, and governed. The pretended directors were the creatures of Erlanger. Marsh, Evans, and Macdonald were his absolute nominees, owing their nominal qualifications in shares to him; and the meeting of directors, which was represented as making the purchase, was a meeting of three *persons styled "directors," but two of whom, [*1225] namely, these two persons, were in fact mere instruments to execute the will of Erlanger. There was no one at that time to exercise an independent opinion on the transaction; and afterwards, when there was a meeting of shareholders to give to the purchase a formal adoption, there was no one to give the shareholders an independent opinion or proper advice. For Sir Thomas Dakin, who was a director and took the chair at the meeting, was absolutely unacquainted with the circumstances of the transaction, did not quite know for what the island had been bought, and only supposed that, even at the price at which it was sold, it might be a profitable bargain for the company. It was impossible to say that, under such circumstances, the contract was one which the law could allow to stand. Not only was the real condition of the island concealed from the shareholders, for the prospectus was entirely misleading on that point, but the very date of the sale was misrepresented. It was not true, as was stated on the face of the

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prospectus, that the directors had entered into the contract on the 20th of September, 1871; for the contract (if it deserved such a name) was merely made between one agent of the vendors to sell and another agent of the vendors to buy. The subsequent transactions were so many additional deceptions practised on the shareholders. The pretended meeting of directors on the 29th of September was in truth no meeting of directors at all, for two of them had not then more than a nominal qualification, and neither then nor afterwards was there any one qualified to give, or capable of giving, disinterested advice to the shareholders.

There had been no delay in this case, such as could affect the right of the shareholders to rescind the contract which had been thus improperly obtained from them. The first ordinary meeting of the shareholders was on the 2nd of February, 1872. Sir T. Dakin, who was completely ignorant of all the real circumstances, took the chair. He could only answer Mr. Stephenson, who mentioned what rumours there were abroad, by saying that he himself had heard something of those rumours, but he believed that if they got this island at the price there named it would be a good bargain. On the 19th of June, 1872, the annual general meeting of shareholders was held, and then the suspicions which had been suggested at the former meeting being put forward more [* 1226] strongly, * a committee of investigation was appointed.

That committee met, and at an adjourned meeting of shareholders held on the 29th of August, presented a report, the result of which was the removal of the directors originally appointed, and the nomination of other directors, with power to take such proceedings, in the name of the company, as they might be devised. These new directors sought to settle matters without litigation, and a correspondence ensued, but no satisfactory conclusion was arrived at, and the bill was filed on the 24th of December, 1872. Considering the difficulties in the way of the committee obtaining information, the necessary distance of time between one meeting and another, the reasonable unwillingness to enter on litigation, and the desire to settle without it, there was no ground whatever for imputing delay, such as the law called laches, to those who represented the shareholders; indeed, they had acted with as much promptitude as the nature of the case admitted.

In addition to the cases cited below, *The Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189; 42 L. J. Ch.

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644; *Dunne v. English*, L. R., 18 Eq. 524, and at p. 535; *Baker v. Monk*, 4 D. J. & S. 388; *Gover's Case*, 1 Ch. D. 182; *Ashbury Railway Company v. Riche*, L. R., 7 H. L. 653; 44 L. J. Ex. 185, No. 6 of "Agency," 2 R. C. 304; *Rothschild v. Brookman*, 2 Dow. & Cl. 188; *Prendergast v. Turton*, 1 Y. & C. Ch. C. 98, and *Clegg v. Edmondson*, 8 D. M. & G. 789, were referred to and commented on.

Mr. Benjamin replied, and in his reply referred to *Hallows v. Fernie*, L. R., 3 Ch. 467, at p. 477, to show that a suit could not be maintained in this form on behalf of a company, and *Pollard v. Clayton*, 1 Kay & J. 462, on the subject of laches.

Mr. Davey was heard in observing on these cases.

LORD PENZANCE: —

My Lords, I will state to your Lordships my view of the circumstances under which the purchase now sought to be set aside was originally made.

What happened was this: The syndicate had bought the *property in question, and it is probable that they bought [*1227] it with the intention of getting up a company which should buy it of them at an increased price. Baron Erlanger, who acted for the syndicate, took steps for that purpose within a few days of the purchase, and there is no proof that any steps were even considered, much less adopted, for dealing with the property in any other way. No time was lost in carrying this intention into effect. The solicitor of the syndicate is set to work — he prepares articles of association and a prospectus. The articles provide that five gentlemen by name shall be the first directors of the company, and that any two of them shall be a quorum to bind the company. They also provide that without any farther authority from the shareholders, these five directors or any two of them may sanction and accept, on the part of the company, a certain contract bearing even date with the articles for the purchase by the company of the property in question. This contract had been prepared by the syndicate themselves, and was on the face of it a contract between Evans as the vendor, and Pavy, on behalf of the future company, as vendee. Both Evans and Pavy were persons who had no interest in the property, and were the nominees of the syndicate, and remunerated by them for their trouble. In this contract the syndicate fixed their own price at which the future company was to buy,

this price being in round numbers double what they had given for it some days before.

The articles of association were therefore so drawn by the solicitor for the syndicate, that the syndicate had it in their power to select, and did select, the five persons, any two of whom were to become the acting agents of the company for the acceptance or rejection of this bargain, by which the syndicate were to obtain for the property double what they had given for it. In exercising this selection they chose first two gentlemen of high standing, one of whom resided abroad, and the other of whom was about to leave England forthwith for Canada, but neither of whom would be expected to take part in the decision as to whether this bargain, advantageous as it was to the syndicate, was also advantageous to the company. Of the other three persons nominated, one (Evans) was a person residing in Paris, who acted in the matter at the desire of Baron Erlanger, and who was remunerated [* 1228] * by him with the gift of 100 paid-up shares in the company. Another, Admiral Macdonald, was a personal friend of Baron Erlanger, to whom the office of director was offered by him as a pecuniary benefit, and an entrance into business affairs, while the third, Sir Thomas Dakin, was the Lord Mayor of London, against whose capacity, honesty, and independence, nothing can, I think, be said.

Of the whole five, however, only two — Sir Thomas Dakin and, perhaps, M. Drouyn de Lhuys — appear, on the 29th of September, 1871, to have embarked their money in the company, and thereby obtained a *bonâ fide* and independent interest in the welfare of the company, such as professed to be secured by the provision in the articles of association that each director shall be the holder of at least fifty shares “in his own right.” For Evans’ shares were given to him by Baron Erlanger, Admiral Macdonald was to hold shares only as trustee for Baron Erlanger, and Mr. Eastwick never had any shares except what Baron Erlanger lent him.

The agents, then, who were to have the power of binding the company to the purchase in question, having been thus selected by the syndicate, and the articles of association having been signed by seven persons, all of whom it was admitted were connected with Baron Erlanger or other members of the syndicate, some of them being clerks of these persons, the next step was to hold a meeting of the directors. This was done on the 29th of September,

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1871. It was attended by Sir Thomas Dakin, Admiral Macdonald, and Evans. It was also attended by Mr. Westall, the solicitor of the syndicate, and himself (on his own part or that of his friends) a member of the syndicate. His interest in and services for the syndicate had been farther secured by the promise of a special fee of £500.

These three directors, without examination of Mr. Chatteris' accounts, without any report from any competent person as to the then condition of the island, or the cost of raising and shipping the phosphate of lime, and, without any inquiry into facts or figures, proceeded at once, under the auspices of the vendors, solicitor, to adopt and ratify the proposed purchase of the island on behalf of the company, which had been completely formed and registered *only eight days previously, and [*1229] which became thereby bound to pay for the property double the sum which had been settled shortly before by the VICE-CHANCELLOR as its true and marketable value.

Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to show they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir Thomas Dakin or Admiral Macdonald was aware

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of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been [* 1230] illustrated * in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of showing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the LORD CHANCELLOR, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside. The question remains whether the present bill has been filed with sufficient promptitude for that purpose.

Now, on this question of delay, I confess that I do not think it easy, guiding myself by any decided cases, to come to a conclusion adverse to the company's claim. The nearest approach to a definition of the equitable doctrine upon this head which is to be found amongst the cases cited, is the statement made in the case of *The Lindsay Petroleum Company v. Hurd*, L. R., 5 P. C. 221. Delay is there said to be "material where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he

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has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted."

How far the company has brought itself by its conduct within either branch of this definition, I will presently inquire, but I think it is clear that the company having, in the first instance, a right to relieve itself from this contract, which the promoters have unfairly fastened upon it, it is for the vendors to show affirmatively that the company has forfeited that right. The

*actual lapse of time before commencing the suit was not [*1231] very great. Delay, as it seems to me, has two aspects.

Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, and it is in many cases particularly applicable to property of a mining character. But delay may also imply acquiescence, and in this aspect it equally bars the plaintiff's right, for such a contract as is now under consideration is only voidable and not void.

It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case. And so dealing with the facts of the present case, I find myself unable to conclude affirmatively that it has been made out by the argument at the Bar that either the character of the property, or the way in which the company had dealt with it, did in point of fact preclude the possibility of justice being worked out on the basis of the contract being rescinded. If the decree which has been made does not work out the justice of the case, it should have been pointed out in what respect it fails to do so, and either an amendment of it prayed, or the impossibility of such amendment clearly shown.

The substantial question, therefore I think, is whether there was such delay as fairly imports acquiescence.

It is hardly suggested that the company or its executive knew, or had the means of knowing, the material facts before the meeting in February. That meeting was not called to consider any question in connection with the matters now in controversy. It

was spoken of as a "*pro formâ* meeting," and it was attended by a minority only of the shareholders. What passed there, I think, showed that Mr. Stephenson had heard the truth about the price at which the promoters had bought, though he had heard it only as a rumour; but he does not appear to have known the circumstances under which Evans and Macdonald had become directors, or the fact that Westall was the solicitor for the promoters, and [*1232] had received *£500, and many other material matters.

The flourishing prospects, however, of the company, laid before the meeting by others, appear to have silenced Mr. Stephenson, and the matter was suffered to drop without farther inquiry at the moment.

Can acquiescence by the company be inferred from the doings of this meeting? I think not. The meeting was so convened that a resolution in favour of acquiescence could hardly have bound the company. How, then, could statements by a single shareholder, coldly received as they were by the others present in the prospect of large profits, go farther to bind the company than a resolution would have done?

How soon, then, after the meeting of February, can the company be said to have known the material facts, or such of them as would make it reasonably their duty to investigate the matter if they meant to take exception to the mode in which the purchase had been effected? There are great difficulties in the way of shareholders in such a case. Those of them who, like Mr. Stephenson, conceive that the company has been wronged, have not only to investigate and obtain proof of the facts, but they have to impress a sufficient number of their fellow shareholders with the strength of their case to enable them to pass a resolution (probably hostile to the directors) for a committee of investigation. All this takes time and trouble, and I am unable to perceive that it could well be expected of them, that by means of a special meeting they should have taken the opinion of the company earlier than the next ordinary meeting which occurred in June. At that meeting they brought the matter forward; a committee of investigation was appointed, which reported to the company in the autumn, when a resolution was at once passed to take legal proceedings. This resolution was followed by attempts to compromise, which were continued through the autumn up to November, and in December the bill was filed.

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As I have already said, I do not see how Mr. Stephenson and those who acted with him can be accused of laches in the course which they thus took. But if it were otherwise I should have great difficulty in coming to the conclusion that the laches of Mr. Stephenson was the laches of the company, and that the great bulk of shareholders had lost their relief from an inequitable contract * because a few of them had not been suffi- [* 1233] ciently prompt in taking steps to obtain that relief.

The position of Mr. Evans, whose name appeared as vendor of the property in the contract made on behalf of the company, and whose name also appears as one of the original directors who attended the meeting of the 29th of December, 1871, and affirmed that contract, was much commented upon in the course of the argument. It was said that, Mr. Evans being thus both vendor and purchaser, the company had at once the right to set aside the contract. But this can hardly be so, I think, in all cases. It is a very common thing for individuals having an established business to get up a company which shall purchase their business of them; they taking part payment in paid-up shares of the company, and becoming original directors. In such cases it is often an inherent part of the scheme, in the interests of the company, that they who already understand the business should take a leading part on the board of directors which is to conduct that business in future, and if all is fair and open in the conduct of such persons, the fullest disclosures being made of all matters material to be known to the company, it would be difficult, I think, to maintain that the purchase which had been adopted by an adequate quorum of independent directors could be set aside merely because one of the directors, who was also a vendor, had concurred in that adoption. In the present case there is nothing on the face of the contract with the company to indicate to the shareholders that Mr. Evans was not in a position something like that which I have just described. It might well be surmised by any shareholder who knew nothing of the real facts, that he, either alone or in conjunction with others, had purchased the island and had worked the phosphate of lime previous to the sale to the company of which he was to become a director, taking £20,000 of the purchase-money in paid-up shares of the company, and his position, thus regarded, would hardly, I think, put any shareholder upon inquiry as to the company having been unfairly dealt with.

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Upon the whole, then, I am unable to satisfy myself, either that it is not practicable to do justice on the basis of the contract being rescinded, or that the company has by any laches or delay laid itself fairly open to the imputation of having acquiesced in [*1234] the *contract which they now seek to set aside; and with some hesitation and diffidence, after having been made aware of the opinion of my noble and learned friend on the woolsack, I must advise your Lordships to reject this appeal.

THE LORD CHANCELLOR (LORD CAIRNS):—

My Lords, the appellants in this case complain of a decree of the Court of Appeal which has set aside a sale made to the Sombrero Company, of the island of Sombrero, and ordered repayment and re-transfer by the appellants of large sums of money and shares which had passed to them from the company on the occasion of the sale.

Your Lordships will observe that the plaintiff in the action in the Chancery Division was the Sombrero Company, and it is necessary to bear this particularly in mind, because it will enable your Lordships to put aside many observations and arguments which are not relevant in the case of an action by the company, although they might have been relevant had an action been brought by a shareholder to throw back his shares on the company, on the ground of misrepresentation or fraud.

In the view which I take of the case, the facts of which it is necessary to remind your Lordships are in a very narrow compass. Sombrero is a small island in the West Indies, about a mile and a quarter long, in which are deposits or beds of phosphate of lime. It belongs to the Crown, and a lease was made of it for twenty-one years from March, 1865, at a rent of £1000. This lease was assigned, in the first instance, to a company called the Old Sombrero Company, who paid £100,000 for it, taking it besides subject to a mortgage of £12,400. This company was wound up by the Court of Chancery, and in the winding-up the lease of the island came in 1871 to be sold. The appellants along with one Thomas Westall, a solicitor, thought well of the speculation, and wished to buy the lease, and for this purpose they formed what is called a syndicate or partnership, and ultimately, on the 30th of August, 1871, did agree to buy the lease by private contract from the official liquidator, Henry Chatteris, for £55,000, the contract being made in the name of Westall on behalf of his principals.

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My Lords, I stop at this point for the purpose of saying that I * think it to be clear that the syndicate in entering [* 1235] into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked. The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the re-sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below.

I now proceed to state what happened subsequently to the 30th of August, 1871.

Shortly before the 20th of September, 1871, the syndicate determined to form a joint stock company, and to sell the island to the company for £110,000, and the syndicate took the necessary steps for this purpose: preparing the memorandum of association,* and the articles, and also the prospectus which was to be issued.

The memorandum of association stated that the object of the company was the purchasing, leasing, and working of mines or quarries of phosphate of lime in the island of Sombrero. The articles stated that the number of directors should from time to time be determined by a general meeting, and that till any other number was determined there should be not less than four nor more than seven directors. Two directors should be a quorum for the transaction of business; and among the acts which the directors were empowered to do were the adoption and carrying into effect of the contract for the assignment to the company of the island of Sombrero, dated the same day as the articles, namely, the 20th of September, 1871.

This contract was a contract by which John Marsh Evans agreed to sell, and Francis Pavy agreed to purchase, the lease of the * island and the property on it for £110,000, [* 1236]

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£80,000 to be paid down, and £30,000 in fully paid-up shares of the new company. John Marsh Evans was a trustee or agent for Baron Erlanger and the other members of the syndicate, and Pavy was a person whose name was introduced into the contract as a matter of form, to represent the company about to be created, in case it should adopt the contract. The contract was, on the face of it, a provisional one, subject to the formation of the company, and the adoption of the contract by it.

In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person. My Lords, if this is the position and duty of a promoter, I ask your Lordships, in the next place, to consider how far that duty was discharged by the promoters in the present case.

The company was, as I have already stated, formed to
[* 1237] purchase * mines in the island of Sombrero, and the directors were armed specifically with the power of adopting

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the contract already mentioned of the 20th of September, 1871. The promoters, in framing the constitution of the company, have themselves given us what they considered to be the proper measure of strength of a board of directors who were to be entrusted with the execution of this power. They were to be not less than four nor more than seven, and in point of fact five names were given as the first directors. They were at once to enter upon business, and the first duty they would have to perform would be to consider whether the contract should be adopted or not. How far, then, were they in a position to perform this duty?

The first name was that of his Excellency Monsieur Drouyn de Lhuys. I will assume that there is some evidence that he had been communicated with, and had given some assent to the use of his name; but it is not pretended that the idea was ever entertained by the promoters that he either would or could take any part in the first great act of the directors, — the adoption of the contract, or that he could attend any meeting for the purpose. Of the second director named, Mr. Eastwick, the same may be said. He was absent at a distance from England, and did not take his seat at the board till the end of December, 1871. The third director, John Marsh Evans, was himself the vendor, and whether he was vendor as being beneficially interested in the property, or as trustee for the syndicate, is, in my opinion, immaterial. There remained two directors, and two only, — Sir Thomas Dakin and Admiral Macdonald, and of these I will speak when I come, as I shall next do, to the first meeting of the directors.

The company was registered on the 21st of September, 1871, and the first meeting of directors took place on the 29th of that month. There were present of the directors, Sir Thomas Dakin, Admiral Macdonald, and John Marsh Evans, who, as I have already said, was himself the vendor. There was also present Mr. Westall, who had been appointed and was acting as solicitor for the company, but who was himself one of the syndicate, although it is said that on the syndicate he merely represented certain other names not disclosed, and had himself no interest beyond the promise of a payment of £500.

* At this meeting a prospectus was produced ready for [* 1238] issue to the public, stating that the contract for purchase had been made by the directors; and the first resolution proposed

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and carried, almost as a matter of course, was that the contract should be approved and confirmed. Neither Sir Thomas Dakin nor Admiral Macdonald has given evidence in the case, and it is difficult to say positively what they knew or what they inquired, or whether they knew anything or inquired anything, about that which they were professing to buy. The conclusion at which I have arrived from such materials as are before your Lordships is, that both Sir Thomas Dakin and Admiral Macdonald treated from the first the adoption of the contract as a foregone conclusion. But whether this was so or not, it was the duty of the promoters to take care that the contract for the purchase of their property was submitted to the intelligent consideration of a complete number of independent directors; and I cannot but regard a meeting at which two of the principal directors did not and could not attend, at which one who did attend and take part in the deliberations was at once a person buying and selling, where the legal adviser present and assisting was virtually another vendor, and where the two remaining directors are not shown to have had the means of exercising, or to have exercised, any intelligent judgment on the subject, as little else than a mockery and a delusion.

I have said nothing, my Lords, as to the provision that two directors should be a quorum. That is a provision which, in my opinion, could not be held to remedy defects such as I have pointed out as going to the entire constitution of the board.

I cannot, therefore, my Lords, entertain any doubt that if, within a proper time after the completion of this purchase, a bill had been filed by the company impeaching it on the grounds that I have stated, the purchase must have been set aside.

The part of the case which, however, has given me the most anxiety is the question whether, having regard to what was made known at the time that the company was formed, and to what became known, and to what also might farther have become known, shortly after it was formed, and having regard, farther, to the very peculiar nature of the property which had been purchased, and to the impossibility of restoring the parties [* 1239] to their original * position, relief can or ought now, consistently with the principles of equity, to be given to those who seek to impeach the contract. On this question I have entertained, and still continue to entertain, considerable doubt,

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or more than doubt. The case has, however, been twice argued most elaborately and ably, and all of your Lordships are, I believe, of opinion that the company has not lost the right, which undoubtedly it had, to set aside the sale. I do not therefore think it necessary to do more than express generally the grounds of the doubts which on this part of the case I have felt.

The prospectus conveyed to those who became shareholders in the company, and conveyed, therefore, to the company, notice of some facts with regard to this contract which appear to me to be of great importance. The company was informed that the contract was already entered into by its directors. It was termed, no doubt, a provisional contract, — that is to say, provisional on the shares being taken and the company completely formed; but, subject to those contingencies, it was a contract actually made. Farther, it was not one out of many contracts that might be made in the course of a business; it was the great central contract of the company, underlying and supporting the whole of their undertaking. The terms of the contract, or at least the principal terms of it, are stated, the price is given, and also an accurate statement of the lease, buildings, machinery, &c., sold. Coupled with this the company is informed that the vendor is one of its own directors, and, therefore, that the contract has been negotiated on behalf of the shareholders between the directors and one of themselves, and they are informed that this contract may be seen at the office of the company's solicitors. We start, therefore, with this, that with reference to a contract which I hold to be voidable, because there was not the exercise upon it of the intelligent judgment of an independent executive, the shareholders are, on the one hand, informed what the terms of the contract are, and, on the other hand, are told that one of their directors has been the vendor in a contract in which he was also, on their behalf, a purchaser.

It is necessary, however, farther to consider the nature of the property as to which the shareholders had this information.

* They are told by the prospectus that it is brought [*1240] substantially as a going concern, with produce ready for shipment, and contracts for produce pending, which require to be executed. The lease, they know, is a running-out lease, with some years expired, and not a great many to come, and the value of the undertaking dependent not merely on the amount of the

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deposits in the island, but on the extent to which those deposits could be worked during the lease. The lease is one for the obtaining and putting on the market an article of commerce, the price of which is varying, uncertain, and speculative; outlay is required, the amount of which must vary with circumstances from time to time. Again, the company is aware that it is about to use the name of the property as a trade name, the effect of which will be that, if used unsuccessfully, the name cannot be restored to its original owners otherwise than injured irretrievably by the use thus made of it.

These considerations would, in my opinion, go far to cast upon the company the duty of taking steps at the earliest possible moment, and even before the first general meeting, to examine into and repudiate, if they did not desire to affirm it, a contract which was thus set before them as one *primâ facie* open to impeachment.

No step, however, appears to have been taken by any person connected with the shareholders to impeach the contract. They are content to ignore the fact both that they have not had the independent judgment of all the directors exercised for their protection in making the contract, and also the farther fact, still more calculated to prejudice them, that one of the directors sitting at the board has been a person with an interest entirely antagonistic to their own.

I think it must be taken that those who did not attend the first general meeting of the company held in the month of February had no desire to make any inquiries into the circumstances under which Mr. John Marsh Evans, their director, had come to be at once the vendor and the purchaser of the property. With regard to those who did attend that meeting, their views may fairly be taken from what was expressed at the meeting. It is stated that

there were about sixty-two shareholders present, and the [*1241] report * of Mr. Mackay, the manager of the company, who had been at Sombrero, was read. Francis Pavy also explained to the meeting the nature and prospects of the island, with which he was acquainted. I do not go through what was stated at the meeting in detail, but the inference which I draw from the report of the meeting is that no doubt was entertained or expressed by any one present that the rumour, which was openly referred to, that the island had been bought for £55,000, and

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re-sold for £110,000 within a few days, was otherwise than true; and it was, I think, in substance, admitted by the chairman that Mr. Evans might be looked upon as having bought it for the lower sum in concert with other people; but that although he was a director at the time that he sold, he was not a director at the time that he bought. And I cannot but come to the conclusion that those present at the meeting, being impressed with the expectation that the concern was going to turn out a very prosperous one, determined that they would not make any inquiry or raise any objection as to the manner in which the property had come to their hands.

Nothing was done, and no objection was made by any person until the meeting in June, 1872, at which time the shipments of the phosphates had turned out, commercially, to be a failure. At this meeting a committee of investigation was appointed; but even that committee did not suggest that the contract could or should be rescinded, but only that proceedings should be taken for recovery of the profit made by the vendors on the re-sale to the company, and the present bill was not filed until December, 1872, fourteen months after the company had taken possession of and commenced to work the island.

Under these circumstances, looking to the very peculiar nature of the property, and the utter impossibility of restoring the property, and the commercial undertaking connected with it, to the vendors in the state in which it was when the company took possession of it, looking to the amount of notice which the company had by the prospectus, and to the knowledge which they might have obtained by pursuing the inquiries which the prospectus ought to have suggested, I should be of opinion that it would be contrary to the principles of equity to give to the

*company the relief which, at an earlier period, they [*1242] might have obtained.

LORD HATHERLEY, after observing that the Court were unanimous in the opinion that, if due steps had been taken at the proper time by the plaintiffs, they could have set aside the contract on the ground of concealment, discussed at great length the question whether the plaintiffs were barred by delay; and, on this point, summed up his opinion as follows:—

No doubt the case of a mine is one which we must look [1254]
into with very great accuracy; and if once we saw the

slightest appearance of *mala fides*, if we saw the slightest indication of wavering and indecision as to whether or not the remedy should be taken until they saw how the thing would turn out, that might be a very different matter; but although it is true that things were so prosperous in February that Mr. Stephenson seems not to have obtained such a hearing as he otherwise would have done, that was not brought home to the minds of all the shareholders who were not present at that meeting. And even if there was such a degree of wavering on the part of Mr. Stephenson, there was certainly no such wavering on the part of anybody else. At the next meeting the appointment takes place of the committee of shareholders, obviously for the purpose of seeing what can be done to free themselves from the contract. Negotiations take place immediately after that, because the committee were recommended to see what could be done by negotiation; and after the failure of the negotiation there is no long or unreasonable time until the filing of the bill.

For these reasons I am satisfied that the appeal ought to fail, and should be dismissed with costs.

Lord O'HAGAN concurred with the majority.

[1259] Lord SELBORNE:—

My Lords, the contract in this case was adopted as the contract of the company (having been previously prepared for that purpose by the vendors) through the machinery of a [*1260] board of directors of *the vendors' own creation, who were so constituted as to be practically incapable of exercising (and who did not, in fact, exercise) any independent judgment on the subject. All the documents were prepared by the vendors' solicitor, who was also made solicitor to the company, and who participated, to the extent of £500, in the vendors' profit. Of the five directors named in the articles of association, two were absent from this country, and were at that time practically incapable of acting; the other three were present when the contract was adopted; but of these, one was the nominal vendor, and the paid agent and trustee of the real vendors; another was a mere instrument in the hands of the vendors, qualified (contrary to the articles) by a loan of shares from Baron Erlanger. The third was the Lord Mayor of London, and it seems only fair to him to suppose that he was too much occupied with other duties to be able to give much attention to this. The consideration for the sale was £110,000 (partly in

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shares of the company), being twice as much as the vendors had paid for the property a month before. Whether this was, or was not, an excessive price to be asked from a company, is a question into which I do not enter. If there had been an independent purchaser and a real bargain, the vendors would have been at liberty to ask what price they pleased; and if that purchaser had agreed to pay more than the property was worth, he could not complain. But there was, in fact, no such purchaser and no such bargain. The vendors themselves managed the whole thing, and they made those who through their means undertook a trust for others, their passive instruments.

By such an adoption of such a contract the company could not be bound in equity, if, when the material facts became known to the shareholders, they sought to be released from it within a reasonable time; nor could the nature of the property (a lease of minerals for years, of speculative value) make any difference in this respect. It was the act of the vendors to put their property, being of that character, in such a position; and, unless some equity arises against the plaintiffs from some conduct or omission of their own, the vendors must take the consequences of that act. The shareholders were put into possession of the property as a going concern; they took over the manager and all the other agents *whom they found upon it, and did not alter or [*1261] interfere with the course of management until they found that the manager was not doing his duty properly, when they promptly did what was right, and appointed a new and a fit person to succeed him. There has, therefore, been nothing done, or left undone, to the injury of the property since it came into the company's hands, which can now stand in the way of the plaintiff's right to relief, unless they have precluded themselves from it by acquiescence; and the relief given by the decree is such as, under these circumstances, is proper and usual, and is granted upon the usual equitable conditions.

With respect to the question of acquiescence I will first consider how it would have stood if nothing important had taken place at the general meeting of the 2nd of February, 1872, — premising that when acquiescence is a bar to an equitable right (which it may be much more easily than to a legal right, especially in mining cases), two things are generally necessary, — first, that there should have been sufficient knowledge of the facts on which the

equity depends; and, (secondly, when a contract is sought to be rescinded), that there should have been substantial freedom of choice and action, independent of the original influence under which the voidable contract was made.

Now, in this case, the original influence of the board of directors nominated by the vendors, who had adopted the contract on the 29th of September, 1871, continued till the meeting of the 19th of June, 1872, when the committee of investigation was appointed; and the new board, resulting from the report of that committee, was not formed until the 29th of August following. After the resolution passed at the meeting of that date authorizing the new board to endeavour to come to "an early settlement with the vendors of the property to the company, so that litigation might, if possible, be avoided," the whole time down to the filing of the bill, appears to me to be sufficiently accounted for; and I think it immaterial that, if the vendors would have consented (which they did not) to give back £55,000, the shareholders would have been willing, on those terms, to retain the property. That the company should, until a settlement was arrived at (or a decree made in case of litigation) continue in possession, and keep the concern going,

in a due course of management, was an inevitable necessity [* 1262] * under the circumstances. A different course (since the vendors did not offer to take back the property) would have given the vendors much more reason to complain of the conduct of the plaintiffs (so far, at least, as my opinion is concerned) than they now have.

From the formation of the company till the inquiry by the committee of investigation, the shareholders had such knowledge as was communicated to them by the articles of association and the prospectus; and (unless by means of what passed at the meeting of the 2nd of February, 1872), they had no more. They knew, from these original sources of information, that the directors had power to adopt, and had adopted, a contract, previously prepared, for the sale of the property by Evans (himself a director), as vendor, to Pavy, on behalf of the company, for £110,000; of which contract a copy might be seen at the office of the company's solicitor; and that Evans had bought from Mr. Chatteris, as liquidator of a former company, under the direction of the Court of Chancery; also, that the working by Mr. Chatteris had been profitable. If any shareholder had referred to the contract (as he was invited to

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do), he would have found in it the date of Evans's purchase (30th of August, 1871); but he would not have found what price Evans had paid. If this had been sufficient information, no shareholder taking shares on the faith of the articles and the prospectus could have had any ground of complaint; and I should have thought that in that case the company would never have had any equity to rescind the contract. But there was in truth (so far) nothing to suggest to any shareholder that the board of directors had not been properly constituted, or that the directors had been nominated by, or had acted under the influence of, the vendors; or that they had not properly exercised their judgment, and performed their duty. Evans was, indeed, stated to be both vendor (as far as appeared, sole vendor) and a director. But this might well be without any interference on his part with the judgment and discretion of his co-directors, as to adopting, or not adopting, the contract. It is no unusual thing for a vendor to be asked, in the interest of a purchasing company, to take a place in its direction. The names with which that of Evans was, in this case, associated, were at least sufficient to justify the shareholders in *taking it for granted that everything had been properly [*1263] and *bouâ fide* done on their part; and I cannot think that, under these circumstances, it would be equitable to hold that they were put upon making farther inquiry, merely by what appeared in the articles of association and in the prospectus.

The remaining question is, whether the discussion which took place at the first general meeting, on the 2nd of February, 1872, alters the case? I think it does not. No notice was given to the shareholders, before that meeting, that any business would be brought before it relative to this contract; and after the meeting no information as to the conversation relative to the contract, which had taken place at it, was communicated to the absent shareholders. The whole number of shareholders was 496, of whom only sixty-two were present. Even as to those sixty-two (I lay aside the particular case of Mr. Stephenson, who brought the matter forward as a dissatisfied shareholder, but whose individual knowledge or acquiescence, even if he did acquiesce, could not affect the rest), it does not appear to me that any communication was then made which added to their previous knowledge more than one material fact, — namely, that the price paid by Evans to Chatteris was £55,000. If this had been all, if the other directors

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had dealt *bonâ fide* and at arm's length with the vendors, as in the due discharge of their duty they ought to have done, the fact that Evans, or those whom he represented, had made this large profit by the re-sale, would not, by itself, have enabled the company to rescind the contract. The suggestion that the contract was or might be voidable for that or for any other reason, does not appear to have been in any way presented to the minds of the shareholders who attended the meeting; not even by Mr. Stephenson himself. So far were the directors from then treating the case as one in which there was an option to rescind or not, that the chairman, Sir Thomas Dakin, professed ignorance of the price which Evans had paid, and treated it as a matter with which the company had nothing at all to do. It is true that he also represented the bargain as a good one; on grounds, which he doubtless at that time believed to be sufficient, but which afterwards proved to be fallacious. If the question of ratifying or rescinding a contract,

then understood or supposed to be voidable, had been [* 1264] *before the meeting, this might have been very important as leading to the conclusion that the shareholders present desired to ratify and not to rescind it. But, in the actual circumstances of the case, I can only regard such a statement as calculated (especially when taken in connection with the answer made to Mr. Stephenson), to confirm the confidence which the shareholders had down to that time placed in the board, and to put them off any farther inquiry into the way in which the duty undertaken by the directors had been discharged. I cannot, therefore, impute any acquiescence, which would make it inequitable now to rescind the contract, even to those shareholders who were present on the 2nd of February, 1872; much less to those (being seven-eighths of the whole number) who were not there, and who were altogether ignorant of what passed at that meeting.

I think that the decision of the Court of Appeal in Chancery was correct, and ought to be affirmed.

Lord BLACKBURN stated the questions to be, — *First*, [1268] whether enough is proved, in fact, to make a case good in law, under which, if the plaintiffs had come promptly, they would have been entitled to the relief given by the decree appealed against. *Secondly*, whether the defendant's plea of laches was made out; and whether, under all the circumstances, the Court could do complete justice by rescinding the contract.

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Upon the first question: Throughout the Companies Act, 1862 (25 & 26 Vict. c. 89), the word "promoters" is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.

Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as *they choose to give to those managers, [*1269] so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent. Some reference was made in the argument to the Companies Act, 1867 (30 & 31 Vict. c. 131, s. 38), on the construction of which there has been a great diversity of judicial opinion. That section does contain the word "promoters," which, as I have already observed, is not to be found in the Companies Act, 1862, but it imposes no fresh duty on them with regard to the company. It imposes a fresh duty towards, and gives a new cause of action to, persons who take shares in the company as individuals; it does not affect the obligation of the promoters towards the corporation. I think that the extent of that fiduciary relation, which, as already said, in my opinion, the promoters bear to the company, is a very important consideration in construing that section; and I am desirous to avoid prejudging that question by saying in this case more than is necessary for its decision. I think, as already said, that the promoters are in a situation of confidence to some extent towards the company they form.

Where, as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendors' interest to get as high a price as possible, and they have a strong bias to overvalue the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

Lord ELDON, in *Gibson v. Jeyes*, 6 Ves. 266, at p. 278; [* 1270] 5 R. R. 295, at p. 306, says that "it is a great rule * of the Court that he who bargains in matters of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence, — a rule applying to trustees, attorneys, or any one else." I think persons having property to sell may form a company for the purpose of buying it in such a manner as to show this, and when they do so, the sale will be unimpeachable. I will not attempt to define how this may be done. Probably there are many ways. What I shall do is to inquire what, on the evidence, appears to have been done in this case, and then to confine myself to saying whether, on the facts of this particular case, it appears that an unreasonable use has been made of that confidence which the company did not indeed place in the promoters, for the company did not then exist, but which the Legislature did place in them for the company when it gave the promoters power to create it.

After commenting in detail on the evidence, he continued: —

[1277] I think that under such circumstances the burden of proof lies on the fiduciary agents, agents selling to those to whom they owed a duty, to prove, if not that sufficient protection had been afforded, at least that they had sufficient reasons for *bona fide* believing that sufficient protection had been afforded to their purchasers. If they could have proved that Sir Thomas Dakin was told that the price at which the property had been recently bought was £55,000, and also that he knew that Westall, by whom the prospectus was prepared, from evidence which he had collected, was not a disinterested attorney, but one having a strong bias in favour of the vendors, they should have done so. If such proof had been given, and it had been shown that Sir Thomas Dakin, well aware that for these reasons he

No. 74. — *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1277, 1278.

should receive the statements and evidence of value with caution, had satisfied himself that the bargain was a good one at £110,000, the case would have been very different. I doubt whether the opinion of one disinterested person so obtained would have been enough protection, but that it is not necessary to consider if, as I think, it is not proved that even this slight degree of protection was given.

My Lords, I have felt much doubt and difficulty as to the second question, though, on the whole, I think the plaintiffs have not lost their remedy.

Several points were made and argued, as to which I think it unnecessary to say more than that I think they were satisfactorily disposed of in the judgments below. That on which I have difficulty, and to which I shall confine my remarks, is whether laches and acquiescence is made out to such an extent as to deprive the company of the remedy by rescission which they had if they had come promptly. Some things are to my mind clear. The contract was not void, but only voidable at the election of the company.

In *Clough v. The London and North Western Railway Company*, L. R., 7 Ex. 34, 35, in the judgment of the Exchequer Chamber, it is said, "We agree that the contract continues valid till the party defrauded has determined his election by avoiding it. In such cases, * (that is, of fraud), the [*1278] question is, Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or, Has he elected to avoid it? Or, Has he made no election? We think that so long as he has made no election he retains the right to determine it either way: subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind." It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*. See per Lord CRANWORTH in *Addie v. The Western Bank of Scotland*, L. R., 1 H. L., Sc. 165. It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in Courts of law and equity, owing as I think, to the difference of the machinery which the Courts have

at command. I speak of these Courts as they were at the time when this suit commenced, without inquiring whether the Judicature Acts make any, or if any, what difference.

It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke v. Dixon*, E. B. & E. 148, and the cases there cited.

But a Court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of equity to give this relief whenever, by the exercise of [* 1279] its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. And a Court of equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in morâ*, than a similar change before he was *in morâ* should do.

In *Lindsay Petroleum Company v. Hurd*, L. R., 5 P. C. 239, it is said: "The doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted,—in either of these cases

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lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and * must [*1280] therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry. The plaintiffs in this case are an incorporated company; but I think that in considering the question of laches, the Court cannot divest itself of the knowledge that the corporation is an aggregate of individuals. The knowledge of one shareholder is not the knowledge of the others; but I think great injustice might sometimes be done if it were held that where it is shown that all the shareholders who paid reasonable attention to the affairs of the company had notice sufficient to make it laches in them not to act promptly, there could not be laches in the company unless the notice was brought home to the company in its corporate capacity. But at the same time it should be recollected that shareholders who seek to set aside a contract made by the governing body, have practically first to change that governing body, and must have time to do so. Now in the present case every allottee had from the beginning by the prospectus full notice that the vendor, John Marsh Evans, was also one of their directors, which alone might have given them an equity to set aside the contract, though in every other respect it was unimpeachable. If that had been the only ground on which the shareholders were entitled to relief, it seems clear that it would have been impossible to give it even the day after

No. 74. — *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1280, 1281.

the directors took possession and paid the price. They had, however, much more substantial equities, but they had also notice of more, for the prospectus referring to the contract, which was open to inspection at the office, I think each allottee was fixed with the knowledge, which he would have had if he had read it, that Evans had purchased from Chatteris so recently as the 30th of August, not quite three weeks before he sold to the company. He would not have known at what price it had been purchased, but as that was known to all who had an interest in the company under liquidation, either as creditors or contributors, it could very easily have been ascertained. And, in fact, it was known and stated at the meeting in February. Now though this was not actual knowledge that the other four directors had not made independent inquiry before making the purchase, it was enough, in my opinion, to have put any reasonable shareholder [*1281] *upon inquiry. And the circumstances attending the nature of the property, which are mentioned by the LORD CHANCELLOR in his opinion, were such as to make it proper for those who intended to get rid of the bargain to act with considerable promptitude. What weighs most with me is that it appears that if the price of phosphate had not fallen below £5 a ton, there would have been a profit of £1 a ton, and the bargain would not have been a bad one; if it had risen, the bargain would have been a good one, and would no doubt have been approved. But I see nothing to lead to the conclusion that the shareholders were waiting to see how the market turned out. Prices no doubt began to fall about February, 1872, and continued to fall, but not with a sudden fall. If I thought the shareholders had been waiting to see how the market ruled, it might have made a difference in my opinion. If no steps to repudiate a purchase of a lottery ticket were taken till after the ticket came up a blank, so that the purchaser, if it came up a prize, might have kept it, it would surely be inequitable to set aside the contract then. And though not nearly so strong a case, such delay seems to be somewhat of that nature.

I cannot read Mr. Stephenson's cross-examination without coming to the conclusion that the shareholders present at the meeting in February were so possessed with the idea that the bargain was a good one, that they would not listen to him; and if they had been competent to do so, would have approved the contract. But

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they could not do so; they were not even a majority. A meeting convened with due notice that this business was to be considered might have probably ratified it, but no other meeting could have done so. So far the company have the benefit of their impersonality. But then comes in the question which weighs with me on the other side; what steps could Mr. Stephenson and those who thought with him, take? for unless they could have done something which they did not do, they can hardly be charged with laches. Before they could take any step to disapprove this contract, they must get a majority of the shareholders, at a meeting duly convened with notice, to agree with them, and they must practically get rid of the board who had adopted the contract. They might have taken steps to have a meeting specially *convened, but I think it was not laches to wait till [*1282] the regular meeting in June. If the shareholders had continued in the temper of those who met in February, they must then have failed. But, before the meeting in June, it was discovered that, greatly owing to the negligence of those who shipped the phosphate (a cause for which the syndicate were not to blame), the early shipments, instead of producing a large profit, had produced a loss, and the temper of the shareholders was changed; they unanimously appointed a committee of investigation, who, without any delay, made a report substantially disclosing the whole of what is now the plaintiff's case. Even in that report it is not proposed to repudiate the contract; the committee expresses the hope that a net profit of £1 per ton may be realized on 10,000 tons per annum (which I may observe would give a fair dividend on £130,000), and recommends that the existing board of directors should be turned out, and the new board should be authorized to take proceedings to recover the difference between the £110,000 paid by the shareholders to the syndicate for the lease, and the £55,000 paid by the syndicate to Chatteris; and this is, I think, of some weight in favour of the defendants. But I cannot assent to the argument that the resolution to adopt this report was equivalent to a resolution affirming the purchase.

On the other hand, I feel that there is much force in the observation that those who deal inequitably with a company know that it must necessarily be slow in its proceedings, and are not entitled to complain that time elapses; and that it is not desirable that such a rule should be laid down as would practically deprive a

company when defrauded of relief. And this is a reason against considering a company as precluded from that relief to which it would otherwise be entitled, on account of delay, unless the delay is excessive. I can find no case in which even a private individual has been precluded by mere delay, except where the delay has been very much greater than in this case. In *Prendergast v. Turton*, 1 Y. & C. Ch. C. 98, nine years elapsed. In *Clegg v. Edmondson*, 8 D. M. & G. 789, nearly as long; and in both cases the plaintiff had lain by whilst the defendants were investing money in the mine, until that investment proved to be [*1283] remunerative. It was clearly not equitable *to leave the defendants to all the risk of loss, and claim to themselves a profit; and this seems to be what Lord ELDON principally relied on in *Norway v. Rowe*, 19 Ves. 144; 12 R. R. 157. In the present case that is no ground for imputing to the plaintiffs what Lord LYNCHURST in *Prendergast v. Turton*, 1 Y. & C. Ch. C. 98, calls a “conditional acquiescence.” As is pointed out in *Clarke v. Hart*, 6 H. L. C. 633, there was in *Prendergast v. Turton*, very nearly, if not quite a legal defence. Here, taking the time at which the active shareholders were put upon exerting diligence to be February, there was not quite nine months before the filing of the bill; that is not very long for getting the majority of shareholders to make an inquiry, turn out the board, and get proper advice, before instituting a Chancery suit. And having come to the conclusion before, that the company had once had the right to this relief, I think the burthen is on the defendants to show that the company have precluded themselves from the relief to which they had a right. I do not think this is made out.

I am of opinion that the judgment below should be affirmed with costs.

Lord GORDON, after a short *résumé* of the facts, concluded as follows:—

[1285] I consider that the fault lay originally with the promoters in not making a full and fair disclosure to the company, and in not putting the company into a position in which to consider properly the propriety of entering into the contract in question; and, in my view, the contract might have been set aside if it had been timeously challenged. In considering the question, I must bear in mind the difficulty referred to by my noble and

Nos. 73, 74. — *Venezuela Ry. Co. v. Kisch*; *Erlanger v. New Sombrero. &c. Co.* — Notes.

learned friend who spoke last, which presents itself to the shareholders of an incorporated company in resolving upon proceedings to be taken against the directors and those who have the management * of the company. I am therefore of [* 1286] opinion that the onus lay on the appellants of showing that there had been such laches on the part of the company as to deprive it of the right to set aside the contract. I think that the appellants have failed to show that there have been such laches on the part of the company. And therefore I am of opinion that the judgment appealed against is right, and should be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.
Lords' Journals 31st July, 1878.

ENGLISH NOTES.

Generally speaking, non-disclosure of facts is not fraud so as to expose the person guilty of it to an action for rescission of the contract or for damages; *Ward v. Hobbs* (1878), 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. 73, 27 W. R. 114, No. 5 of "Animal." 3 R. C. 125. See also *Keates v. Lord Cadogan* (1851), 10 C. B. 591, 20 L. J. C. P. 76, where it was held that a landlord is not bound to disclose the ruinous and unsafe condition of the house to an intending lessee; *Edwards-Wood v. Majoribanks* (1860), 7 H. L. Cas. 806, 30 L. J. Ch. 176 (which decided that the vendor of an advowson is not under an obligation to disclose any charges on the living). But where a party to a contract has done some act to conceal a defect, the doctrine of *caveat emptor* does not apply either to maintain the contract or to shield the deceiver from damages; *Shirley v. Stratton* (1785), 1 Bro. C. C. 440; *Dean v. Rastron* (1792), Anstr. 64; *Hill v. Gray* (1816), 1 Starkie, 434, 18 R. R. 802; *Fothergill v. Phillips* (1871), L. R., 6 Ch. 770. In sale, "with all faults," the vendor must not actively conceal defects in the object sold; *Baglehole v. Walters* (1811), 3 Camp. 154, 13 R. R. 778; *Schneider v. Heath* (1813), 3 Camp. 506, 14 R. R. 825; *Early v. Garrett* (1829), 9 B. & C. 928, 4 M. & R. 687.

Even where silence does not amount to fraud, the circumstances may show such a hardship that a Court of Equity may refuse to grant specific performance of the contract; *Ellard v. Lord Llandaff* (1809), 1 Ball & Beatty, 241, 12 R. R. 22. There a lessee obtained the renewal of a lease on the surrender of an old lease, suppressing the fact known to him that the person on whose life the old lease depended was *in extremis*. The Court declined to help the lessee.

Nos. 73, 74. — Venezuela Ry. Co. v. Kisch ; Erlanger v. New Sombrero, &c. Co. — Notes.

Again, upon a sale of land there is (by implied contract) a duty on the vendor to disclose the material facts relating to the title. In *Edwards v. M'Leay* (1818), 2 Swanst. 287, an estate having been sold, part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract and unknown to the purchaser, the contract was rescinded and the vendors were ordered to repay the purchase-money, with all costs and expenses incident to the purchase and conveyance. In *Gibson v. D'Este* (1843), 2 Y. & C. Ch. C. 542, KNIGHT BRUCE, V. C., held a purchaser entitled to rescind a contract for the sale of land where the vendors or their agent knew of a public right of way affecting the property and omitted to disclose it to the buyer. The House of Lords overruled this decision, *s. n. Wilde v. Gibson* (1848), 1 H. L. Cas. 605, on the ground that in order to set aside a purchase perfected by conveyance and payment of the purchase-money, the vendor must be proved to have had personal knowledge of the fact concealed. Mere knowledge and concealment by the agent was not sufficient.

The former of the two principal cases furnishes an example of another well-known exception to the rule *caveat emptor*. The case shows a duty on the company issuing the prospectus. In effect the company invite the public to rely upon the substantial accuracy of the prospectus as a full disclosure of the position.

Another way in which a duty may be imposed upon a company or its agents to tell the whole truth is by statutory enactment.

By section 38 of the Company's Act 1867 (30 & 31 Vict. c. 131): "Every prospectus of a company and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

Again, a duty to disclose the truth may arise where a statement or representation has been made in the *bonâ fide* belief that it is true, and before it is acted on, the party who has made it discovers that it is untrue. For instance in *Traill v. Baring* (1864), 4 Giff. 485, 33 L. J. Ch. 521, an assurance society (A.) proposed to insure, by way of re-insurance, with another assurance society (C.) the life of X. for £1000, part of £3000 originally insured. The proposal was accepted on the 4th of May, 1861. On the tenth of the same month X. insured his life

Nos. 73, 74. — *Venezuela Ry. Co. v. Kisch*; *Erlanger v. New Sombrero, &c. Co.* — Notes.

with society A. for £3000; and society A. at the same time represented to society C., that another society (B.) would take £1000 of the risk, while society A. would itself retain £1000, and they also represented that X.'s life was a good one. On the 15th of May, 1861, and before the contract between the societies A. and C. was completed, society A. without informing society C. assured £2000 with society B. On the 18th of May, the policy for £1000 in favour of society A. was executed by society C. On the death of X. in the following January the society C. discovered that the society A. had taken practically no risk on the life, and refused to pay. On an action being instituted by society C. to rescind the policy of May 18, a decree to that effect was made by Vice-Chancellor STUART and confirmed by the Lords Justices TURNER and KNIGHT BRUCE. The ground of this decision in effect concurs with the following *dicta* of Lord BLACKBURN in the later case of *Brownlie v. Campbell* (H. L. Sc. 1880), 5 App. Cas. 925, at p. 950. He says: "Where a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, and thereby allowing the other party to go on, and still worse, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say as at present advised. And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also." Per Lord BLACKBURN, in *Brownlie v. Campbell* (1880), 5 App. Cas. at p. 950.

The rule in the latter of the principal cases is further illustrated by *The Emma Silver Mining Company v. Lewis* (1879), 4 C. P. D. 396, 48 L. J. C. P. 257, 40 L. T. 168, 27 W. R. 836; and *Lydney and Wiggpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, 55 L. J. Ch. 875, 55 L. T. 558, 34 W. R. 749.

AMERICAN NOTES.

The *Kisch case* is cited by Mr. Lawson (Contracts, § 220), and by Mr. Pomeroy (Equity Jurisprudence, pp. 1235, 1238, 1239, 1260, 1262), as the leading case.

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Mr. Lawson observes: "But it is not believed that the American adjudications require in such contracts any greater degree of good faith than is exacted of parties in regard to other contracts, nor would such contracts be avoided unless the representations were made with the fraudulent intention of inducing other persons relying on them to act."

In *Rohrschneider v. Knickerbocker Life Ins. Co.*, 76 New York, 216; 32 Am. Rep. 290, the defendant advertised and represented that its patrons could be insured at half the expense of insuring in other companies, by paying half the premiums in cash and giving notes for the other half, the dividends always paying the notes. The dividends had never paid the notes, but generally fell far short, as the managers knew. Held, actionable fraud. See *Bosley v. N. M. Co.*, 123 New York, 555; *Terwilliger v. Gt. W. Tel. Co.*, 59 Illinois, 249; *Howard v. Turner*, 155 Pennsylvania State, 349; 35 Am. St. Rep. 883; *Upton v. Tribilcock*, 91 United States, 45.

"All the elements of a fraudulent representation must exist in order to avoid a subscription" to stock, "as well as any other contract." Note, 81 Am. Dec. 401. That is, it must have been false, fraudulent, and relied upon as true. *Clem v. Newcastle, &c. R. Co.*, 9 Indiana, 488; 68 Am. Dec. 653; *Salem M. Corp. v. Ropes*, 9 Pickering (Mass.), 187; 19 Am. Dec. 363; *Wight v. Shelby R. Corp.*, 16 B. Monroe (Kentucky), 4; 63 Am. Dec. 522; *Cortes Co. v. Thannhauser*, 45 Federal Reporter, 730, with notes; and other cases cited in last-mentioned note.

If a subscription for shares has been obtained by false representations, it may be annulled by the subscriber at any time before other equities have intervened. *Bosher v. Richmond, &c. Co.*, 89 Virginia, 455; 37 Am. St. Rep. 879.

In the last cited case it was also held that a promoter "is an agent of the corporation and is subject to the disabilities of such. He is guilty of a breach of trust if he sells property to the corporation, purchased after he began promoting, without informing the company that the property belongs to him; or he may commit a breach of trust by accepting a *bonus* or commission from a person who sells property to the corporation. The same doctrine is declared in *Pittsburg Min. Co. v. Spooner*, 74 Wisconsin, 307; 17 Am. St. Rep. 149, citing the *Erlanger case*; *Simons v. Vulcan, &c. Co.*, 61 Pennsylvania State, 202; 100 Am. Dec. 628; *Yale Gas Store Co. v. Wilcox*, 64 Connecticut, 101; 25 Lawyers' Rep. Annotated, 90 (with notes citing *Erlanger case*); *Placquemines T. F. Co. v. Buck*, 52 New Jersey Eq. 219; *Burbank v. Dennis*, 101 California, 90.

But in *Burbank v. Dennis*, 101 California, 90, it was held that the mere fact that a promoter sells his own land to the company at a profit will not render him liable in the absence of fraud; and this is held of owners forming of themselves an association and selling their land to it, in the absence of fraud. *Densmore Oil Co. v. Densmore*, 64 Pennsylvania State, 43.

 No. 75. — *Bates v. Hewitt*, L. R., 2 Q. B. 595, 596. — Rule.

No. 75. — *BATES v. HEWITT.*

(1867.)

RULE.

CONTRACTS of insurance are *uberrimae fidei*. It is the duty of the insured to disclose all material facts; and in default of his doing so the contract may be avoided by the insurer.

Bates v. Hewitt.

L. R., 2 Q. B. 595-612 (s. c. 36, L. J. Q. B. 282; 15 W. R. 1172.)

Marine Insurance. — Concealment of material Fact by Assured. [595]

A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material; though, if a particular fact be known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that the fact was not communicated; but if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the assured to show that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated.

During the late American war, in 1863-64, the *Georgia* screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, and this was also a subject of public notoriety, and, as such, known to the defendant, an underwriter at Lloyd's; *at Liverpool she was bought by the plaintiff at public [*596] auction, and converted by him into a merchant vessel. In August, 1864, the plaintiff, through his broker in London, effected with the defendant an insurance of the vessel for six months. The particulars furnished by the plaintiff were, *Georgia*, S.S., chartered on a voyage from Liverpool to Lisbon and the Portuguese settlements on the west coast of Africa and back. The vessel sailed from Liverpool, and was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, the defendant set up as a defence the concealment of the fact that the *Georgia* proposed for insurance was the late Confederate war steamer, and therefore liable to capture by the United States. The jury found, that the defendant was not aware that the *Georgia* which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge coupled with the particulars given by the plaintiff.

Held, that the defendant was entitled to the verdict.

Declaration on a policy of marine insurance, for six calendar months, on the screw steamer, *Georgia*, subscribed by the defendant for £100, claiming a total loss.

Plea, that the defendant was induced to effect the insurance, and to subscribe the policy, by the wrongful and improper concealment, by the plaintiff and his agents, from the defendant of certain material information, then known to the plaintiff and his agents, and unknown to the defendant, and which ought to have been communicated to the defendant.

Issue joined.

At the trial before COCKBURN, C. J., at the sittings in London, after Michaelmas Term, 1866, the following facts were proved: The plaintiff is a shipowner at Liverpool, and the defendant is an underwriter at Lloyd's. A vessel called the *Japan* was built at Dumbarton in 1863. Shortly afterwards she was fitted out as a vessel of war, on behalf of the government of the Confederate States of America, and her name was changed to the *Georgia*. For about a year she was employed as a cruiser, and became very notorious in this service; but on the 2nd of May, 1864, she put into Liverpool, and was there dismantled; this was a fact of general notoriety at the time. She was put up to sale by public auction, and purchased by the plaintiff for £15,000. The plaintiff fitted her out as a merchant vessel, at an expense of £4,000 or £5,000; and chartered her on the 28th of July, 1864, to the agent of the Portuguese government for a period of four months, to trade [* 597] from Liverpool to * Lisbon, and from thence to the Cape de Verde Islands and the Western Coast of Africa.

On the 27th of July, 1864, the plaintiff wrote from Liverpool to Bradford and Co., insurance brokers, in London: —

“At what rate can you do me the hull of the S.S. *Georgia* for four months, chartered to proceed on the following voyages: From Liverpool to Lisbon, and from thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and return to Lisbon, calling at all ports as ordered.”

To which Bradford & Co. replied: —

“We presume the *Georgia* is the Confederate boat, and the voyage the Portuguese mail service; if so, we should think the four months would be from three to four guineas per cent., but it is rather a guess on our part. The company's steamers doing that work were insured at seven guineas the year, but there was a

batch of them, whereas this is a single matter. We should be glad to secure you the best possible terms, and, if you send an order, please say all you can of the vessel's condition, and any particulars that may assist us."

On the first of August, 1864, the plaintiff wrote to Bradford & Co.: "Annexed I beg to hand you particulars of the voyage of the *Georgia*; if you can insure her at 3½ guineas per cent., for six months, please do so to the extent of £23,000. Captain Wittycombe, who is to command, has been master at times of nearly all my ships, and is at present overlooking her.

"*Georgia*, S.S. Built by Denny and Co., at Dumbarton, in 1863, 427 tons register, 200-horse power, Captain Wittycombe, — for and during the space of six calendar months, commencing on the 7th of August, 1864, at all times and in all places, and on all lawful service, Liverpool to Lisbon, there and thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and back to Lisbon ^{and} or Liverpool, calling at above named places on the return voyage, — ship valued at £23,000.

"I think the underwriters know W. F. Wittycombe very well. He has been master in my ships for sixteen years, built many of them, and up to this moment has never cost underwriters on his ship a shilling. If not done telegraph to me."

* Bradford and Co. telegraphed to the plaintiff that they [* 598] could not insure the *Georgia* at his limit, but could do so at four guineas. Eventually they effected (amongst other policies) an insurance at Lloyd's, on the 6th of August, for £6000 on the *Georgia* steamer, for six months from her sailing, at four guineas per cent., of which the defendant underwrote £100. It is customary for time policies effected at Lloyds to contain a memorandum that the insurance is free of capture and seizure, but this clause was omitted in the present policy. The letters of the 27th of July, and of the 1st of August, with the particulars, were shown to the defendant and the other underwriters at the time they underwrote the policy.

The defendant stated, at the trial, that he knew that a vessel called the *Georgia* had been in the Confederate service as a war steamer, and that she had been sold at Liverpool; but that these facts were not present to his mind at the time he underwrote the policy, and that he did not know that he was asked to insure and was insuring the Confederate *Georgia*; and had he known that the

vessel in question was the *Georgia* which had been in the Confederate service, he would not have insured her. He also admitted that he did not observe that the policy was not free of capture and seizure; and he stated that Bradford & Co. were the brokers for a company who had steamers running to the Mediterranean, and being under the impression that he was insuring one of these steamers he did not give much attention to the plaintiff's letters and particulars.

The vessel sailed from Liverpool, upon her voyage, on the 8th of August, and was captured on the 15th by a frigate of the United States of America.

The following is the statement furnished to the parties by the Chief Justice, of his direction, and the questions he left to the jury and their finding: —

“I direct the jury:—

“1. That the fact of the *Georgia* having been a Confederate war steamer was a material fact.

“2. That the fact not having been communicated to the insurer, the verdict must be for the defendant, unless defendant knew the fact, or had the means of knowledge of which he ought [* 599] to have *availed himself (this point, however, being subject to the leave reserved).

“3. That it is immaterial that the defendant may have previously been aware that the Confederate steamer *Georgia* was at Liverpool, so that if he had remembered it he would have known the vessel proposed to be insured was the same, if he had forgotten his former knowledge, as the knowledge must be not a past but a present one.

“I leave to the jury:—

“1. Whether the defendant had a present knowledge of the identity of the vessel.

“2. If not, whether taking the previous knowledge of defendant as to the Confederate *Georgia* being at Liverpool, and the particulars disclosed by the slip and memorandum accompanying it, defendant, by the exercise of ordinary intelligence and knowledge of his business, might have known that this was the Confederate *Georgia*.

“Verdict: The jury are not satisfied that defendant was aware of the fact that the *Georgia* proposed for insurance was the former Confederate cruiser; but their verdict is that he had abun-

dant means of identifying the ship at the time of underwriting the ship.

“ In answer to a question from me the jury added that the means of knowledge referred to were to be found in the slip itself. On this finding I directed the verdict to be entered for defendant, subject to leave reserved.” See also the judgment of the Chief Justice, *post*, p. 825.

A rule was accordingly obtained to enter a verdict for the plaintiff, on the ground that on the finding of the jury the plaintiff was entitled to have the verdict entered for him.

A cross rule was obtained on behalf of the defendant for a new trial (in the event of this Court, or a Court of Appeal, holding that the finding of the jury amounted to a verdict for the plaintiff), on the ground that the verdict was against the evidence.

May 30. James, Q. C., T. Jones, Q. C., and Sir G. Honynman, Q. C., for the defendant, showed cause against the rule to enter the verdict for the plaintiff. The verdict was rightly entered for the defendant. It will be conceded on the other side that

* the *Georgia* was a vessel which had been employed by [* 600] the Confederate States on a service which exposed her to capture in the hands of a neutral subject. It will be further conceded that the plaintiff knew this fact, and that it was a material fact, which ought to have been communicated to the defendant; and the jury have found that the defendant did not actually know the fact, except so far as he may be charged with knowledge through the memorandum enclosed in the letter of August 1st, to Bradford & Co. Then the question is, does the description of the vessel as given on the face of the memorandum show that she had been the Confederate cruiser *Georgia*? It is clear it does not. It is well established law that in contracts of insurance the strictest good faith must be observed, and the person proposing the insurance is bound to communicate every material fact which he knows, and the underwriter does not know. To this rule there are some exceptions, — the insured need not mention what the underwriter knows, or what in the ordinary course of his business he ought to know. *Carter v. Boehm*, 3 Burr. 1905, 1910. By not communicating to the defendant the fact that the *Georgia* had been in the Confederate service the plaintiff was guilty of a concealment which vitiated the policy. Concealment is defined, in Phillips on Insurance, s. 531, to be “Where one party suppresses

or neglects to communicate to the other a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known, or presumed to be so, to the party not disclosing it, and is not known or presumed to be so to the other." The underwriter is not bound to use any extraordinary diligence in finding out the facts which would enhance the risk; but if he suspected that there had been a concealment, and chose not to ask lest he should know, then he might be liable on the policy. *Oakeley v. Ouldeen*, 2 F. & F. at p. 659. In *Foley v. Tabor*, 2 F. & F. 663, 672, it was sought to avoid an insurance on the ground that the assured had concealed from the underwriter the charter under which the ship was to carry iron, not exceeding her registered tonnage; the underwriter knew [* 601] the vessel would carry iron, but he did not know * the quantity: he might, however, have ascertained this by referring to a book at Lloyd's, in which the cargoes of insured ships were entered. ERLE, C. J., in summing up the case to the jury, laid it down: "The material fact must have been known to the assured, and unknown to the insurer. As to the latter point, actual knowledge is not essential if the insurer knew he had the means of knowing the fact." The law, however, laid down by ERLE, C. J., goes farther than that decided by other cases. In no case has it ever been decided that the means of knowledge an underwriter may have is equivalent to knowledge. In the case of *Central Railway Company of Venezuela v. Kisch*, L. R., 2 H. L. 99, 120, No. 73, p. 759, *ante*, the LORD CHANCELLOR says: "It appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector: 'You at least who have stated what is untrue or have concealed the truth for the purpose of drawing me into a contract cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" The defendant has accepted the risk on the faith of the representations made to him by the plaintiff, and he was not bound to make further inquiries; if the representations are not true, or the information is not as full as it ought to have been, the contract of insurance is void; and it is no

answer to the underwriter's objection that there has been a concealment, to say that he might have known the truth by proper inquiry.

June 3. Milward, Q. C., and Potter, in support of the rule. No doubt the identity of the *Georgia* insured with the Confederate *Georgia* was a material fact; but the fact was notorious that the late Confederate vessel was at Liverpool, and the information afforded to the defendant by the memorandum was amply sufficient to put him upon ascertaining the identity, even if it did not, in fact, disclose it; and this is all that is necessary; if an underwriter chooses to lie by and make no inquiries when the information given him naturally ought to lead to them, then he cannot afterwards set up that the material fact was not disclosed to him. The cases go * much farther than that [* 662] actual knowledge on the part of the assurer alone excuses the assured from not disclosing a material fact. Thus in *Carter v. Boehm*, 3 Burr. at p. 1910, it is said by the Court: "The insured need not mention what the underwriter ought to know;" and in *Noble v. Kennerly*, 2 Dougl. 510, it was held that an underwriter is bound to know everything that is generally known in regard to a particular branch of trade; or a particular voyage; *Stewart v. Bell*, 5 B. & Ald. 238. In 2 Duer on Marine Insurance, p. 555, the information contained in Lloyd's Lists is given as an instance of what an underwriter is bound to know; but actual misrepresentation by the assured, though inconsistent with the lists, will prevent the assured from recovering. *Mackintosh v. Marshall*, 11 M. & W. 116. Here all the representations were accurate.

[SHEE, J. Duer cites for his first proposition *Friere v. Woodhouse*, Holt, N. P. 572; 17 R. R. 679; but the information here would not disclose or even lead to the identity of the *Georgia* with the Confederate steamer. In *Mackintosh v. Marshall* there was a misrepresentation coming within the very first definition of *dolus malus*.]

It is quite clear on the facts that the defendant scarcely read the memorandum or the policy. Had he taken any trouble whatever to read the documents he could not have failed of at once seeing that it was the Confederate *Georgia* that he was about to insure.

At the close of the arguments on the plaintiff's rule the Court directed counsel to proceed with the defendant's cross-rule; and

at the close of the arguments on the latter rule (June 13), the Court at once pronounced judgment, discharging the plaintiff's rule to enter a verdict, intimating that they were ready to give judgment on the defendant's rule, if and when it should be rendered necessary by a Court of Appeal reversing the decision on the plaintiff's rule.

June 13. COCKBURN, C. J. I am of opinion that the verdict ought not to be disturbed. The policy of insurance upon which this action was brought was upon the steamer the *Georgia* [*603] for *six months from her sailing from Liverpool, the voyage being stated in the particulars shown to the defendant to be to Lisbon, and to the Portuguese settlements upon the western coast of Africa. The defence rested upon the ground that a material fact, which ought to have been communicated to the underwriter, to enable him to ascertain the amount of risk against which he was engaging to protect the assured had not been communicated; the material fact being that the vessel in question had been a ship of war in the Confederate service, which exposed her to the danger of being seized by the government of the United States.

It appeared that the vessel had been the well known Confederate cruiser, the *Georgia*: she was brought to Liverpool, and was there dismantled and sold; she was bought by the plaintiff at a public auction, he being the person proposing the vessel to be insured.

It was admitted at the trial that the fact of the vessel having been a vessel of war in the Confederate service, as she was consequently liable to the danger of being seized by the United States Government, was a circumstance material to be communicated to the defendant, the underwriter. It was clear that the fact of the vessel having been in the Confederate service was not directly, nor in terms, communicated to the underwriter; and, therefore, if the case had stood simply as I have just stated it, it is plain that, according to the well established rule of insurance law, the plaintiff would not be entitled to recover, and the defendant would have a good defence to the action. The plaintiff, however, while he admits that the fact was material to be communicated, and that it had not been communicated, contends that the case falls within a well established exception to the general rule.

At the trial, the plaintiff endeavoured to establish that the

No. 75. — *Bates v. Hewitt*, L. R., 2 Q. B. 603, 604.

defendant, at the time that he underwrote the policy, knew the fact that the vessel he was insuring was the Confederate cruiser. In the second place, he contended, that, even if the defendant was not aware of the fact, nevertheless, taking into account the previous knowledge which he had of the Confederate cruiser being at Liverpool, and the particulars disclosed by the plaintiff in proposing the insurance, the defendant ought to have known, if he

* had properly considered the matter, that this was the [* 604] Confederate vessel.

The first ground taken by the plaintiff is disposed of by the finding of the jury. In effect, the jury have found that at the time the defendant underwrote the policy, he, in point of fact, did not know that the vessel was the Confederate steamer. The plaintiff must, therefore, rely on the second ground, viz. that, taking the previous knowledge of the defendant into account, the particulars stated by the plaintiff in proposing the insurance would, if the defendant had given due consideration and attention to the matter, have brought to his mind that he was insuring the Confederate steamer. I think what passed between the jury and myself must be taken to amount to a finding by the jury in the affirmative of the question I put to them; whether, taking the previous knowledge of the defendant as to the Confederate steamer *Georgia* being at Liverpool, and the particulars disclosed by the slip and memorandum, the defendant, by the exercise of ordinary intelligence and knowledge of his business, might have known that this vessel was the Confederate steamer *Georgia*. The jury did not, in fact, directly find the affirmative or the negative of the question, but they found that the defendant had abundant means of identifying the ship at the time of his underwriting the policy; and, inasmuch as the abundant means might have been something extrinsic to the particulars communicated by the plaintiff to the defendant, I asked the jury whether they meant by their answer to say that, taking the previous knowledge and the particulars afforded by the plaintiff, the defendant had the means of knowledge; or whether they meant to say that, looking at the particulars, if he had made further inquiry, he must have acquired a knowledge extrinsically: and their answer amounts to this, coupling what was contained in the particulars supplied by the plaintiff with the defendant's previous knowledge, he had abundant means of identifying the vessel as the Confederate steamer.

Now, the question is, whether the finding of the jury entitles the plaintiff to the verdict, and I am of opinion that it does not.

No proposition of insurance law can be better established than this, viz. that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him [* 605] to *determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows. Short of these things, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure; and I apprehend that, as to the matters which the party proposing the insurance is bound to communicate to the insurer, there is no answer to be made, except that the insurer had, at the time of entering upon the contract, knowledge of the particular fact. I do not mean to say that, if the insurer choose to neglect the information which he receives, he can take advantage of his wilful blindness or negligence; if he shuts his eyes to the light, it is his own fault; provided sufficient information, as far as the assured is concerned, has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss: not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance; the law will not lend itself to a defence based upon fraud; it will not allow the underwriter to say, "I have taken the premium with the knowledge of the particular fact, but because the assured has not communicated it to me I will not make good the loss." Therefore, if the fact be known to the underwriter, he cannot avail himself of the circumstance that it was not communicated by the assured; but putting that aside, it is the duty of the assured to make known to

the insurer whatever is material with regard to the extent of the risk.

It is admitted that a fact was not communicated to the underwriter in such a shape, or in such an abstract form, as that, *independently of something extrinsic to the communication itself, it would afford him the necessary information. But it is said: "The underwriter had previous knowledge of the fact of the Confederate steamer *Georgia* being at Liverpool; he also knew she was there for the purpose of being dismantled and sold." We must, however, take it, on the oath of the defendant and the finding of the jury, that those facts were not present to the defendant's mind at the time he underwrote the policy. The case may be put in two ways; either, that, if the previous knowledge which the defendant had with reference to the vessel had been present to his mind, that, with the particulars before him, would have brought to his mind the fact that he was asked to insure the Confederate steamer *Georgia*; or that, if he had carefully studied the particulars stated in the memorandum, those particulars would have brought back to his mind the knowledge which had been previously present to it, which, for the moment, had been forgotten, and the combination of the knowledge thus resuscitated and revived with the particulars contained in the memorandum would have led him to the conclusion that the vessel offered for insurance was the Confederate steamer. But the facts are to the contrary; the previous knowledge that the defendant may have had was not present to his mind; and what the defendant swore was, that the particulars did not bring that knowledge back to his mind. The result was, as the jury have found, that at the time he underwrote the policy of insurance the defendant did not know that the vessel was the Confederate steamer.

I think that we should be sanctioning an encroachment on a most important principle, and one that is vital in keeping up the full and perfect faith which there ought to be in contracts of marine insurance, if we were to hold that a party — who is under an obligation to communicate the material conditions and facts which constitute the basis of the contract into which he invites another to enter — may speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him by the assured, if those particu-

lars fall short of the fact which the assured is bound to communicate.

If we were to sanction such a course, especially in these [* 607] days, when parties frequently forget the old * rules of mercantile faith and honour which used to distinguish this country from any other, we should be lending ourselves to innovations of a dangerous and monstrous character, which I think we ought not to do.

The rule we find established is this: that the person who proposes an insurance should communicate every fact which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against which he undertakes to protect the assured. True, if it can be established that the insurer did know the fact, it will not lie in his mouth to say the fact of which he had previous knowledge was not communicated; if it can be established that the underwriter had knowledge of the fact, the assured would be protected against the fraud of the underwriter in seeking, under such circumstances, to avoid the insurance. And it is also well established law, that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known. I think that there is every reason to believe that both parties imagined that the fact that the vessel had been a Confederate war steamer was not a material circumstance, and the plaintiff must be exonerated from any imputation of having wilfully and intentionally kept back that material fact; because he had only a short time before bought the vessel for £15,000, and laid out £4000 or £5000 on her; and it is extremely improbable that he would have expended this large sum of money on her if he had supposed she was a vessel liable to seizure by the United States government. He probably thought that when she was bought by a British subject, and had a British flag flying aboard, she was safe from capture. That turned out to be a mistake; and it is now admitted that the fact of her being thus exposed to the danger of seizure was a material fact to be communicated, though the non-communication of it may have arisen from perfect innocence on the part of the plaintiff, and from his thinking that it was not a material fact. It is clear that there was an obligation on the part of the plaintiff to communicate

this fact; it is clear that he did not * communicate it; [* 608] that he had disclosed partial information which, by possibility, if it had brought back to the defendant's mind what had previously been known to him, would have led him to the knowledge that this was the Confederate steamer *Georgia*; or if, on the other hand, he had the knowledge present in his mind, he might have read the particulars communicated to him in a different light from that in which he read them. It is laid down as a general proposition, that the party proposing the insurance, if he has omitted a material fact, can only enforce the insurance which, from the omission to communicate the fact, would otherwise be avoided, in the event of the jury finding by their verdict that by means of what he did communicate, coupled with any other fact that then might be present to the mind of the insurer, the latter knew at the time he granted the insurance the fact which it was the duty of the assured to communicate.

Taking, therefore, the finding of the jury in the most favourable sense for the plaintiff, we think that the verdict entered for the defendant is right, and should not be disturbed, and that this rule should be discharged.

MELLOR, J. I am of the same opinion. I think the verdict entered for the defendant must stand. It is of the greatest importance to abide by the cardinal rules which have prevailed on this subject since the judgment delivered by Lord MANSFIELD in the case of *Carter v. Boehm*, 3 Burr. 1905; and it would be most dangerous, as it appears to me, to allow those well-established rules to be frittered away by the introduction of doubtful equivalents. I cannot help thinking that to enable a person proposing an insurance to speculate upon the maximum or minimum of information he is bound to communicate would be introducing a most dangerous principle into the law of insurance.

The plaintiff proposed a vessel, the *Georgia*, to the defendant for insurance. It is conceded that the history of this vessel was perfectly well known to the plaintiff, and that she was, in fact, the Confederate cruiser, the *Georgia*. It was admitted by the plaintiff's counsel that this was information material to have been communicated to the defendant; but it was urged that the information was in substance * afforded by the terms of [* 609] the letters and the slip, and that the defendant, had he taken any reasonable trouble in reading and considering these

documents, could not have failed to know that the vessel in question was the *Georgia*, the Confederate cruiser. The jury found that, in point of fact, the defendant did not know that such was the case; but they were of opinion that if he had read the documents with reasonable care, they, coupled with his previous knowledge of the history of the Confederate steamer, the *Georgia*, and the exercise of ordinary intelligence and reflection, would have afforded to him abundant means of knowledge that the vessel in question was the Confederate vessel. Notwithstanding this opinion of the jury, it appears to me that we should be introducing the very mischief to which I have referred if we were to hold that a party proposing an insurance was under no obligation to communicate a material fact known to him, but unknown to the other party, on the ground that such party might peradventure, by an effort of memory and of reasoning applied to the information actually communicated, have arrived at the knowledge of the fact so material.

Lord MANSFIELD, in *Carter v. Boehm*, 3 Burr. 1909, 1910, says: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and, therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement." That lies at the root of the whole matter. Lord MANSFIELD then goes on to say: "There are many matters as to which the insured may be innocently silent: he need not mention what the underwriter knows, — *scientia utrinque par pares contrahentes facit*. An underwriter cannot insist that the policy is void because the insured [*610] did not *tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of." Then Lord MANSFIELD goes on to illustrate that doctrine by refer-

ring to a variety of matters which lie equally within the knowledge of both parties; everything else the assured must communicate. It is not enough that the underwriter be furnished with materials from which, by a course of reasoning and an effort of memory, he may be induced to suspect that the vessel is a dangerous risk. The matter must not be left to speculation or peradventure. So far as I know, the judgment of Lord MAXFIELD has never been qualified or questioned. The only part of it upon which any doubt has been raised is, as to the admissibility in evidence of the opinions of brokers, who are in the habit of negotiating policies of insurance, as to the materiality of facts not communicated.¹ That judgment rests on a sound principle, and has always been considered as laying down the true rules which govern the law of insurance.

I concur in the conclusion at which the LORD CHIEF JUSTICE has arrived; and I say that if we were to enter a verdict for the plaintiff we should be giving countenance to the substitution of doubtful equivalents in lieu of actual and plain communications, and this we ought to discourage to the utmost of our power.

SHEE, J. I am of the same opinion. The principle on which the law of concealment, as it relates to marine insurances, rests, is, that in bargaining for an insurance, the person proposing the insurance should take care that the underwriter is as well informed as he himself is of all those circumstances which would increase the risk which he offers to the underwriter. He is not bound to communicate things which are well known to both; he is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter; he is not bound to communicate facts relating to the general course of a particular trade; because all these things are supposed to be within the knowledge of the person carrying on the business of insurance, and which, therefore, it is not necessary for him to be *specially informed of. But the person pro- [*611] posing the insurance is bound to communicate to the person whom he asks to undertake the insurance everything within his knowledge which is of a nature to increase the risk which the underwriter is asked to undertake.

In this case there was a fact especially within the knowledge of plaintiff, viz., that this vessel had been a Confederate cruiser.

¹ See the notes to *Carter v. Boehm*, 1 Sm. L. C. 4th ed. 422.

The plaintiff did not know that that fact was of a nature to increase the risk. It was, however, of a nature to increase the risk, because the vessel was, from having been a Confederate cruiser, liable to seizure by the government of the United States. That was a fact material to the risk which the person proposing the insurance knew, and which the person to whom the insurance was proposed did not know. The parties, therefore, while they were considering what one would be willing to give for the protection which he desired, and what the other would be willing to take for giving him that protection, were not upon equal terms; they had not an equal amount of knowledge; and the reason that they had not an equal amount of knowledge was, that the plaintiff kept back a material fact which he well knew.

It was argued by the plaintiff's counsel, that it is enough if the person to whom the insurance was proposed had the means of knowing the material fact. No authority was cited for that proposition. No doubt there are cases in which it has been held, where the underwriter has the means, by merely looking at lists which are hung up in the room where the insurance is effected, of ascertaining a particular fact, it is not necessary that it should be communicated. In *Friere v. Woodhouse*, Holt, N. P. 572; 17 R. R. 679, it was ruled that information contained in Lloyd's lists need not be communicated to the underwriter, as by fair inquiry and due diligence in his business he could have ascertained the facts they contained. But the facts of the present case are very different. The underwriter had no means of presently knowing the fact not communicated to him; he might by possibility, if he had instituted inquiries, have found it out; but that he is not obliged to do. The person who proposed the insurance knew the fact, and it was a fact material to the estimate of the risk, and he [*612] ought to have communicated it. *For these reasons it appears to me that the plaintiff was guilty of concealment, and the verdict ought not to be disturbed. *Rule discharged.*

ENGLISH NOTES.

The same principle is followed in *Ionides v. Pender* (1874), L. R., 9 Q. B. 537, 43 L. J. Q. B. 227, 30 L. T. 547, 22 W. R. 884; *London Assurance Co. v. Mansell* (1879), 11 Ch. D. 363, 48 L. J. Ch. 381, 41 L. T. 225, 27 W. R. 444; and *Blackburn v. Vigors* (1887), 12 App. Cas. 531, 57 L. J. Q. B. 114, 57 L. T. 730, 36 W. R. 449.

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AMERICAN NOTES.

The doctrine of the principal case prevails in this country, as to all sorts of insurance. In *McLanahan v. Universal Ins. Co.*, 1 Peters (U. S. Supr. Ct.), 170, it is said: "The contract of insurance is one of mutual good faith, and the principles which govern it are those of enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any fact material to the risk, which he does not disclose." Every fact is material which if communicated to the underwriter would influence his action; and concealment of any material fact, although only through accident, inadvertence, negligence, or mistake, will avoid the policy. *Livingston v. Delafield*, 1 Johnson (New York), 522; *Ely v. Hallett*, 2 Caines (New York), 57; *Oliver v. Greene*, 3 Massachusetts, 133; 3 Am. Dec. 96; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 398; *Burritt v. Saratoga Ins. Co.*, 5 Hill (New York), 188; 10 Am. Dec. 345.

The false representation of a material fact, however innocent, avoids the policy. *Daniels v. Ins. Co.*, 12 Cushing (Mass.), 416; 59 Am. Dec. 192; *Hartford Ins. Co. v. Harner*, 2 Ohio St. 452; 59 Am. Dec. 681; *North Am. Ins. Co. v. Throop*, 22 Michigan, 146; 7 Am. Rep. 638; *Smith v. Niagara F. Ins. Co.*, 60 Vermont, 682; 6 Am. St. Rep. 144; *Stevens v. Queen Ins. Co.*, 81 Wisconsin, 335; 29 Am. St. Rep. 905.

The American decisions apply this doctrine, both as to concealment and representations, to life insurance. *Campbell v. Insurance Co.*, 98 Massachusetts, 391; *Hartwell v. Ins. Co.*, 33 La. Ann. 1353; 39 Am. Rep. 291; *Clemans v. Supreme Assembly, &c.*, 131 New York, 485; 16 Lawyers' Rep. Annotated, 33.

But where the policy is issued upon a written application, furnished by the company, with questions and answers, an innocent failure to communicate any facts, or innocent failure to disclose facts not inquired about, will not avoid the policy. *Browning v. Home Ins. Co.*, 71 New York, 508; *Dennison v. Ins. Co.*, 20 Maine, 125; 37 Am. Dec. 42; *Washington Mills M. Co. v. Weymouth Ins. Co.*, 135 Massachusetts, 505; *Clark v. Manuf. Ins. Co.*, 8 Howard (U. S. Supr. Ct.), 249; *Nat. Bank v. Union Ins. Co.*, 88 California, 497; 22 Am. St. Rep. 324; *Blackstone v. Standard, &c. Ins. Co.*, 74 Michigan, 592; 3 Lawyers' Rep. Annotated, 486.

Where however the answers given by the insured to questions in the application, are therein and by the policy declared to be warranties, and are mistaken, the insured is bound by them, without regard to their materiality or his innocence. *Cobb v. Covenant, &c. Assoc.*, 153 Massachusetts, 176; 10 Lawyers' Rep. Annotated, 666. This is the general doctrine of warranty in such cases.

The principal case is cited by May on Insurance, § 207, and by Wood on Fire Insurance, p. 388, and fortified by many examples.

No. 76. — *Huguenin v. Baseley*, 14 Ves. 273. — Rule.

No. 76. — HUGUENIN *v.* BASELEY.

(1807.)

No. 77. — LYON *v.* HOME.

(1867.)

RULE.

WHERE a relation is constituted between two persons such that one of them has obtained an ascendancy over the mind of the other, and the latter is accustomed to rely and act upon his advice ; the former is not entitled to use the influence so obtained to his own advantage. And if he does so use it, the contract or transaction so entered into may be rescinded or avoided by the other party. And for the purpose of estimating the undue influence, the “ professor ” of a foolish superstition may take equal rank with a respectable clergyman or physician.

Huguenin v. Baseley.

14 Ves. 273–301 (s. c. 9 R. R. 276.)

Undue Influence. — Voluntary Settlement on a Clergyman.

[273] Voluntary settlement by a widow upon a clergyman and his family set aside ; as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs ; upon the principles of public policy and utility applicable to the relation of guardian and ward, &c.

The object of the bill in this cause was to set aside a conveyance made by the plaintiff, Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained. The following are the principal circumstances, established by evidence and admission, under which this relief was sought.

In 1803 Mrs. Huguenin, then Mrs. Hill, appeared to be entitled in fee simple to the manors of Cleydon and Hampton Gay, and other estates, in Oxfordshire, under the ultimate limitation of the reversion by a will, dated in 1768, to her father, Richard Hindes, who had gone to Jamaica, where he acquired considerable property, real and per-

No. 76. — *Huguenin v. Baseley*, 14 Ves. 273-275.

sonal, which upon his death also descended to her. After some correspondence with their solicitors in England, she, in September, 1803, returned with her husband from Jamaica. He died in October, 1803; and in November she, being then about the age of 40, first became acquainted with the defendant, Thomas Baseley, a clergyman, who was also connected with the family of Hindes, and had with other persons upon the death of the testator, in 1798, instituted a suit claiming as heirs-at-law * of Richard [*274] Hindes; in which cause an inquiry, directed by the LORD CHANCELLOR, produced the title of Mrs. Huguenin, as the only child of Richard Hindes.

The bill stated that the defendant Baseley, with a view of getting the control and management of the said estates, and of getting them ultimately settled upon himself, procured an introduction to Mrs. Huguenin, and, having by various means ingratiated himself with her, represented that her solicitors had mismanaged and neglected her property, and induced her, then a stranger, having no friends or relations in England, and being quite ignorant of the value of property, to withdraw her affairs from those solicitors, and to place them in the hands of the defendant, who, with such design, wrote the following letter, which she, by his inducement, caused to be copied, and signed and sent to the solicitors: —

“SIRS, —

“Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I feel myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs, and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself. Impressed with this agreeable idea, I beg leave to inform you that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley’s hands, and hope that you will prepare without any delay every account * that [*275] you have standing against me, with the deeds, &c., of the estate at Hampton. As I wish to leave London at Lady Day next, I must desire that no delay on your part will take place. Mr.

Baseley will be ready to meet you on the business whenever you will appoint a day. With this determination I remain, &c.,

“ANN HILL.”

The deeds were accordingly delivered to Baseley, and were deposited by him with his solicitor. The bill farther represented that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate, as she had proposed, and recommended to her a surveyor, who gave a very unfavourable account of the situation of the estate; and the defendant, Baseley, soon afterwards offered her £400 a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing £420 a year as the utmost value, which was confirmed by his solicitor; that she executed the deeds under the persuasion of the solicitor that they were her will, and the lease to Baseley; and that she had no intention to give away or settle her estate, &c.

By the deed, dated the 5th of May, 1804, which was the subject of the bill, the plaintiff, Mrs. Huguenin, in consideration of 10s., conveyed the Hampton Gay estates to a trustee, his heirs, and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, &c., an annuity of £400, secured by a trust term of 500 years, and, subject thereto, to the use of the defendant, Baseley, for life, without impeachment of waste; with remainders to trustees to preserve contingent remainders, to his wife for life, to their children, born or to be born, in tail, with cross-remainders, and the ultimate remainder to Mrs. Huguenin. [* 276] The value * of that estate was rather more than £400 per annum.

The defendant, Thomas Baseley, by his answer, represented that from the time of his first acquaintance with the plaintiff a great intimacy took place, and she expressed a great affection for him and his family; that she complained of the conduct of her solicitors, declaring her intention of taking the management of her affairs from them; and upon her application he recommended to her his solicitor and a surveyor, and she intimated to the defendant her intention of settling her estates on him and his family, and requested him to write to her solicitors, to acquaint them that she should take her affairs out of their hands; and the defendant at her request did, in her presence and with her sanction, and according to her directions, write the form of a letter for that purpose, which

the plaintiff, as he believes, copied, and sent to her solicitors; but the defendant positively denies that such letter was written at his instigation, or by his desire; on the contrary, he wrote the same at the pressing desire of the plaintiff; and, though the language of the letter was the defendant's, yet the substance was in fact dictated by her. In another part of the answer the defendant denied that he induced her to send that letter, stating his belief that it was written by him, but that it was so written at the particular instance and request of the plaintiff, who desired him to draw up such letter, as before mentioned; and he believes he did upon that occasion state to the plaintiff that, if it was her wish to discharge her solicitors, such letter ought to be in her own handwriting, as it would not be so proper for it to appear in his handwriting, and the plaintiff did copy such letter.

* The answer further stated that the plaintiff frequently [* 277] expressed to the defendant a wish to settle her affairs, and make a disposition of her property, inquiring whether the defendant was related to her, and who was her heir-at-law; and being informed, expressed a great dislike to that family; and after various conversations she repeated her determination to settle the Hampton Gay estate on the defendant and his family; and, in March, 1804, without any persuasion, suggestion, or influence, she gave instructions accordingly; and the defendant understood her intention to settle the estate so as to reserve to herself a rent-charge for her life about equal to the reasonable rent; and that it was her wish that the defendant should go and reside there immediately with his family, so that the mansion-house might be kept up, declaring that she would never reside there on account of the trouble of repairing, &c.; and the defendant denied all the charges of fraud, influence, &c.

The answer of the attorney who prepared the deed, stated that, when instructed by her to prepare the settlement, he recommended to her to make a will, which might be revoked or altered; when she replied that she would not do it by will on that account, as, if she should alter her situation, she intended it should not affect the settlement of her property. The defendant, according to the voluntary instructions of the plaintiff, prepared two deeds of settlement; viz., that of the 5th of May, 1804, as to the Hampton Gay estate, in the bill mentioned, and the other, dated the 21st of June, 1804, relating to all her other estates and property. In the former deed

blanks were left for the plaintiff's rent-charge and the names of the trustees; and she made alterations as to the uses among Baseley's children, and as to the ultimate limitation, which originally was to Baseley in fee. That deed was settled, and the other [*278] prepared, by *counsel, and they were voluntarily and deliberately executed, and the blanks filled up by her direction.

This answer farther stated that in the deed of the 21st of June, 1804, the defendant Thomas Baseley, and this defendant and William Sleet, of Jamaica, were named trustees; and the estates and property therein comprised were conveyed and assigned upon trust during the life of the plaintiff, Ann Huguenin, to convey, &c., according to her appointment, and to her separate use, notwithstanding coverture; and, after her decease, for any future husband surviving her for his life, with remainder to her children by any such marriage, as tenants in common in tail, with cross remainders; remainder to her mother and William James Clarke, and the survivor, and to the children of Clarke; with remainder to Thomas Baseley and the two other persons named as trustees as tenants in common; and £5,000 was settled on Mary Ann Elliot, and she was directed during her minority to be brought up by Mrs. Baseley, who was to receive the interest of her fortune; £2,000 on Elizabeth Eleanor Clarke; £100 a year on Mrs. Hindes; £200 a year on William James Clarke; and by that deed are settled several estates in Jamaica, with the stock, several sums of money due from different persons; a leasehold estate in Middlesex, the manor of Cleydon in the county of Oxford, and all the estates real and personal then late the property of Thomas Hindes, not before conveyed and settled by the plaintiff, and other estates real and personal stated to be mentioned in the schedules.

This answer also denied all the charges of fraud, misrepresentation, &c.

[*279] Sir Samuel Romilly, Mr. Hollist, and Mr. Trower for the plaintiffs.

The authorities against permitting a transaction of bounty to take effect between persons standing in certain relations are numerous. Among those relations that of guardian and ward is not for this purpose confined to persons so related in a strict sense; as under an appointment of guardian by will, or by the order of this Court: but the rule includes any person placing himself in that situation. *Hylton v. Hylton*, 2 Ves. Sen. 547; *Pierce v. Waring*,

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cited 1 Ves. Sen. 38; 2 Ves. Sen. 548;¹ *Griffin v. De Veille*, 3 Woodd. Append. 16; 1 Bac. Ab. edit. by Gwillim, 109; 3 P. Will. 131, Mr. Cox's note; *Hatch v. Hatch*, 9 Ves. 292, 7 R. R. 195; *Proof v. Hines*, For. 111; *Dixon v. Olmias*, 1 Cox, 414, 1 Ves. Jun. 153 [and see 9 R. R. 286, n.]. *Wright v. Proul*, 13 Ves. 136;² *Newman v. Pague*, 2 Ves. Jun. 199; see the note, 204. The last of these cases is perhaps the most applicable to this: one person undertaking to manage the affairs of another. Such a transaction as this, between persons so connected, cannot upon principles of public policy, or, as Lord HARDWICKE expresses it, public utility, be permitted.

The law of other countries, however, affords authorities more precisely applying to the circumstances of this case. According to Pothier, *Traité des Donations entre Vifs*, s. 1, by the ancient law of France the same doctrine that by our law prevails as between guardian and ward, is applied to an administrateur, a person managing the affairs of another, who cannot * take a bounty either for himself or his children; what is [* 280] given to the children being, with reference to natural affection, considered as given to the parent; and this, by a singular concurrence with Lord HARDWICKE, is expressed to be upon the ground of public utility. This case, however, goes beyond that. This is an instance of a very peculiar species of influence, gained over the mind of this lady by no common means; appearing by the letter written or dictated by the defendant for Mrs. Huguenin to copy, in terms which he cannot be supposed to use in the light and profane way that too frequently occurs. The English courts of justice do not afford an instance of influence acquired by such means; but in foreign Courts such instances have occurred. According to Pothier it has been decided, upon the same principles of public utility, that a confessor, or director of the conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character; and the apprehension of the empire which these persons obtain, was carried so far that a gift to the Order of which they were members was not allowed to have effect.

Mr. Richards, Mr. Fonblanque, Mr. Hart, Mr. Martin, Mr. Leach, and Mr. Wetherell for the defendant.

¹ Stated from the Register's Book in *Fraud and Confirmation generally*, *Crowe v. Ballard*, 1 Ves. Jun. 215, 2 Cox, 253, 1 R. R. 122, and see note 1 Ves. Jun. p. 221.

² See the note, 13 Ves. p. 137; and upon

The conduct of persons who place themselves in situations of confidence, must be examined with the most scrupulous attention; but there is no rule that creates a disability to take a bounty under these circumstances. The result of the authorities is, that the transaction must be fairly sifted; but a voluntary deed, free from any imputation of surprise, undue influence, spontaneously executed by a person with her eyes open, cannot be set aside in a

Court of Equity. In *Villers v. Beaumont*, 1 Vern. 100, [*281] the * principle that has constituted the rule ever since, is laid down by Lord NOTTINGHAM: that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for, if you would relieve in such a case, you must consequently establish this proposition, — that a man can make no voluntary disposition of his estate but by his will, which would be absurd.

[282] In the case of *Wright v. Proud*, 13 Ves. 136, the transaction was set aside, as the party had been deceived and practised upon; not exercising a fair, unbiassed purpose of bounty. The authority cited from the French law is not supported by the civil law, which, prohibiting donations *inter vivos*, on the ground of relation, does not go beyond that of husband and wife; but Pothier, *Traité des Donations entre Vifs*, s. 1, goes much farther than the case of the administrateur, — to a physician, a surgeon, a confessor, every one who may have influence, — and extends it even to wills. The rule thus extended can stand only upon the principle of the civil law by which an act of improvidence even may be restrained by the judge. In this country a man has the absolute dominion over his property, and may give it away in any manner he thinks proper. Then, to whom is bounty usually distributed, — to strangers, to persons in whom no confidence is placed? It is the natural effect of habits of intimate connection and friendship. It is not unusual for a gentleman at a certain age to remunerate his tutor by a gift, who has never been deemed incapable of taking in that way; yet that would be within the restriction of the French Ordinance, which, singular and severe as it is, does not go the length of prohibiting a present to the minister of a parish or chapel attended by the donor.

Admitting, what is not clear upon the authorities, that the

relation of guardian and ward creates an absolute *disability [*283] in the former, precluding gift by the latter, without distinction between an act the result of abused confidence under an impulse preventing the free exercise of judgment, and the spontaneous bounty springing from affection of a person emancipated from control, all accounts settled; admitting also, according to *Griffin v. De Veille*, 3 Woodd. Append. 16; 1 Bac. Ab., edition by Gwillim, 109; 3 P. Will. 131, Mr. Cox's note, that the restriction applies to any person assuming the office and functions of a guardian, though not legally so constituted, is there any case upon the relation of guardian and ward, in which youth and inexperience on one side were not ingredients? Was that character ever applied to a confidential intercourse between persons of advanced life and equal age? In those circumstances their intercourse was merely that of mutual kindness and reciprocal esteem. The defendant undertook no office. He never assumed the functions of her attorney: a relation involving necessary confidence on one side and probable influence upon the other, calling for application of the principle of public policy; but in the capacity of attorney another person was employed by the plaintiff, — her own attorney, who prepared the deed from her instructions, without any direction or interference of the defendant. She went alone to the attorney's office, and gave her own instructions, from time to time dictating alterations. It is then said, the defendant was her agent. There is no authority that a mere agent, generally employed in receiving rents, &c., is not capable of receiving a gift; and the case of *Gartside v. Isherwood*, 1 Bro. C. C. 558, where the leases were set aside expressly on the ground of fraud, disproves it. The principle of public policy has no reference to that mere naked relation.

Sir Samuel^a Romilly, in reply, cited the judgment of Lord Chief Justice WILMOT in *Bridgeman v. Green*, 2 Ves. [286] Sen. 627; Wilm. 58. There was in that case much evidence that the person was perfectly aware of what he was doing, and had repeatedly confirmed it. Upon that Lord Chief Justice WILMOT's observation is, that it only tends to show more clearly the deep-rooted influence obtained over him (Wilm. 70). "In cases of forgery, instructions under the hand of the persons whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition they prove nothing, for *the same power which [*287]

produces one produces the other ; and therefore, instead of removing such an imputation, it is rather an additional evidence of it."

Having before (Wilm. 60, 61) mentioned the distinction of the Roman Law between liberality and profusion, he says our laws strike no such boundary : "*Stat pro ratione voluntas*, is the law with us ;" and this Court never did, nor ever will, annul donations merely as being unprovident, and such as a wise man would not have made, or a man of very nice honour have accepted ; nor will this Court measure the degrees of understanding, and say that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But though this Court disclaims any such jurisdiction, yet, where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is made ; and if it sees that any arts or stratagems or any undue means have been used, if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him, if there be the least *scintilla* of fraud, this Court will and ought to interpose ; and by the exertion of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the [* 288] danger either of inducing guardians to flatter * the passions of their wards, or of the improper exercise of their authority ; as the relation of husband and wife is guarded from the effects both of indulgence and severity.

If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case ? Though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors, upon such a subject not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has yet occurred, upon this ground alone, from its infinite importance to the community.

The LORD CHANCELLOR (LORD ELDON).

With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this *suit. If there- [*289] fore their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridgman v. Green*, 2 Ves. Sen. 627, Wilm. 58, is an express authority that it is within the reach of the principle of this Court to declare that interests so gained by third persons cannot possibly be held by them; and Lord HARDWICKE observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance therefore the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the LORDS COMMISSIONERS; and Lord Chief Justice WILMOT expresses himself thus (Wilm. 64): —

“There is no pretence that Green’s brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff: but does it follow from thence, that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it.”

* This was also the doctrine of Lord THURLOW in the [*290] case that has been referred to (*Lutterel v. Lord Waltham*, 11 Ves. 638; *Dixon v. Olmies*, 1 Cox. 414); and, though it was not practically acted upon, Lord THURLOW was inclined to carry it farther. The object of the bill in that case was, that an estate should be enjoyed as if a recovery had been suffered; upon the ground that Lutterel had, while Lord Waltham was upon his death-bed, engaged in suffering a recovery, prevented it, with the view that the estate should devolve upon the person with whom he was connected. That estate was by the law vested in that

individual: a much stronger case therefore than the acquisition of property through imposition. Lord THURLOW, whatever might have been his final decision upon that case, had no doubt that it was against conscience that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case so much at large if it had been no more than that. These plaintiffs therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

Then, as to persons concerned in these transactions, I agree with the argument, that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments, taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this Court to prevent a voluntary gift by a man stripping himself entirely of his property, if undue influence is not imputed, that any Judge, sitting here, has ever thought himself at liberty to interpose. I agree farther, that the relief must proceed upon what is alleged and proved by the persons complaining; that their complaints must be treated as effectual or [* 291] ineffectual according *to what they have, not what they could have, represented: also, as to the defence it may frequently happen that many passages may have taken place in the course of the transaction that are not brought into view: but the case must be dealt with as it is alleged and proved. I have therefore looked through this bill with reference to the frame of it; and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also, that many circumstances might have been brought forward on behalf of the defendants which I am bound not to look at; but, taking the case as it stands, though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to show that this deed cannot stand, if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates; unquestionably has very different provisions for very different persons, reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think that deed could not be

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made the subject of the same bill ; at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of this case is this : that attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this : that the Court is by the nature of the defence required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions, in the course of which it was executed ; and it is * much the same [* 292] as if the defendant had said he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs ; and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which this deed forms a part.

The great body of evidence shows the alarm of this lady at the trouble of taking possession of an estate dilapidated. Upon the evidence until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother ; had great regard for a female child Mary Ann Elliot ; and had also a natural half-brother, named Clarke, of the age of sixteen, in whose education she appears to have been much interested. She brought him over to England ; placed him with Mr. Baseley at an expense to herself of £200 a year. Her brother-in-law Benjamin Hill states, that he, previously to the introduction of Baseley, managed her concerns, and that until after that introduction she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed ; which is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley, is too strong ; that she entertained that dissatisfaction is clear ; that Baseley did not discourage it, that he gave in to it, is in evidence : that he created it, I cannot say ; that he participated in, and acted upon, it with her, is clearly established.

In October preceding the month of January, when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, * died. She lived with, [* 293]

or was frequently with, the two brothers of her deceased husband. The answer therefore, stating that she was not without friends in this country, is material, but in this view only: that it could be supposed she had ever consulted with them. There is, however, no evidence that either Baseley ever stated to them what she proposed to do; or that the attorney concerned in the transaction, as Lord Chief Justice WILMOT says, felt the obligation of talking both with the grantor and the grantee, before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business, after the solicitors were discharged; and, as to George Hill, though there is evidence that she did declare her purpose, it was in conversations in which it was suggested to them both, and that ample provision was to be made for their children; which, I fear, had some influence with them. No such provision however was made.

It is doubtful upon the report whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report the rents remained to be accounted for by Baseley to the amount of £300 or £400. After the date of that report small sums were lent to her; she had not even then paid the costs of the deed; she had borrowed £100 from the attorney; and there is one item of £57 advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in a condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors in January, 1803, either she adopted the resolution of dismissing them, and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it; or it was suggested to her by Baseley. My opinion is [* 294] that the weight of the evidence, which * does not agree upon this, is that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction in a Court of justice has this character at least, that it was demonstration to Baseley, that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account; and his answer represents it thus: that she called, and requested him to write a letter to the solicitors, and at her request he did in her presence, with her sanction, and by her direction, write the form of a letter,

which he believes she copied, and sent to them; but he positively denies that it was written at his instigation or by his desire, and says he wrote it at her pressing desire; and, though the language was his, the substance was hers. Who dictated that letter is of very little importance. If at her dictation he wrote it, and permitted her to send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him; and the language of a Court of justice has in all times been that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in him, he ought to reject it as soon as proposed. This letter is therefore upon the answer to be taken as expressing her sentiments in his language. The effect of it is at least a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs: that she wanted that friend whom Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage, and her affairs brought into such a plan that she could conduct them with facility to herself.

* This letter produced from the solicitors, rather too [* 295] hastily, a total severance of themselves from the concern; and Baseley entered to a certain degree at least upon the management of them. The purposes expressed and alluded to in that letter cannot mean that all her estate should be given away; that she was to be enabled to conduct her affairs with facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared, in June, these two deeds, conveying this estate, worth at that time at the lowest calculation £420 a year, which Annesley wished to purchase upon the supposition that it was worth £610 a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life, with remainders to Mrs. Baseley for life, and to all their children born or to be born, and the ultimate limitation to Mrs. Hill. A deed was prepared at the same time, which appears intended to be a conveyance of all her property, but which they were very much perplexed to describe, conveying all her freehold estates in the West Indies, and everywhere, none of the parties knowing what they were, all the leaseholds for lives mentioned in a schedule, of which there are none, and all the leaseholds for

years, of which there are some, to her, for her separate use for life, with remainders to the husband, whom she should marry, surviving her, and to Mrs. Hindes and young Clarke and his children, and the ultimate limitation, for what reason is not explained, to Baseley and the attorney, and a person resident in the West Indies: this cotemporaneous deed permitted to be made by her, having in contemplation a second marriage; which appears upon the deed itself.

To the question whether these instruments, being such as

I have represented them, the consequence is that this [* 296] * Court shall undo them, I answer no, if they are the pure, voluntary, well-understood acts of her mind; but if they have not that character, if they are the result of her notion that this is the true effect of that friendly assistance, that kind, providential interference to which she was looking for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well-understood acts of her mind, this Court will undo them.

Has an instance ever occurred that a person situated as this lady was permitted to execute such instruments as these, with a purpose of marriage demonstrated upon one of them, and having a mother and other persons whom she regarded with affection and anxiety for their welfare in life? Lord HARDWICKE reasons with great force as to the voluntary deed upon the same principle, which induced me to ask how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation; but it was a power to revoke in the presence of three persons, who perhaps never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence that the party did not understand the transaction, whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation; and that is a part of the transaction, one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He [* 297] was struck with the circumstance of her * making an

irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, is it too much to say the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by the various limitations in the other deed? I do not say instruments are to be set aside by the want of great delicacy in the person who prepared them; but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady; or, as Lord Chief Justice WILMOT says (*Wilm.* 69), go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was whether a fine and recovery were necessary; why that should be thought of I do not know, as she had the remainder in fee simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of £400 is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rent charge are left in blank, before the deed was laid before counsel, and the filling up those blanks is left to Baseley and herself; and the power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The reason that there is no power of revocation is that the gentleman before whom the draft was laid thought his business was to execute the intention of the parties. There is a difference of opinion upon that, * other gentlemen thinking some observation [* 298] necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation, or that she is to have any power to alter the uses: not a word is dropped upon the subject; but by that deed this lady who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will to alter completely these uses. Is there any evidence showing why that power should be there? A power not to revoke the uses, but much less convenient, yet open to all the objections that she could have to a temporary instrument, as not binding herself down.

Other observations occur upon these instruments. This latter deed in the limitation as to all the estates provides an interest to a husband surviving and to her children. According to the instructions as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children; which however they thought they had inserted, as there is afterwards a provision upon failure of children. Another circumstance as to the instrument of the 21st of June, 1804, is, that the instructions as to the trustees' names mention Baseley, the attorney, Sleet and Anderson; and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee, but his name is afterwards struck out. Clearly at the time of the instructions it was not intended that there should be an ultimate limitation to the trustees for their own use, but they were to be trustees for undefined purposes. The deed was originally drawn so, expressing the trust to be for such uses as they should think necessary and proper; but that was afterwards struck out, and the use for the benefit of the trustees themselves substituted.

[* 299] * It does not rest there. Suppose these transactions entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property for the purposes of facility of management, and putting it out of her own reach, she is permitted to place her West India property under the care of a clergyman and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life subject to her control; how efficacious, every one knows, without any control whatsoever after her death. The management is perfectly *ad libitum* to lease and carve out of the estates and other interests; and they have all discretionary powers as to the children, Mary Elliot and Clarke, and she could not change any of the trustees without executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds, and the defendant according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit without considering what an agent engaged for reward can do, the known doctrine is that the fruit of that relation if it was not absolutely dissolved cannot be permitted to subsist. Then was the relation dissolved?

Look at the transactions from the date of the letter to the end of the year, possession taken, and her anxious wish that Baseley should be the occupier proved, her satisfaction expressed at seeing the house repaired, her declarations that she could not possibly think of undertaking that trouble, and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate, that it was no object to her, that she had so much property it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that *she [*300] intended to give it to him, it is by no means out of the reach of the principle. The question is, not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf. Her situation with reference to pecuniary circumstances during the whole period must also be attended to, her husband a few weeks before having been relieved from distress by a sum of money advanced by Baseley.

In that view of the case no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, farther, that the parties to the transaction did not understand it. Repeating therefore, distinctly, that this Court is not to undo voluntary deeds, I represent the question thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences which the defendants Baseley and the attorney were bound by their duty to communicate to her before she was suffered to execute them; and though perhaps they were not aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle it is necessary to impute knowledge which the party may not actually have had. These parties therefore cannot possibly hold the benefit of these instruments.

As to the costs, the same principles of public utility that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered up, I have not upon this form of the *bill authority to examine here the [*301] contents of the rest of the attorney's bill of costs, who, by

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happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deeds, I am bound by the principle established in *Bridgman v. Green*, 2 Ves. Sen. 627, Wilm. 58, and other cases, to hold that if an attorney thinks proper to do no more than obey the instructions which he ought not to have permitted to take effect, the Court has frequently said that is not sufficient; and if he has not only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration, whether he shall not pay the costs, if the others cannot. If, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments which the decree says ought not to have been executed.

One circumstance now occurs to me, which I shall notice, that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstance that Baseley would repair, and lay out money upon the estate. If that had been expressed, it would have amounted to so little as valuable consideration that the Court would not have been justified in paying much attention to it; but I cannot find, in any of these cases in which a deed has been affected on account of undue influence, that the Court has ever attended to anything supposed merely to oblige the parties, if not expressed.¹

Lyon v. Home.

37 L. J., Ch. 674-686 (s. c. L. R. 6 Eq. 655; 18 L. T. 451; 16 W. R. 824).

Undue Influence. — Voluntary Gift. — Spiritual Medium.

[674] The plaintiff, an aged widow lady, childless, and living alone though wealthy, being devotedly attached to the memory of her husband, sought out the defendant, who professed to be a "medium" of communication between the spirits of living and of dead persons. By means of so-called spiritual manifestations which attended the defendant's presence, he acquired great ascendancy over the mind of the plaintiff, who adopted him as her son, and made large gifts to him, supported by irrevocable deeds. Subsequently, the

¹ The decree was affirmed by the House of Lords, 14 Ves. 607. See 15 Ves. 180.

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plaintiff instituted a suit to set aside these gifts, on the ground that they had been obtained by undue influence : —

Held, that the *onus* of supporting the gifts and deeds rested entirely on the defendant, who must prove that the plaintiff's acts were "the pure, voluntary, well-understood acts of her mind, unaffected by the least speck of imposition or undue influence;" and, the defendant being unable to make or prove such a case as was requisite for their support, the gifts were set aside.

This was a suit instituted, on the 15th of June, 1867, to set aside certain gifts from the plaintiff, Jane Lyon, to the defendant, Daniel Dunglass Home, consisting of about £30,000 stock transferred to him absolutely, and another sum of £30,000 settled upon him in reversion, subject to a life interest therein reserved to the plaintiff, on the ground that such gifts had been obtained by the defendant by means of undue influence exercised by him over the mind of the plaintiff.

The plaintiff was a widow and childless, and in 1866 was seventy-three years of age. Her husband had died in August, 1859, leaving to her absolutely a considerable fortune which, with what she herself was possessed of, amounted altogether to about £140,000. The plaintiff, who was the natural daughter of a Newcastle tradesman, had no relations of her own. She felt aggrieved by the manner in which her husband's relations had received her, and was therefore not on terms of intimacy with any of them excepting a Mrs. Clutterbuck, who was herself advanced in life and wealthy. The plaintiff lived alone, in London, in lodgings at the rent of 30s. a week, without any friends about her or even a servant of her own, and she never went into society. She was devotedly attached to the memory of her husband, as was proved by the evidence of Mrs. Pepper, the plaintiff's landlady, and Mrs. Denison, a niece of the plaintiff's husband. It was also proved that some words which the plaintiff's husband had used shortly before his death, telling her that seven years after his death a change would take place and they would meet again, had created a great impression upon the plaintiff's mind, who, in consequence of them, expected she should die in the year 1866. Moreover, the plaintiff was proved to have been very superstitious, and to have believed in the truth of dreams and visions as fortelling the future; and she was particularly impressed by the vision of a fair-haired boy which she had seen years before, and her father having told her she should adopt a son, she firmly believed that the son she was to

adopt was this fair-haired boy she had seen in her vision. In July 1866, the plaintiff called upon Mrs. Sims, a photographer, in Bayswater, to have a photograph taken of a portrait of her husband, and in the course of conversation with her mentioned the strong impression she had formed of her impending death. Mrs. Sims then told the plaintiff it was not necessary she should die in order to meet her husband, but that if she were to become a spiritualist he could come to her. Shortly afterwards Mrs. Sims further informed the plaintiff that the "head spiritualist," Mr. Home, the defendant, had opened a Spiritual Athenæum in Sloane [* 675] Street, and suggested that she should *write to him to send her a prospectus and particulars of the Athenæum. In consequence of these conversations with Mrs. Sims, the plaintiff took to reading books on Spiritualism, and amongst others one written by the defendant, entitled, "Incidents in my Life." After reading this she wrote to Mr. Burns, the librarian, from whom she had obtained the books, making further inquiries about the Athenæum and Mr. Home's Address. This letter, which was dated the 28th of September, 1866, contained the following passage: "I am most anxious to see Mr. Home. How long does he remain in London? Where other place could I see him? I am a firm believer in all he states in his book, and consider him highly favoured by the Most High God, for it is He alone who performs all the works seen. The time is at hand when we shall all be spiritualists. This is the beginning of the end, and Mr. Home is not the first spiritualist." On the 2nd of October, 1866, the plaintiff called upon the defendant Home at the Spiritual Athenæum in Sloane Street, and then saw him for the first time.

The following description of the defendant and the spiritual phenomena attending him is taken from his answer: "I was born in Scotland on the 20th of March, 1833, and from my childhood I have been subject to the occasional happening of physical phenomena in my presence, which are most certainly not produced by me or by any other person in connection with me. I have no control over them whatever; they occur irregularly, and even when I am asleep. Sometimes I am many months, and once I have been a year without them. They will not happen when I wish, and my will has nothing to do with them. I cannot account for them further than by supposing them to be effected by intelligent beings or spirits. Similar phenomena occur to many other persons

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These phenomena occurring in my presence have been witnessed by thousands of intelligent and respectable persons, including men of business, science, and literature, under circumstances which would have rendered, even if I had desired it, all trickery impossible. They have been witnessed repeatedly and in their own private apartments, when any contrivance of mine must have been detected, by their Majesties the Emperor and Empress of the French, their Majesties the Emperor, Empress, and late Empress Dowager of Russia, their Imperial Highnesses the Grand Duke and Duchess Constantine of Russia and the members of their august family, their Majesties the King of Prussia, the late King of Bavaria, the present and late King of Würtemberg, the Queen of Holland, and the members of the Royal Family of Holland; and many of these august personages have honoured, and I believe still honour, me with their esteem and goodwill, as I have resided in some of their palaces as a gentleman and their guest, not as a paid or professional person. They have had ample opportunities, which they have used, of investigating these phenomena, and of inquiring into my character. I have resided in America, England, France, Italy, Germany, and Russia, and in every country I have been received as a guest and friend by persons in the highest position in society, who were quite competent to discover and expose, as they ought to have done, anything like contrivance on my part to produce these phenomena. I do not seek, and never have sought, the acquaintance of any of these exalted personages. They have sought me, and I have thus had a certain notoriety thrust upon me. I do not take money, and never have taken it, although it has been repeatedly offered me for or in respect of these phenomena, or the communications which appear to be made by them. I am not in the habit of receiving those who are strangers to me, and I never force the subject of spiritualism on any one's attention. . . . Some of the phenomena in question are noble and elevated, others appear to be grotesque and undignified. For this I am not responsible, any more than I am for the many grotesque and undignified things which are undoubtedly permitted to exist in the material world. I solemnly swear that I do not produce the phenomena aforesaid, or in any way whatever aid in producing them."

The defendant Home proceeded further to state, in his answer, his marriage in 1858 with a Russian lady of noble birth, who died in 1862, leaving him with one son; his success as a public reader

in America, in 1865 ; and his consequent determination to [* 676] *go upon the stage, which he was obliged to abandon on account of ill health and his present position as the paid secretary of the Spiritual Athenæum, the salary from which placed him in an independent position. Such were the relative positions of the plaintiff and the defendant when they met for the first time, on the second of October, 1866. Their interview on that occasion was described by each of them. The plaintiff alleged that she then was induced by the defendant to believe that “a manifestation of the spirit of her deceased husband was taking place through his instrumentality,” and that certain expressions of endearment on the part of his spirit were conveyed through the defendant Home to her. The defendant Home, on the other hand, denied that any spiritual manifestation took place either then or for several days afterwards, although he admitted that the plaintiff entered into conversation with him on the subject of his book and of spiritual phenomena, and said she was a believer in them ; yet, he said, “she appeared to me to dwell much less on spiritualism than on the fact of my knowing ‘them high folks,’ as she termed the royal and aristocratic personages mentioned in my book.” On the 4th of October the defendant called upon the plaintiff at her lodgings. At that interview, according to the defendant’s own account, the plaintiff questioned him about his past life, and then asked him what he would say to being adopted as her son : she added, “I will settle a very handsome fortune for you. We will take a house, and your son (whose name had been mentioned) will live with us and have his tutor.” She then told him her history, among other things saying that “previous to her late husband’s death he told her a change would come over her in seven years, and that she thought it meant her death, but that now she thought the event to occur was that she was to meet and adopt me.” The next interview between the plaintiff and the defendant was on the 7th of October, when the defendant again called upon the plaintiff. According to the defendant’s own account, the plaintiff then greeted him most warmly, and said she had now made up her mind to adopt him. “She told me that she had resolved to pay to my account £24,000 on the 11th of the month ; that she had at first intended the sum to be £30,000, but had now decided I should have only £700 a year to begin with, to see how we got on together, and that if she found me all she expected me to be she would give me much more

afterwards." At this interview she recognized in the defendant Home the fair-haired boy whom she had seen in her visions. The defendant stated, that "up to this time no phenomena known as spiritual manifestations had taken place at any interview between the plaintiff and myself, but as I rose to go there came sounds known as 'rapping.' A call for the alphabet was made, and the following sentence or words nearly similar spelled out: 'Do not, my darling Jane, say, Alas! the light of other days for ever fled, the light is with you; Charles [the name of the plaintiff's deceased husband] lives and loves you.'" The defendant, by his answer, asserted that these sounds were not produced by him. On the 8th of October he again called upon the plaintiff, and at her suggestion to name some friend of his with whom she might talk over the matter of her intended bounty to him, he mentioned Mr. S. C. Hall. At this same interview the plaintiff told the defendant she would make a new will and leave all her fortune to him, on condition he should take the name of Lyon. On the 10th of October the defendant, with Mr. Hall, again called on the plaintiff, and had another interview with her. On the 11th of October he called again, at her request, with a cab, and took her into the city, in order that she might raise the £24,000 for him by a sale of stock to that amount. It was proved that, whilst at her bankers', in the city, for this purpose, she was very garrulous in talking to her bankers of her intention of adopting Home as her son, and of the aristocratic connections which he had. In pursuance of her intention of giving £24,000 to the defendant, the plaintiff sold out consols to that amount, and handed over the proceeds to the defendant. The plaintiff alleged that in doing this she was acting "in the full conviction and belief that she was fulfilling the wishes of her deceased husband, communicated to her through the medium of the defendant," who had "induced her to believe that the spirit of her deceased husband required her to adopt the said *defendant as her son, and place him in a position of [* 677] independence suitable to his rank and position in life as her adopted son." On the 5th of November, 1866, Home invested all but a small part of the £24,000 in the purchase, in his own name, of £26,756 consols. On the 10th of November, 1866, the plaintiff, acting, as she alleged, at the instigation of the defendant, and while under the ascendancy and power which he had acquired over her mind, executed a new will, leaving all her property to the

defendant. The plaintiff alleged that she was induced by the defendant to believe that the terms of this will were dictated by her deceased husband's spirit ; and that the spirit of her said late husband also dictated the terms of the letters written by her to Dr. Hawkesley and Mr. Rudall, the attesting witnesses to this will (who were unknown to the plaintiff), requesting them to attest her execution of the will. On the 3rd of December, 1866, the defendant, by deed, enrolled in the Court of Chancery, assumed the name of "Lyon." On the 10th of December, 1866, the plaintiff again (as she alleged, acting under the ascendancy and influence which the defendant had gained over her) went with him to the Bank of England and transferred into his name the sum of £6,798 17s. 4d. consols (being equivalent to a sum of over £6000 sterling). On the 12th of December, 1866, the plaintiff executed a deed-poll, whereby after reciting her gift and transfer to the defendant, and that it was her intention, absolutely and irrevocably, to vest in him the absolute use and enjoyment of the moneys so given and transferred, "in further evidence of such her intention, and to remove all doubts, suspicions and controversies in that behalf," did "absolutely and irrevocably declare that she made the said gift and transfer of her own free will and pleasure, and without any influence, control, or interference of Home, or any other person ;" and that Home, his executors, administrators and assigns, should stand possessed of the said sums for his and their own absolute use and benefit, without any reservation, condition, trust or purpose whatsoever. This deed-poll was prepared by Mr. Wilkinson, a solicitor, a friend of the defendant, and the bill alleged that the plaintiff executed it while acting under the influence of Home, and "without the intervention of any independent or other solicitor or person on her behalf."

On the 19th of January, 1867, the plaintiff executed an indenture made between herself of the one part and the defendant Wilkinson of the other part, whereby, after reciting that the plaintiff was entitled to a sum of £30,000 on mortgage, and that she was desirous of making a further provision for her adopted son, the defendant Home, and that by an indenture of even date with, but executed before the indenture now being stated, the plaintiff had assigned to the defendant Wilkinson the said principal sum of £30,000, and the securities for the same, it was agreed between the parties thereto, and in particular the plaintiff thereby abso-

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lutely and irrevocably declared that the defendant Wilkinson should stand possessed of the said sum and securities upon trust for varying the investment of the said sum at the plaintiff's request, or for purchasing lands therewith at the like request, and upon trust to pay the plaintiff the interest or rents during her life, and, subject thereto, in trust for Home absolutely. The same indenture also contained an express declaration by the plaintiff that the settlement thereby made by her was absolute and irrevocable, and should in nowise be disputed or controverted by her heirs, executors, &c., and that the said sum of £30,000 was, subject as aforesaid, freely and absolutely given to Home for his own use and benefit, without any reservation, condition, or trust whatsoever, and was intended by the plaintiff to be in addition to and not in lien of her previous gift to Home." The bill stated that "the said indenture of the 19th of January, 1867, was prepared by the defendant Wilkinson as the solicitor for and on behalf of the defendant Home, and the plaintiff had no independent advice with regard thereto, and executed the same and the said indenture of even date therewith, by which she assigned the said £30,000 and securities to Wilkinson, whilst under the influence of the defendant Home." But there was evidence in contradiction of this allegation to show that Wilkinson had laid the whole transaction fairly before her.

On the 21st of February, 1867, the plaintiff again went to the Bank of England * in the company of the defend- [* 678] ant, and transferred a further sum of £2290 odd consols into his name.

On the 13th of March, 1867, the defendant Home sold out part of the consols which he had taken under the plaintiff's gift to him, and invested the proceeds, amounting to £20,000 upon a mortgage of certain iron works and other property in Yorkshire.

The bill stated that the plaintiff had lately discovered that her gifts to the defendant had been made under the influence of the ascendancy and power which had been acquired by the said defendant over her mind by the means and under the circumstances aforesaid.

The prayer of the bill, so far as it is material to this report, was, first, for a declaration that the gift of the £24,000, the transfers of the several sums of stock, the assignment of the mortgage, and the deed-poll declaration of trust had been obtained by Home from the plaintiff by undue means, and were fraudulent and void, and not

binding on the plaintiff. Secondly, for a declaration that the £20,000 lent by Home upon mortgage of the Yorkshire property was the money and property of the plaintiff, and for a consequent direction that Home should assign the said mortgage debt and securities or pay the said sum of £20,000 and interest to the plaintiff. Thirdly, for an order that Home should retransfer to the plaintiff the residue of the unsold stock standing in his name, and repay the dividends thereof. Fourthly, that the defendant Wilkinson might be ordered to assign to the plaintiff the said mortgage debt of £30,000 and the securities for the same, and to deliver up to the plaintiff the said assignment thereof and the said declaration of trust. Fifthly, for an injunction restraining the defendant Home from dealing with the said unsold stock and from receiving the dividends thereof, and from dealing with the said mortgage of £20,000 and the interest thereof. Sixthly, for an injunction restraining both defendants from dealing with the said mortgage debt of £30,000 or the interest thereof, and from parting with the securities for the same, or the said declaration of trust, and that all deeds and papers relating to both the said mortgages for £20,000 and £30,000 respectively might be delivered up by the defendants to the plaintiff, or as she should direct.

The affidavits filed on both sides were very numerous and exceedingly voluminous. They contained a very circumstantial and detailed narrative of the whole of the transactions between the plaintiff and the defendant Home. Both the plaintiff and the defendant and numerous other witnesses on both sides were cross-examined in court. The evidence thus given in the case was extremely contradictory. That adduced by the plaintiff was directed to show that from her first acquaintance with the defendant Home she had been the dupe of impositions and tricks practised upon her by him; that by means of frequent so-called spiritual manifestations caused by him, he had induced her to believe that through him she was placed in communication with the spirit of her deceased husband; that he thereby had obtained an unlimited influence and ascendancy over her mind which he had used to promote his own interests; that by means of such spiritual phenomena he had imposed upon the plaintiff and induced her to believe that the spirit of her husband told her to adopt the defendant as her son and heap all this bounty upon him, and that all her gifts had been made under and in consequence of such belief. In short, the alle-

gations went to this, that the defendant Home was a mere adventurer, a needy impostor, who had contrived by means of clever tricks practised upon an old woman whom he knew to be foolish, superstitious, and friendless, as well as rich, to gain from her very large pecuniary benefits. The plaintiff also, in her affidavits, attempted to raise serious charges against the defendant Wilkinson, Home's solicitor, but these charges were at once abandoned by her counsel on the case coming before the Court. The case raised by the defendant's evidence was, that he was no adventurer, but was in an independent position and admitted to terms of friendship by many persons of well-known reputation and integrity; that although he possessed "a strange gift" and was a "medium," he was not an impostor, and had no control over the phenomena which attended him; that the plaintiff was a shrewd person of good common sense and *business-like habits, and that so far from [* 679] his having obtained any influence over her, he was under her influence and control; that it was untrue that he had ever pretended to communicate her husband's commands to her, and in fact it was only on a few occasions, and that not in the first part of their acquaintance, that spiritual manifestations had occurred in her presence; that her gifts to him were from the spontaneous action of her own mind uncontrolled by him; that she sought him out and wished to be connected with him on account of his aristocratic friends, or for other reasons of her own, and that her adoption of him as her son and her gifts to him were made solely with the view of carrying out this wish. He alleged also that the plaintiff had entertained the design of marrying him, and eventually had quarrelled with him because "he refused to accept any other relations than those of mother and son."

The book B. referred to in the judgment was a manuscript book in the handwriting of the defendant Home, containing notes of the phenomena which had occurred at various spiritual manifestations when he and the plaintiff were alone together during the first part of their acquaintance. The defendant Home stated that he had written the statements in this book whilst under the influence of the plaintiff.

Mr. W. M. James, Mr. Druce, and Mr. Fischer were for the plaintiff. They argued that the case rested on the broad, well-recognized principle of the Court established in *Huguenin v. Baseley*, 14 Ves. 273 (No. 76, p. 834, *ante*), and acted upon in *Hunter v. Atkins*,

3 Myl. & K. 113, 135; *Dent v. Bennett*, 4 Myl. & Cr. 269, 8 L. J. (N. S.) Ch. 125, and other cases, in which the rule that a person standing in a relation of confidence to another shall not take advantage of his position in taking a gift or making a bargain from the latter, was extended to all the variety of relations in which dominion may be exercised by one person over another. Where a person standing in such a relation to another takes a gift from him, the *onus* of proving that the gift was an act of pure volition uninfluenced is at once thrown upon the person taking it. If the defendant's account were correct, and the plaintiff sought him only for the sake of his aristocratic society, why were spirits introduced at all into the matter? It was uncontradicted that at the interview of the 7th of October there was some sort of manifestation connected with the spirit of the plaintiff's husband. That alone would be sufficient to throw the *onus* of supporting the gift upon the defendant. They also referred to *Norton v. Kelly*, 2 Eden, 286; *Hatch v. Hatch*, 9 Ves. 292; 7 R. R. 195; *Bridgman v. Green*, 2 Ves. Sen. 627; *Thomas v. Prince*, 2 C. P. Coop. 275.

Mr. Henry Matthews, Mr. Fitzroy Kelly, and Mr. C. Walker for the defendant Home. This case was distinguishable from those cited on the other side. The defendant did not stand to the plaintiff in any relation of confidence or other position, by means of which he had acquired a dominion over her. The counsel on the other side had compared this to a case of religious influence, but manifestations so grotesque as those described in the evidence were radically different from the solemn awe and mysterious obligations of religion. And it could not be said that the superstitious creations of the plaintiff's own imagination, such as her vision of the golden-haired boy, amounted to undue influence exercised by the defendant Home over her. To discover the reasons for the gift, you must look to the antecedent position and lives of the plaintiff and the defendant. On the one hand you found a widow lady, living in second-rate lodgings in London, alone, childless, and without any friends about her, having great wealth which to her was useless, an imaginative, superstitious person, but with warm, affectionate feelings. She had dreamt she was to adopt a son, and had an unsatisfied yearning for a child. At the same time she wished for *éclat*, feeling the slur under which she lay in the eyes of her husband's relations on account of her birth. In the defendant Home she found much that would naturally attract her

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towards him, — a man of pleasing appearance and aristocratic connections. From the first she conceived feelings of natural affection towards him. The foolish fondness she was *proved to have entertained towards him at once supplied a sufficient and natural motive for her bounty.

The *bona fides* of Home was shown by the fact that the money was still intact, although, if the plaintiff's account were correct he must have known that the result of the first conversation she held with any rational person would be to overthrow the gift.

Mr. Kay and Mr. Godfrey Lushington, for the defendant Wilkinson.

Mr. James replied.

GIFFARD, V. C. I proceed without preface to examine the facts and evidence in this case so far as it appears to me to be material to do so. The suit was instituted on the 15th of June, 1867. Its object is to set aside certain gifts from the plaintiff to the defendant, Daniel Dunglass Home, consisting of about £30,000 made over to him absolutely, and another sum of £30,000 settled upon him in reversion, subject to the plaintiff's life interest. The transactions connected with these gifts began in October, 1866. At that time the plaintiff was well past seventy, the defendant thirty-three. The plaintiff was a widow and childless, had lost her husband in 1859, had received a considerable fortune from him, and with what she herself had brought on her marriage, was possessed of about £80,000 or so over and above the £60,000 the subject of the suit. She had no relations of her own; with or without reason she was displeased with her husband's relatives, excepting Mrs. Clutterbuck, his sister, who is wealthy and far advanced in life. The plaintiff lived in London lodgings at a rent of about 30s. a week. She had no servant of her own or society, and she had no friends about her capable of giving her advice. There is some uncontroverted evidence as to the state of things before and up to this time to which it may be well to advert. [His Honour referred to the evidence of Mrs. Pepper, the plaintiff's landlady, and to that of Mrs. Denison, with regard to the plaintiff's devotion to the memory of her husband, and her impression that a change was to come to her in the autumn of 1866, being seven years from his death.] Subsequently to this month of May, 1866 (the time of which Mrs. Denison spoke), the plaintiff returned to London, and in the month of July following she became acquainted with Mrs.

Sims. The plaintiff's account of her acquaintance with Mrs. Sims is confirmed by her, and in substance is not the subject of controversy. [His Honour referred to the affidavits of the plaintiff and of Mr. and Mrs. Sims upon this point. He then read the following passage from the plaintiff's letter to Mr. Burns of the 28th of September, 1866:] "I am most anxious to see Mr. Home. How long does he remain in London? Where other place could I see him? I am a firm believer in all he states in his book, and consider him highly favoured by the Most High God, for it is He alone who performs all the works seen. The time is at hand when we shall all be spiritualists. This is the beginning of the end, and Mr. Home is not the first spiritualist." It was not until the 2nd of October that the plaintiff saw the defendant Home. She then saw him for the first time at the Spiritual Athenæum in Sloane Street, where he had apartments. She had read his book, a publication which has been proved and adverted to in the cause. Its title is, "Incidents in my Life." Its effect on her mind may be gathered by her letter of the 28th of September, which I have quoted as having been proved on the part of the defendant. There can be no doubt as to what were the main causes which induced the plaintiff thus to seek the defendant Home at this time. The defendant Home thus describes himself. [His Honour here read the passage from the defendant Home's answer set out above; and, after referring to other portions of the evidence, continued thus:] Such having been their antecedents, the plaintiff and the defendant, as we have seen, met for the first time on the 2nd of October, 1866. The interview of the 2nd of October was followed by interviews on the 4th, the 7th, the 8th, the 10th, and the 11th. On the 9th the plaintiff had an interview with Mr. S. C. Hall. On the 11th, £24,000 was made over; £30,000, however, had been alluded to on the 7th. [His Honour then proceeded to read at length the account given by Home in his answer of the several transactions, contrasting it with the evidence of plaintiff's and some of defendant's witnesses and Home's letters, and continued:] I [*681] have not gone *through the affidavits made by the plaintiff herself, or her cross-examination, because I think no one could have read those affidavits, contrasted them with the evidence adduced on the part of the defendant, particularly Mr. Wilkinson's and Mr. Jencken's, and heard that cross-examination, without coming to the conclusion that reliance cannot be placed

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on her testimony, and that it would be unjust to found on it a decree against any man, save in so far as what she has sworn to may be corroborated by written documents or unimpeached witnesses, or incontrovertible facts. Much, however, as I distrust all that the plaintiff has said, and much as I suspect what she has done in contemplation of the suit, I do not hesitate to say that I disbelieve the allegation made by the defendant that the plaintiff turned against him because "he refused to accept any other relations but those of mother and son." Even if this was true, it would not have assisted him; but the statements and letters of the plaintiff, as proved on behalf of the defendant, are at variance with this; and every letter and every act of the defendant, and every communication, spiritual or otherwise, inconsistent with any such notion. I forbear, however, to pursue this part of the case further, and turn to consider, first, whether the merits are so before the Court as to enable it to decide on them, and if so, then, what the law is as applicable to cases of this description, and, bearing that law in mind, the result of the facts and evidence. With respect to the merits being before the Court, I certainly could have wished that the bill had been somewhat differently framed; that it had contained the material or most of the material allegations in the affidavits of the plaintiff's principal witnesses, and an explicit reference to the book B, and to the extract from the destroyed book. Considering, however, the contents of the defendant's answer, of his concise statements and interrogatories, and of the plaintiff's answer to those interrogatories; considering that the plaintiff and defendant were each cross-examined, and each cross-examined with reference to the statements of the various witnesses, and adding to this that there was a motion on the part of the defendant for the admission of new evidence on the ground of surprise, which was substantially successful, — I think that there was no issue or material allegation of fact of which each side was not sufficiently apprised and had not the opportunity of meeting, and this being so, that all the requirements of justice are answered in this respect. Then, as regards the law, the question is not as to the validity of a will, but whether two gifts, one to the amount of £30,000 actually transferred, and the other to the amount of £30,000 in reversion, each irrevocable and without consideration, supported by deeds, are or are not to be upheld. On this I will

first of all refer to what has been said in two cases by Lord ELDON and Lord COTTENHAM.

In *Hatch v. Hatch*, Lord ELDON said: "This case proves the wisdom of the Court in saying, 'It is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty.' The Court cannot permit it except quite satisfied that it is an act of a rational consideration, an act of pure volition uninfluenced; and that inquiry is so easily baffled in a court of justice, that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression. Therefore, if the Court does not watch these transactions with a jealousy almost invincible in a great majority of cases it will lend its assistance to fraud."

In *Dent v. Bennett* (which was the case of a medical man), Lord COTTENHAM said: "It was argued upon the authority of the civil law and of some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are, but I will not narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most fully exercised. The relief, as Sir S. Romilly says in his celebrated reply in *Huguenin v. Baseley*, the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

Huguenin v. Baseley was the case of a minister of religion. [* 682] The question then * arises, was the relation of the defendant to the plaintiff during these transactions at all analogous to those which are referred to by Lord ELDON and Lord COTTENHAM? I answer that it has been proved to be so. At the outset the result of the evidence of Mrs. Pepper, Mrs. Denison and Mrs. Sims is, that the plaintiff was greatly attached to her husband; that her husband had told her that a change would take place in seven years from his death, and that they would meet; that she consequently expected her own death in the autumn of 1866, and was told that if she became a spiritualist that need not be, but he would come to her; that she took to reading books on Spiritualism, among others, the "Incidents in my (defendant's)

Life," and became desirous of meeting the defendant. Then Mr. Burns proves the letter of September, 1866, in which she writes with reference to the defendant, "I am a firm believer in all he states in his book, and consider him highly favoured by the Most High God." Besides this the plaintiff is proved to have been superstitious, and eminently affected by dreams and visions, particularly by the vision of the golden-haired boy. I am satisfied, in spite of what she said on cross-examination, that she was deeply impressed with that vision, and felt it as a reality. Moreover, she had been told by her father that she would adopt a son, and it was with a mind saturated with all this that she sought the defendant because of that which she terms "his strange gift." I have read from his answer the defendant's account of himself. On the 2nd of October, according to the answer, the incidents in the defendant's life were alluded to. On the 4th he called on the plaintiff, and became acquainted with her antecedents, birth, parentage, marriage, wealth, and other circumstances. He was then told by the plaintiff "that previous to her late husband's death he told her a change would come over her in seven years, and that she thought it meant her death, but that now she thought the event to occur was that she was to meet and adopt the defendant." On the 7th £30,000 is alluded to and £24,000 promised. The plaintiff is represented by the defendant as saying, "Why, I have seen you in visions these many years, and the only difference was that your hair was lighter, more of a golden yellow than it now is, — many years ago, even before you could have been born. Why, even my father before he died told me I should adopt a son." With reference to this we find in one of the defendant's letters a communication signed with the initials "M. G.," as betokening her father, which is as follows: "The spirits say, 'Dear Daniel, be patient and hopeful; you are recovering, and with care you will have many years of usefulness on earth. Your mother, my darling Jane, is well, and we are near her at all times.'" At this same interview of the 7th of October the defendant tells us there came sounds known as rapping. A call for the alphabet was made, and the following sentence, or words nearly similar, spelt out; "Do not, my darling Jane, say 'Alas! the light of other days for ever fled;' the light is with you; Charles lives and loves you." This is the defendant's own account. Whether there were or were not what are called manifestations before the 7th, there were cer-

tainly manifestations then and on the 8th, and manifestations far beyond any admitted by the defendant. "On the 11th," says the defendant, "I called at her request, and we went to the city in a cab. There were no manifestations. The plaintiff sat very near me, with my hands in hers, under her shawl, all the way to the city." On this occasion the £24,000 was transferred, and the defendant spoken of by the plaintiff at the bankers' and brokers' as her adopted son. This, without more, is in my judgment enough to throw upon the defendant the *onus* of proving that the plaintiffs' acts were the pure, voluntary, well understood acts of her mind, unaffected by the least speck of imposition or undue influence, or, as Lord Eldon has expressed it, "acts of rational consideration, of pure volition uninfluenced." But the case does not stop here. The defendant states himself to be what is called "a medium." Mr. Wilkinson casually saw the plaintiff and defendant sitting at a table, and the defendant acting as a medium, and it is to be inferred that this is nothing unusual or uncommon, not only from this circumstance but from the fourth paragraph of Mrs. Tom Fellowes's affidavit, in which she says she went by the plaintiff's appointment to meet the defendant at the plaintiff's [* 683] lodgings, "and he came accordingly, *and after a short time we all three sat at the table for a *séance*, the plaintiff asking the defendant to seat himself at his own place at the table, and to begin to call the spirits;" and from the eighth paragraph of Mrs. James Fellowes's affidavit, in which she says, after alluding to her introduction to the defendant, that "the plaintiff said to him, 'Let us have a manifestation,' but he said he could not, as he had a bad headache and must leave." I am aware that the defendant has been cross-examined as to these and other parts of these affidavits, and of the extent to which he has contradicted them, but Mrs. James Fellowes and Mrs. Tom Fellowes were cross-examined, and I am satisfied that they are both the witnesses of truth, and in every sense, as regards memory and otherwise, quite reliable. I am satisfied, too, that much more occurred on Sunday, the 7th of October, 1866, in the shape of manifestations and communications, than the defendant admits. Even on his own admission what did occur had reference to the plaintiff's husband. I am satisfied that the representations made by the plaintiff to Mrs. Tom Fellowes in the defendant's presence were according to the facts, and that Mrs. Tom Fellowes is accurate when she says in the

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seventh paragraph of her affidavit, "On this occasion the plaintiff was very open and communicative in telling me in the presence of the defendant of her disposition of her property, and he continually checked her, saying it was unnecessary to go into minute particulars, and the plaintiff said she wished Plessy (meaning myself) to know exactly what she had done, as she had only obeyed her husband's commands as communicated by his spirit through the mediumship of the defendant. He, however, then denied that he had himself had anything to do with the matter. I remember also that on this occasion the defendant asked me whether I never lost any one very dear to me into whose presence I should like to be brought again." I cannot take defendant's denial, so referred to, to mean more than that the communications from the plaintiff's husband were not caused by any act or volition of the defendant, — this being in truth consistent with what he represents as his "strange gift." Then the defendant in his cross-examination swears that he has seen spirits, that he has conversed with them orally, that in his presence tables and chairs have been moved bodily, in violation of the rules of gravity, and that he himself has floated in the air, and on being asked how the spirits communicate to a medium when they communicate by knocking, he says: "Strange sounds are heard like a rapping sound. The alphabet is called or pointed out in some instances, and when a sound is given that indicates that that letter is to be written down. I have no alphabet to be used for this purpose, — they can be called orally as well as pointed out. We go through A, B, C, D, and so on, and when the right letter is arrived at the spirit gives a knock. The knocks are both affirmative and negative, — one signifies 'No,' and three signifies 'Yes,' but you can arrange that as you please." Add to this the antecedents of the plaintiff and the defendant, the defendant's letters from which I have read extracts, the page from the destroyed book and book B, in his handwriting. Then consider that a woman past seventy, within eleven days after first seeing the defendant, mentioned £30,000, and actually transferred £24,000 to him, and followed this gift by a will in his favour, then with £6000, and then with a reversionary interest in £30,000 more, and assuredly there is proof of transactions which ought to be watched with what Lord ELDON termed "a jealousy almost invincible," proof which throws on the defendant the whole *onus* of supporting such gifts. I have already read the defendant's

statements and explanations from his answer and affidavits with reference to the book B; I have read extracts from the book itself. I am altogether dissatisfied with those statements and explanations. The contents of the book disprove them. It is said, however, that the plaintiff's desire to be introduced into the society in which the defendant moved prevailed much with her; that her testimony is not to be relied on; that there is not only what the defendant has sworn to, but Mr. Wilkinson's answer, and evidence of many witnesses besides his to which weight is due; that the plaintiff professed herself to be "a medium;" that she still deals in spiritualism; that the defendant was under [* 684] her influence, not she under his; that she had *the advantage of independent advice, — Mr. Hall's, Mr. Jencken's, Mr. Wilkinson's; that she is a person of business habits and business knowledge; that the letters commencing with that of the 10th of October, 1866, were entirely her own; and that she herself has stated and admitted to Mr. Wilkinson and other persons, that the transactions were not connected with spiritualism. I agree that she did so state to Mr. Wilkinson and other persons. I have said that I cannot rely on her testimony. She seems to have had to do with spiritualism in connection with this very suit, but her desire to be introduced into the society in which the defendant moved was clearly not such an inducement as to account for what she did, or the main inducement; and when it is said that the defendant was under her influence, not she under his, I disagree entirely. The facts I have recapitulated, the letters I have read, the defendant's appearance here in court, the antecedents of both parties, and the statements in the defendant's answer of what occurred when and after he and the plaintiff quarrelled, lead irresistibly to a widely different conclusion. As to the plaintiff's admissions and statements that the transactions were unconnected with spiritualism, for some months she was as anxious as the defendant to support the gifts, — I may say obstinately desirous of supporting them. From her oral communications with Mr. Wilkinson (these commenced on the 12th of November, after her conversation with Mrs. Tom Fellowes) she was aware of the danger of referring what she did to spiritualism. These circumstances and her peculiar character, and the knowledge or suspicion that her sanity might be questioned, sufficiently account for what she said and did as deposed to by the various witnesses. Besides which

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the defendant was generally present, and by no means unaware of the value of anything which might be deemed confirmatory. I am satisfied that the statements and admissions to the effect that the transactions had nothing to do with spiritualism were not according to the fact. As to the plaintiff professing to be a medium, she said this, and almost anything which occurred to her from time to time, as seeming likely to make her of importance to those with whom she was conversing. But the defendant has been proved to be the person who acted as the "medium." There is no proof of the plaintiff having ever so acted, nor do I believe she did. True it is, however, that she has business habits and a knowledge of business, but obviously a limited capacity, — very limited as compared with the defendant's; and though I disregard her statements as to her letters, and think her quite able of herself to have composed the letters she wrote to Mr. Wilkinson, the letter of the 10th of October —

"MY DEAR MR. HOME, — I have a desire to render you independent of the world, and having ample means for the purpose without abstracting from any needs or comforts of my own, I have the greatest satisfaction in now presenting you with, and as an entirely free gift from me, the sum of £24,000, and am, my dear sir, yours very truly and respectfully,

JANE LYON."

— is at singular variance with what she said at the bankers' and the brokers' the day after with reference to the adoption of the defendant as a son, and with what the defendant represents her as having said to himself both on the 11th and at the interview on the 7th of October. This letter has not been satisfactorily explained or accounted for. As to the independent advice, the relation between the plaintiff and the defendant remained unaltered throughout. He was in constant communication with her. Both parties expected that what was being done would be questioned by the husband's relations. Sanity was talked of. Precautions were taken that questions of the kind might be put at rest if raised. Nothing like a power of revocation was ever suggested, though this would have added much to the validity of the deeds and to the control of the plaintiff over the defendant; and besides, I think it a just and sound observation that all that was done was much more by way of caution against what others might do than by way of protection to the plaintiff against her own folly and infatuation.

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There had been acts of confirmation in *Bridgman v. Green*, Wilm.

70, but WILMOT, C. J., said: "In cases of forgery instructions * under the hand of the person whose deed or will is supposed to be forged to the same effect as the deed or will are very material; but in cases of undue influence and imposition they prove nothing, for the same power which produces one produces the other; and therefore, instead of removing such an imputation, it is rather an additional evidence of it."

In *Huguenin v. Baseley* there was the answer of the solicitor who prepared the deed; but with reference to this Lord ELDON said: "There is in this case an attempt to show why there was not a power of revocation, and that is a part of the transaction most liable to objection. The evidence and answer of the attorney go to show distinctly that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making it an irrevocable deed, and told her that she should make a will." And in another part of the judgment he said: "I am bound to look at all the circumstances that had led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief Justice WILMOT says, go and talk both to the grantor and grantee upon it."

There was no suggestion of a power of revocation or of communication with any of the husband's relations, or any question asked or inquiry made of the defendant; and, on the 19th of January, 1867, when the last of the deeds was being read over and executed, the defendant says (this being his account, varying from the plaintiff's): "She afterwards called me to her, and kicking a footstool from under the table pointed for me to kneel there. I did so, close to her, and she put her left arm round my neck and fondled my cheek while they were reading the parchments."

I have already said that, in my opinion, the *onus* of supporting the gifts and deeds rests entirely on the defendant; to this I now add, for the reasons I have given, and having regard to the facts and evidence I have gone through, that, in my judgment, he has not made or proved such a case as is requisite for their support. There must, therefore, be a declaration in the usual form that the gifts and deeds are fraudulent and void; there must be the necessary transfers and assignments to the plaintiff, and an account against the defendant. There remain the costs to be disposed of

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The plaintiff and her counsel agreed that they had no case against Mr. Wilkinson, and that his costs must be paid by her. This, of course, must be done. Under any but exceptional circumstances these costs would be recovered over against the defendant, and he would pay all the other costs of the suit. The expenses, however, have been very seriously increased, first by the unwarrantable attack in the plaintiff's affidavit on Mr. Wilkinson, and secondly, by her innumerable misstatements in many important particulars, — misstatements on oath so perversely untrue that they have embarrassed the Court to a great degree and quite discredited the plaintiff's testimony. The plaintiff, therefore, must bear Mr. Wilkinson's costs and her own; the defendant will escape these costs.

I have now only a few words to say in conclusion. I know nothing of what is called "spiritualism" otherwise than from the evidence before me; nor would it be right that I should advert to it except as portrayed by that evidence. It is not for me to conjecture what may or may not be the effect of a peculiar nervous organisation, or how far that effect may be communicated to others, or how far some things may appear to some minds as supernatural realities which to ordinary minds and senses are not real. But, as regards the manifestations and communications referred to in this cause, I have to observe, in the first place, that they were brought about, by some means or other, after and in consequence of the defendant's presence, how there is no proof to show; in the next, that they tended to give the defendant influence over the plaintiff as well as pecuniary benefit; in the next, that the system, as presented by the evidence, is mischievous nonsense, well calculated on the one hand to delude the vain, the weak, the foolish, and the superstitious, and on the other to assist the projects of the needy and of the adventurer; and, lastly, that beyond all doubt there is plain law enough and plain sense enough to forbid and prevent the retention of acquisitions such as these by any "medium," whether with or without a strange gift; and that this * should be so [* 686] is of public concern and (to use the words of Lord HARDWICKE) "of the highest public utility."

ENGLISH NOTES.

The following cases arising out of voluntary gifts between members of a family where undue influence was presumed may be added to those cited in the principal cases: — *Cocking v. Pitt* (1749), 1 Ves. Sen. 400;

Archer v. Hudson (1846), 7 Beav. 551; *Harvey v. Mount* (1847), 8 Beav. 439; *Page v. Horne* (1850), 11 Beav. 227; *Dimsdale v. Dimsdale* (1856), 3 Drew. 556; *Wright v. Vanderplank* (1857), 2 K. & J. 1, 8 De G. M. & G. 133, 25 L. J. Ch. 753; *Grosvenor v. Sherratt* (1859), 28 Beav. 659; *Everitt v. Everitt* (1870), L. R., 10 Eq. 405, 39 L. J. Ch. 777, 23 L. T. 136, 18 W. R. 1020. In all these cases there was absence of independent advice.

In *Coulson v. Allison* (1859), 2 De G. F. & J. 521, a settlement of real and personal property belonging to the plaintiff executed in consideration of marriage purporting to be contracted with her deceased sister's husband, was set aside partly on the ground of undue influence and partly on the ground of failure of consideration. In *Smith v. Kay* (1859), 7 H. L. Cas. 779, a young man only just of age had become largely indebted to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. The defendant was held entitled to the protection of the Court, even though the influence was not parental, spiritual, or fiduciary. In delivering judgment, Lord KINGSDOWN said: "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies specially to those cases for this reason, and for this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not exist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a Court of Equity are just as applicable in the one case as in the other."

In *Tate v. Williamson* (1866), L. R., 2 Ch. 55, a young man, A., aged twenty-three years, entitled to a moiety of a freehold estate the entirety of which was worth £440 a year, being largely indebted, and being estranged from his father, wrote to his great-uncle for advice and assistance as to the payment of his debts. The uncle deputed his nephew, W. (the defendant), to see A. on the subject. A., refusing to compromise his debts, and being willing to sell his moiety, the defendant offered him £7000 for it, payable by instalments, which offer was accepted by A. The defendant had the property valued before signing the agreement, and upon this valuation the mines under the entirety of the estate were estimated at £20,000. The sale was completed without the valuation having ever been communicated to A. On a bill by A.'s heir to impeach the sale, it was held that the sale could not be supported as the parties stood in fiduciary relationship. The same

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principle is illustrated by *Rhodes v. Bates* (1866), L. R., 1 Ch. 252, 35 L. J. Ch. 267 (gift by an unmarried lady to a brother-in-law with whom she was living); *Ellis v. Barker* (1872), L. R., 7 Ch. 104, 41 L. J. Ch. 64 (a case where undue pressure was exercised by a trustee who was also agent to the plaintiff's landlord); *Bainbrigge v. Brown* (1881), 18 Ch. D. 188, 50 L. J. Ch. 522, 44 L. T. 705, 29 W. R. 782 (a transaction between a father and a son and daughters living in family with him).

The rule in *Bridgman v. Green* (1755), 2 Ves. Sen. 627, cited in the principal case of *Huguenin v. Baseley*, that a Court of equity can take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others, has also been acted upon in various later cases. In *Maitland v. Irving* (1846), 15 Sim. 437, A. and B. consented to postpone the payment of £5000 due to them from C., in consideration of C. procuring and giving them the plaintiff's guarantee for that sum; and C. at the same time informed A. and B. (as the fact was) that the plaintiff was his niece and was possessed of considerable property, that she had resided with him for some time, that he had been her guardian, and that she had been of age for about a year and a half. Afterwards another arrangement was made between A., B., and C., in pursuance of which A. and B. delivered up the guarantee, and C. procured and gave them the plaintiff's cheque for £3000 and her promissory-note for £1200 as securities for his paying them these sums. The Court granted and afterwards continued an injunction restraining A. and B. from prosecuting an action against the plaintiff to recover the £3000.

In *Kempson v. Ashbee* (1874), L. R., 10 Ch. 15, 44 L. J. Ch. 195, 31 L. T. 525, 23 W. R. 38, a young lady in 1859, shortly after attaining majority, executed a bond to the defendant as surety for her step-father with whom she was residing. In 1866 she was induced to give a second bond as surety for the payment of the judgment which the defendant had recovered against her step-father on the bond. She had no independent advice, and both deeds were prepared by the step-father's solicitor. In an action to set aside the bond, it was held that the second bond must be taken as connected with the first, and that as she was not aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first, and both bonds were set aside.

In *Bainbrigge v. Brown*, *supra*, it was held that where a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is afterwards impeached by the child, the *onus* is on the father to show that the child had independent advice, and that this *onus* extends to a volunteer claiming

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through the father, and to any person taking with notice of the circumstances which raises the equity, but not further.

Akin to the topic of undue influence is dealing with reversioners and expectant heirs. As regards the sale of reversions, the Statute 31 Viet. c. 4, overriding the rule prevailing prior to its passing, enacted that no purchase made *bonâ fide* and without undue or unfair dealing of any reversionary interest in real or personal estate should thereafter be opened or set aside merely on the ground of undervalue. This does not interfere with the jurisdiction of the Court to give relief in cases of "catching bargains" with heirs or reversioners, which have been held to be fraudulent. The chief cases on this subject are, *Earl of Chesterfield v. Janssen* (1750-1), 2 Ves. Sen. 125; *Tyler v. Yates* (1871), L. R., 11 Eq. 265, L. R., 6 Ch. 664, 40 L. J. Ch. 768; *Earl of Aylesford v. Morris* (1873), L. R., 8 Ch. 484, 42 L. J. Ch. 546, 28 L. T. 541, 21 W. R. 424; *Benyon v. Cook* (1875), L. R., 10 Ch. 389, 32 L. T. 353, 23 W. R. 413, 531; *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *Neville v. Snelling* (1880), 15 Ch. D. 679, 49 L. J. Ch. 777, 43 L. T. 244; *Fry v. Lane* (1889), 40 Ch. D. 312, 58 L. J. Ch. 113, 60 L. T. 12, 37 W. R. 135; *James v. Ker* (1889), 40 Ch. D. 449, 58 L. J. Ch. 355, 60 L. T. 212, 37 W. R. 279.

Neither will a transaction be supported where a person dealing with an expectant heir purports to sell him goods that he may turn them into cash, and takes a security for the nominal price; *Barker v. Fanshomer* (1782), 1 Bro. C. C. 149; *King v. Hamlet* (1854), 1 My. & K. 456.

Confirmation of, or acquiescence in, the transaction after the undue influence is withdrawn will make it valid and not subject to subsequent rescission; *Mitchell v. Homfray* (1883), 8 Q. B. D. 587, 50 L. J. Q. B. 460, 45 L. T. 694, 29 W. R. 558; *Allicard v. Skinner* (1887), 36 Ch. D. 145, 56 L. J. Ch. 1052, 57 L. T. 61, 36 W. R. 251. The validity of the confirmation or acquiescence is conditional on the entire cessation of the undue influence, and on the knowledge of his rights by the injured party; *Moron v. Payne* (1873), L. R., 8 Ch. 881, 43 L. J. Ch. 240; *Kempson v. Ashbee* (1874), L. R., 10 Ch. 15, 44 L. J. Ch. 195, 31 L. T. 525, 23 W. R. 38.

AMERICAN NOTES.

The doctrine of the principal cases has been widely accepted in this country. A careful analysis of the cases may be found in Browne on Parol Evidence, p. 70. It is there stated: "Where one occupies a position of trust for, or sustains a position of legal or natural authority or influence over another, any gift or benefit from the latter to the former, or any financial settlement between them, is presumptively void, and can be enforced or retained only upon the clearest proof of good faith on the part of the former, and of under-

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standing and intention on the part of the latter." The doctrine has been applied in the following relations :

Husband and wife : *Haydock v. Haydock*, 34 New Jersey Equity, 570; 38 Am. Rep. 385; *Boyd v. De La Montague*, 73 New York, 198; *Darlington's Appeal*, 86 Pennsylvania State, 512; 27 Am. Rep. 726; *Shipman v. Furniss*, 69 Alabama, 555; 44 Am. Rep. 528; *Gobling v. Golding*, 82 Kentucky, 51.

Affiliated parties : *Kelly v. McGrath*, 70 Alabama, 75; 45 Am. Rep. 75; *Butler v. Butler*, 21 Kansas, 521; 30 Am. Rep. 411; *Hamilton v. Smith*, 57 Iowa, 15; 42 Am. Rep. 39; *Hall v. Carmichael*, 8 Baxter (Tennessee), 211; 35 Am. Rep. 696; *Gilmore v. Burch*, 7 Oregon, 374; 33 Am. Rep. 710; *Pierce v. Pierce*, 71 New York, 154; 27 Am. Rep. 22; *Kline v. Kline*, 57 Pennsylvania State, 120; 98 Am. Dec. 206; *Falk v. Turner*, 101 Massachusetts, 494; *Rockafellow v. Newcomb*, 57 Illinois, 186 (man complaining of woman); *Graham v. Graham*, 143 New York, 573.

Parent and child : *Wood v. Rabe*, 96 New York, 414; 48 Am. Rep. 640; *Noble's Adm'r v. Moses*, 81 Alabama, 530; 60 Am. Rep. 175. *Contra* as to grandparent and grandchild : *Cource v. Cornell*, 75 New York, 91, 31 Am. Rep. 428. Case of benefit from father to son through advice of a justice of the peace, his confidential friend. *Fisher v. Bishop*, 108 New York, 25; 2 Am. St. Rep. 357.

Persons *in loco parentis* : *Berkmeier v. Kellerman*, 32 Ohio State, 239; 30 Am. Rep. 577.

Executor and legatee : *Leach v. Leach*, 65 Wisconsin, 284.

Administrator and distributee : *Williams v. Powell*, 66 Alabama, 20; 41 Am. Rep. 742.

Brother and sister : *Gillespie v. Holland*, 40 Arkansas, 28; 48 Am. Rep. 1.

Physician and patient : *Cadwalader v. West*, 48 Missouri, 483; *Crispell v. Dubois*, 4 Barbour (New York Supr. Ct.), 393; *Woodbury v. Woodbury*, 111 Massachusetts, 329. *Contra* : *Audourcil's Appeal*, 89 Pennsylvania State, 114; 33 Am. Rep. 731.

Guardian and ward : *Ferguson v. Lowery*, 54 Alabama, 510; 25 Am. Rep. 718; *Bickerstaff v. Marlin*, 60 Mississippi, 509; 45 Am. Rep. 418; *Mum v. McDonald*, 10 Humphrey (Tennessee), 275.

Equitable wardship : *Jacox v. Jacox*, 40 Michigan, 473; 29 Am. Rep. 547.

Attorney and client : *Dickinson v. Bradford*, 59 Alabama, 581; 31 Am. Rep. 23; *Evans v. Ellis*, 5 Denio (New York), 610; *Stout v. Smith*, 98 New York, 25; 50 Am. Rep. 632; *Darlington's Estate*, 147 Pennsylvania State, 624; 30 Am. St. Rep. 776 (attorney in fact).

Minister and parishioner, or religious adviser and disciple : *Connor v. Stanley*, 72 California, 556; 1 Am. St. Rep. 81; *Finnigan v. Theisen*, 92 Michigan, 173; *Thompson v. Hawks*, 14 Federal Reporter, 902. *Contra* : *Jackson v. Ashton*, 11 Peters (U. S. Supr. Ct.) 255 (*obiter*).

Agent and principal : *Hull v. Knappenberger*, 97 Missouri, 509; 10 Am. St. Rep. 337.

Contra as to mere confidential friends : *Pressley v. Kemp*, 16 South Carolina, 334; 42 Am. Rep. 635; *Hemingway v. Coleman*, 49 Connecticut, 390; 44 Am. Rep. 243. In the former case, an unmarried woman, seventy years old, feeble and deaf, deeded a considerable part of her property, twelve days before her

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death, to a young unmarried man, in whose family she was living, to whom she was strongly attached, and who had acted as her agent in a few instances. The deed was drawn by an attorney under her directions, and was executed in the grantee's presence, after she had read and understood it. She had previously executed a will bestowing the same property on charities. No coercion being shown, it was held that the deed should not be set aside for constructive fraud on account of the relations of the parties. Citing *Huguenin v. Baseley*, but deeming it to hold the rule "more strictly than it is held by the Courts of this country," and emphasizing the fact that the transaction would have been valid if done through the medium of a will. In the Connecticut case, the defendant had been a trusted labourer in the service of A. in taking care of oyster beds. Seven years after he left the service, but while on friendly terms with A., the latter became mentally feeble and unable to manage his affairs, and his wife, intelligent and capable, transacted them for him. The wife, on defendant's advice and through his agency, sold part of the oyster beds, and wishing to sell the rest, and defendant offered to buy them, and she said he might have them if he would pay as much as any one else. Defendant offered \$200, although he knew they were worth \$500. The sale was completed on those terms, the wife believing defendant honest and friendly, and that he would offer a fair price, and making no inquiry, and he knowing her reliance. Held, that the sale should not be set aside. The latter case may be supportable, but not so of the former, in the writer's opinion. The contrary was held in *Zimmerman v. Bitner*, Maryland, to appear.

In *Aulenreith's Appeal*, *supra*, A. was seventy years old, very wealthy, infirm and confined to the house, but of sound mind and judgment. F. was his physician and confidential friend. A. executed a contract with F., by which in consideration of one dollar and F.'s services in procuring certain stock for A., A. agreed to transfer a certain interest in it to F. F. realized about \$50,000 thereby. It did not appear that A. had any independent advice. Held, that F. was at liberty to show that the transaction was a gift, and that the burden of proof of fairness was not on him. Of this, the present writer is still of opinion, as he declared himself in a note to the case, 33 Am. Rep. 736, that it "is opposed to the almost unanimous current of authority."

The doctrine is not applicable to wills. *Mackall v. Mackall*, 135 United States, 167; *Bancroft v. Otis*, 91 Alabama, 279; 24 Am. St. Rep. 904. *Tyson v. Tyson's Exr's*, 37 Maryland, 583; *Post v. Mason*, 91 New York, 539.

See Lawson on Contracts, §§ 260-268; Pomeroy's Equity Jurisprudence, pp. 1268 *et seq.*; 1370 *et seq.*, citing the principal cases.

In *Hall v. Perkins*, 3 Wendell (New York Court of Errors), 626, the doctrine was unanimously applied where a simple, ignorant, young nephew was induced by his uncle, an advocate (*par courtoisie*) in justice's court, to accept a conveyance of land worth not more than \$240 in satisfaction of a claim of at least \$500.

 No 78. — Oakes v. Turquand, L. R. , 2 H. L. 325. — Rule.

No. 78. — OAKES v. TURQUAND

PEEK c. THE SAME.

RE OVEREND, GURNEY, & CO.

(1867.)

RULE.

THE right to rescind a voidable contract must be exercised within a reasonable time, and is destroyed when *restitutio in integrum* has become impossible. Declared insolvency of a company which is followed by a winding-up order puts an end to any right of rescission of the contract of membership, on the ground of misrepresentation or otherwise.

Oakes (Appellant) v. Turquand & Another (Respondent).

Peek v. The Same.

In re Overend, Gurney, & Co.

L. R., 2 H. L. 325-379 (s. c. 36 L. J. Ch. 949; 16 L. T. 808).

Company. — Contribution. — Fraud. — Winding-up. [325]

Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time.

A contract induced by fraud is not void, but voidable; and therefore though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights which they may enforce against the party who has been so induced to enter into it.

The Limited Liability Acts previous to 1862 do not destroy, but only restrict the liability of a shareholder in a company formed under their provisions, and change the form of enforcing it.

The direct remedy of a creditor of an incorporated company is solely against the company, and not against its individual members as upon a contract with them. But though, as between the company and the member, the member might have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors.

No. 78. — *Oakes v. Turquand*, L. R., 2 H. L. 326, 327.

[326] A. applied, on the faith of statements in a prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. A. then applied to have his name removed from the list of contributories.

Held, affirming the decision of MALINS, V. C., that it was properly placed there.

The first of these cases was an appeal against a decision of Vice-Chancellor MALINS, by which the name of Mr. Oakes was kept on the register of members of the company called "Overend, Gurney, & Co., Limited," and he had been held liable to [* 327] answer any call * that might be made upon him by the liquidators appointed to wind up the company.

The second was an appeal by Mr. Peek against a like decision, the only difference between the two cases themselves being that Mr. Oakes was an original allottee of the shares in respect of which liability was fixed on him, while Mr. Peek had purchased his shares in the ordinary way.

Both the appellants alleged, in substance, that the representations made by the directors of the company were false and fraudulent, and that in consequence of such false and fraudulent representations, and by means thereof, they had become the holders of the shares. They insisted, therefore, that they were, as a result of the imposition practised upon them, released from all liability to have their names kept on the list of members, and be made to contribute to the debts of the company.

The company had begun business on the 1st of August, 1865, and stopped payment on the 10th of May, 1866. On the 11th of May Vice-Chancellor KINDERSLEY made an order appointing, provisionally, Messrs. Turquand and Harding to be the official liquidators of the company. An extraordinary general meeting of the members of the company was called for the 11th of June, 1866, "to consider the position of the affairs of the company, and, if deemed expedient, to pass the following resolution: 'That the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily.'" The meeting was held, and 363 shareholders, representing 30,193 shares, were present, and 623 shareholders, representing 26,312 shares, sent proxies. The resolution actually passed was this: "That it has been proved to the satisfaction of this meeting that Overend,

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Gurney & Co., Limited, cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily under the supervision of the Court, and that William Turquand and Robert Palmer Harding, of &c., be and are hereby appointed liquidators." Two shareholders (Mr. Henry Kingscote and Mr. Henry Grissell) and one depositor (Mr. Charles Oppenheim) were appointed a committee of supervision.

Petitions for winding up the company were presented, and were heard before Vice-Chancellor KINDERSLEY on the 22nd of June, 1866, * when the following order was made: "That [* 328] the voluntary winding up of the said Overend, Gurney & Co., Limited, referred to in the affidavit of William Bois, filed on the 22nd of June, 1866, be continued, but subject to the supervision of this Court, and that William Turquand and Robert Palmer Harding be continued as liquidators, and that any of the proceedings under the said voluntary winding-up might be adopted as the Judge should think fit."

The liquidators put the names of Mr. Oakes and Mr. Peek on the list of contributories; and on the 20th of August, 1866, made a call of 10 per cent. on the members of the company in respect of the unpaid portion of the shares. Notice of motion to remove the names of these appellants from the list, and to stay, as against them, all proceedings on the call, having been given, the motion was heard before Vice-Chancellor MALINS, who, on the 9th of February and the 7th of March, 1867, made orders dismissing the motion, and directing that Mr. Oakes and Mr. Peek should pay the costs of the liquidators, and that the costs of Mr. Oppenheim, the depositor, who represented the creditors, should come out of the assets of the company. This appeal was brought against these orders.

The facts of the case are stated somewhat more in detail in the judgment of the LORD CHANCELLOR.

The case was fully argued, and on a subsequent day, —

15 Aug. THE LORD CHANCELLOR (LORD CHELMSFORD): — [340]

My Lords, these are appeals from orders of Vice-Chancellor MALINS, refusing to remove the names of the appellants from the register of members of the company of Overend, Gurney & Co., Limited, and from the list of contributories of the said company, and to rectify the register accordingly. The cases are of the greatest importance, and the decision of this House upon them will

determine for the future the rights and liabilities of creditors and shareholders of a limited liability company upon its winding up under the Companies Act, 1862.

The appellants dispute their liability to be placed upon the list of contributories on the ground that they were induced to take shares in the company by false and fraudulent representations made by the directors in a prospectus issued by them on [* 341] its *formation; that consequently their agreements to become shareholders in the company are not binding upon them, and that they never, by any subsequent act, affirmed them or acquiesced in their validity. The appellant Oakes was an original allottee of his shares; the appellant Peek purchased his in the market, either from an allottee or from a purchaser from an allottee. In considering the case, I shall look at it throughout as if Oakes was the only appellant, because if he fails to establish his right to be relieved from liability, Peek cannot possibly succeed.

The prospectus of the company was dated on the 12th of July, 1865. Oakes, on the 15th of July, applied for 100 shares, but twenty-five only were allotted to him. There can be no doubt that Oakes was induced by the prospectus to take his shares; and, therefore, the first question to be considered is, whether, as he alleges, the representations it contained were false and fraudulent.

The company was formed, as the prospectus states, "for the purpose of carrying into effect an arrangement for the purchase, from Overend, Gurney, & Co., of their long-established business of bill brokers and money dealers." In order to form an opinion of the true character of the statements made in the prospectus, it is necessary to know what was the state of the firm of Overend, Gurney, & Co., at the time when it was proposed to convert their partnership into a joint stock company. At this period they stood high in the commercial world. Their dealings and transactions were known to be of a most extensive description, and they were supposed to be carrying on their business upon a safe and sure basis. But it appears from the affirmation of Mr. John Henry Gurney, one of the firm, that, for some time before, the partners managing the business had been making considerable advances of an exceptional character to various parties and companies, upon securities of a speculative and uncertain nature, and that, "on a close examination which was undertaken prior to the transfer of the business to the company of 'Overend, Gurney, & Co., Limited,' it was found that the doubtful

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advances amounted to £4,199,000, of which sum it was estimated that £1,082,000 only would be realized, leaving the sum of £3,117,000 to be provided."

From the same source of information we learn, that from the year 1860 the total result of all the operations of the firm had *been a loss of about £500,000 a year. Mr. Gurney [*342] described the business carried on by Overend, Gurney, & Co., as having been of an exceedingly extensive and profitable nature, and stated that for the five years ending on the 31st December, 1860, after allowing interest upon capital, and upon the balances to the credit of the partners, the profits divided amongst the several partners averaged upwards of £190,000 per annum; but that, subsequent to that period, the actual net profits had not been ascertained or appropriated, but were reserved to meet the losses consequent upon the exceptional business before mentioned. From this statement it might be supposed that a different course was adopted with respect to the profits of the business after 1860 from that which had been pursued previously. But upon the cross-examination of Mr. Gurney he proved, that in 1855, and every succeeding year down to 1860, portions of the balances had always been employed in writing off losses.

Such was the condition of the partnership of Overend, Gurney, & Co., at the time when it was proposed to turn it into a joint stock company.

The partners in the firm, who were to become directors of the new company, were, of course, acquainted with all these particulars, and the other persons, whose names appear on the prospectus as directors, must have been fully informed of them.

Under these circumstances the prospectus, which the appellant alleges to be false and fraudulent, was issued. It is headed, in very large characters, with a name likely to attract attention and inspire confidence, "Overend, Gurney, & Co., Limited," and describes the intended capital of the company to be £5,000,000, in 100,000 shares of £50 each, of which it is said it is not intended to call up more than £15 per share. After describing the purpose for which the company was formed, the prospectus proceeds: "The consideration for the goodwill being £500,000, one-half being paid in cash and the remainder in shares in the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders."

It is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it con- [* 343] ceals most * material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood. If the real circumstances of the firm of Overend, Gurney, & Co. had been disclosed, it is not very probable that any company founded upon it would have been formed. Indeed, it was admitted in the course of the argument that if the true position of the affairs of Overend, Gurney, & Co. had been published it would have entailed the ruin of the old firm, and would have been utterly prohibitory of the formation of the new. To which the only answer which fairly suggests itself is, "Then no company ought ever to have been attempted, because it was only possible to entice persons to become shareholders by improper concealment of facts."

From the memorandum and articles of association and deed of covenant in relation to the business, to which applicants for shares were referred in the prospectus, nothing unfavourable to the prospects of the new company could be gathered. But from a deed of arrangement contemporaneous with the deed of covenant, the existence of which was not made known in the prospectus, the real conditions of the transfer of the business of Overend, Gurney, & Co. appear. It is true the prospectus states that the vendors guaranteed the company against any loss on the assets and liabilities transferred, which, it is said, was sufficient to inform, or, at least, to caution, persons disposed to take shares that there might be unsatisfied liabilities of Overend, Gurney, & Co. to be provided for. But without dwelling on the postponement of the full effect of the guarantee for three years by the private deed of arrangement, the statement that £500,000 were given as the consideration for the goodwill was calculated not merely to lull suspicion as to the state of the affairs of Overend, Gurney, & Co., but to attract persons to join the proposed company. No one can for a moment suppose that if it had been possible to take the goodwill of Overend, Gurney, & Co.'s business into the market with a disclosure of all the circumstances attending the business, it would have realized a single shilling; but the parties, some of whom were both vendors and purchasers, arranged amongst themselves for the payment of a sum for this unmarketable goodwill, the half of which must have come out of the moneys of the shareholders.

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* It is said that the directors believed *bonâ fide* that the [* 344] company would be a profitable concern, and upon the strength of that opinion they themselves took shares, and never parted with those shares, although at one time they were at a premium.

With respect to this proof of the sincerity of their belief, it must be observed that they were each of them compelled to possess 200 shares as the qualification of a director under the articles of association. I entertain no doubt, however, that the directors were honestly and sincerely of opinion that if they could procure additional capital, and could carry on some of the business of Overend, Gurney, & Co. on a healthier system, the company would succeed. But as the experiment was to be made with other people's money as well as with their own, I think they were bound to furnish to others the information which they possessed themselves, and so enable others to form a competent judgment as to the prudence of embarking in the new concern.

If this had been a case between Oakes and the company, in which he sought to be relieved from his contract, as in *Venezuela Railway Company v. Kisch*, L. R., 2 H. L. 99, No. 73, p. 759, *ante*, or the company had been suing him for calls, as in *The Borch-g-Plum Lead Mining Company v. Baynes*, L. R., 2 Ex. 324; 36 L. J. Ex. 183, he would have succeeded in the one case, and the company would have failed in the other, on the ground — which, I venture to think, was correctly laid down in the recent case of *The Western Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145 in this House — that “where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations” (and I would here add, “by fraudulent concealment”) “of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent.”

It is quite clear, therefore, that Oakes might originally have disaffirmed that contract, and divested himself of his shares, and that he never did any act to affirm it, nor was aware of the true state of the firm of Overend, Gurney, & Co. at the time of the * formation of the new company, nor until after the [* 345] failure. No dividend was paid to the shareholders, and no

general meeting was called, the articles of association prescribing that the first general meeting should be held not more than twelve, nor less than ten months from the day of incorporation, and the company having come to an end before the twelve or even the ten months had expired.

Such was the position of *Oakes* when the order for winding up the company was made on the 22nd of June, 1866. His name, being upon the register of shareholders, was placed (as a matter of course) by the liquidators upon the list of contributories. A motion was made before Vice-Chancellor MALINS to remove his name from the list, when his Honour refused to make any order, and from that refusal the present appeal is brought.

The question, as I have already said, is one of the highest importance, involving present pecuniary interests to an enormous extent, and calling for a final decision upon the relation to each other of creditors and shareholders of limited companies in every case of a winding-up under the Companies Act, 1862.

On the part of the creditors, it is said that every person whose name is found upon the register at the time when the order for winding up is made is a shareholder, and liable to contribute towards the payment of the debts of the company to the extent of the sums due upon his shares, unless he can prove that his name was put upon the register without his consent.

On the part of the shareholders it is contended that a person who has been induced by fraud to enter into a contract to take shares, and whose name is afterwards placed upon the register, never becomes a shareholder, because his agreement, being obtained by fraud, is of no validity. In support of this proposition, the words of my noble and learned friend (Lord CRANWORTH) in *The Penzance Railway Company v. Kisch*, L. R., 2 H. L. 99, p. 759, *ante*, were cited, where he said: "The case of the respondent is that he never was a member, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was induced to do." My noble and learned

friend never meant to deny the distinction between void [* 346] and voidable contracts, or to say that *an agreement obtained by fraud is in no case any agreement at all. His language must be understood in its application to the case before him, in which the respondent seeking relief from the contract into which he had been drawn by fraud, was entitled, if he chose to

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repudiate it, to treat it as null and void *ab initio*, and therefore to say that he never was a member.

The distinction between void and voidable contracts is one which will be found very necessary to be borne in mind when we come to consider the words of the Companies Act, 1862, upon which the question of Oakes's liability will ultimately turn. It is a settled rule of law, as Mr. Justice CROMPTON said, in *Clarke v. Dickson*, E. B. & E. 148, "that a contract induced by fraud is not void, but voidable only at the option of the party defrauded." If it were otherwise, if a contract induced by fraud were void, there would be an end of the question in this case, because a contract void in itself can have no valid beginning, and Oakes never would have become a shareholder of the company.

After stating and commenting on the various provisions of the Companies Act, 1862, he proceeded: —

* The result of these provisions of the Act is that a con- [* 349] tributary is a person who has agreed to become a member of the company, and whose name is upon the register.

Did the appellant then agree to become a member? His counsel answer this question in the negative; because they say that a person who is induced by fraud to enter into an agreement cannot be said to have agreed; the word "agreed" meaning having entered into a binding agreement. But this is a fallacy. The consent which binds the will and constitutes the agreement is totally different from the motive and inducement which led to the consent. An agreement induced by fraud is certainly, in one sense, not a binding agreement, as it is entirely at the

* option of the person defrauded whether he will be bound [* 350] by it or not. In the present case, if the company formed on the basis of the partnership of Overend, Gurney, & Co., had realized the expectations held out by the prospectus, the appellant would probably have retained his shares, as he would have had an undoubted right to do. But when the order for winding up came, and found him with the shares in his possession, and his name upon the register, the agreement was a subsisting one. How could it then be said that he was not a person who had agreed to become a member? To hold otherwise would be to disregard the long and well-established distinction between void and voidable contracts.

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[353] In the conclusion at which I have arrived in this case

I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer; but I cannot help remarking upon the singular state of things which would result from relieving the appellant from his liability. The same right of relief established by him would belong to all the allottees of shares who had retained them in their possession; and in the winding up of this company the only contributories to the debts of the company would be the directors and those unfortunate shareholders who had purchased their shares in the market. So that, although the shareholders who had suffered by the fraud of the directors might recover from them the full amount of the damages sustained, the creditors could only make the directors of this limited liability company contribute towards payment of their debts to the extent of their shares.

[356] In my opinion, my Lords, the decree of the VICE-CHANCELLOR ought to be affirmed, but with a variation as to the costs, which must be borne by each of the appellants in respect of his own case. I submit to your Lordships that these appeals ought to be dismissed with costs.

Lord CRANWORTH:—

My Lords, the appellant, Mr. Oakes, in order to sustain his appeal, must make out two propositions. He must satisfy [* 357] the *House, first, that he was induced to take his shares in Overend, Gurney, & Co., Limited, by the fraud of the company, or of those for whom the company became responsible; and, secondly, if that is made out, that he ought not to be retained on the list of contributories. The first question is one of fact, and its determination, however important to the parties concerned, is of no general interest. The other question is of very extensive consequence in the mercantile world. It is of the utmost importance that persons dealing with joint stock companies should be in no doubt as to who are the persons to whom they are entitled to look as liable to perform the obligations and pay the debts of the partnership.

I shall proceed at once to consider this second question,—to determine what are the relative rights of Mr. Oakes and the creditors; and for this purpose shall assume it to be true that he was

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induced to take shares by the fraud of the company, or of those for whom the company became responsible. There is no doubt that the direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder; and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. This being so, the argument of the appellant is, that it is only to the assets of the company that the creditor can resort, and so that the only question is, of what those assets consist. This question, he contends, so far as the assets consist of money to be recovered by legal process against other persons, whether shareholders or not, can only be solved by ascertaining what rights the company has against those other persons. If in any proceeding by the company instituted for the purpose of recovering money from any person, that person has a valid defence, whether legal or equitable, the appellant contends that the sum claimed from him does not form part of the assets of the company. These assets, he says, consist solely of property in the actual possession of the company, or which the company can recover by means of legal proceedings. In this case the appellant contends that he was induced to become a shareholder by means of a fraud which entitles him to repudiate the status of shareholder, and to say, as between himself and the company, that he never held a share. And if he can say this against the company, then *the appellant contends he can say it [*358] against all the world, for his liability is a liability to the company and to no one else.

But it must be borne in mind that a company formed under the statutes of 1862 is not a mere common-law corporation: its rights and liabilities depend in great measure on statutable provisions; and in order fully to understand and interpret them we must consider not merely the enactments of the Companies Act, 1862, under which the firm of Overend, Gurney, & Co., Limited, was incorporated, but also the other Acts previously passed *in pari materia*. When it became the habit and interest of persons engaged in commerce to unite in great numbers for carrying on any particular trade, it soon became evident that the ordinary provisions of the laws of this country were ill adapted to the business of such bodies. It is a general principle of mercantile law that when two or more persons are associated in partnership for carrying on a trade, every

partner can bind his copartners in all contracts made in the ordinary course of the business. But where a hundred persons or upwards are engaged in any particular trade to be managed by directors acting for the whole body, that principle plainly became very inconvenient in its application. So, again, it was a principle of our Courts that in any proceeding by or against a partnership, all the partners must either, as plaintiffs or defendants, be made parties to the proceeding. But when numerous members of a partnership, to the extent of many hundreds of persons, were concerned as partners, this rule would, if adhered to, have made litigation practically impossible, and would often have amounted to a denial of justice.

To meet these and many other difficulties arising from the same or similar causes, the Legislature has from time to time interfered, the last general Act on the subject being the Companies Act, 1862, under which Overend, Gurney, & Co., became incorporated. I have already observed, that in order to understand the true effect of that statute, it is necessary to consider some of those which preceded it. The first general statute to which I need refer is the Banking Act, 7 Geo. IV. c. 46. Before the passing of that Act it was not lawful for more than six persons to be united together as partners in carrying on the business of bankers. This restriction was removed by that statute as to banking partnerships [*359] carrying on business at *a distance of more than sixty-five miles from London. The Act provides that the company shall file annually at the Stamp Office a list of all the partners, open to general inspection. And in order to make it possible for such companies, the number of whose partners was unlimited, to maintain and defend suits instituted by and against them, they were bound to appoint a public officer, who, in all disputes between the company and third persons, should represent the company, — an officer by whom the company might sue and be sued. Any creditor or other person having a demand on the company might proceed against the public officer, and on recovering judgment against him might issue execution against any member of the company, or any person who had ceased for not more than three years to be a member, but who was a member when the contract recovered on was entered into. Companies trading under the provisions of this Act were not incorporated. They were mere associations of individuals trading in partnership, but with several important

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statutable incidents connected with them. This Act was confined to banking partnerships. No general Act relating to partnerships in any other business was passed until the year 1844, although numerous private Acts had before that time been obtained by persons engaged in speculations requiring capital beyond what could be supplied from private resources, incorporating them, and introducing regulations for the benefit of creditors and other persons dealing with them.

In 1844 the Legislature passed the 7 & 8 Vict. c. 110, being the first general joint stock company Act. The provisions of that Act material for the question now before us were as follows: It was declared to apply, with some exceptions, to all companies the capital of which was divided into shares transferable without the consent of all the other shareholders. The persons intending to become shareholders were obliged to execute a deed stating the nature and particulars of the proposed business. A public officer was appointed for keeping a register of, amongst other things, the name of every projected company; a statement of the nature of its intended business; the amount of its capital; and the names and addresses of every subscriber, with the number of the shares to be taken by him. The persons intending to form themselves into a company were obliged to furnish to the registrar these particulars, * with many others to which I do not feel it [*360] necessary to advert; and on its being certified that this had been done, it is enacted that the shareholders shall be thenceforth incorporated for the purpose of carrying on the business mentioned in the deed, and shall so continue until it is dissolved and its affairs are wound up; but so, nevertheless, as not to restrict the liability of any shareholder under a judgment recovered against the company, it being expressly declared that every shareholder shall continue liable as if the company had not been incorporated.

As the company thus became incorporated for the purpose of its business, it was unnecessary that it should (as in the case of banking companies trading under 7 Geo. IV. c. 46) appoint a public officer for the purpose of suing and being sued. The company itself was able to bring and defend actions and suits in its own name without any special enactment for that purpose; but the statute provides that any person having recovered judgment against the company may, if he cannot obtain satisfaction from the funds of the incorporated body, obtain execution against any shareholder, or

against any person who should have ceased for less than three years to be a shareholder, and who was a shareholder when the debt or liability accrued in respect of which the judgment was recovered. I have said that certain companies were excepted from the operation of this Act, and amongst those so excepted were all banking companies.

But concurrently with this Act another Act was passed, 7 & 8 Vict. c. 113, intituled "An Act to regulate Joint Stock Banks in England." It differed in some important particulars from the other Act. It did not incorporate any joint stock banking company, but it enabled persons desirous of forming themselves into such a company, upon complying with certain requisitions, to obtain, under the sanction of the Board of Trade, a royal charter of incorporation, subject to various statutable qualifications, and, amongst other things, that, notwithstanding the incorporation, the shareholders should be liable as if they were not incorporated, and there is the same provision as in the former Banking Act, and in the general Joint Stock Companies Act, making former shareholders liable in certain cases for a term of years after they have ceased to be shareholders.

[* 361] * It thus appears that, under the Act of the 7 & 8 Vict. c. 110, or the Banking Act, 7 & 8 Vict. c. 113, the provisions in these two statutes, so far as regards the present question, being nearly the same, the course which a creditor was to take in order to enforce a debt or demand, was to sue the incorporated company as his debtor, and having recovered judgment against that body, he was, in the first instance, to endeavour to levy his debt by an execution against it, and if that did not produce sufficient to satisfy him, then he was entitled to issue execution against any shareholder, or, within certain limits, against any of those who had been shareholders when his right arose. If the present question had arisen under either of these statutes the right of the creditor could not have been controverted. It would have been no answer on the part of any person who had agreed that his name should be on the list of shareholders, and against whom a *fi. fa.* had been sued out, to say that he had been induced by fraud to become a shareholder. This was decided by the Court of Queen's Bench, in a judgment delivered by Lord CAMPBELL in the case of *Henderson v. Royal British Bank*, 7 E. & B. 356; 26 L. J. Q. B. 112; and nearly at the same time by the Courts of Common Pleas and Exchequer, in cases

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before them in which the circumstances were similar. Lord CAMPBELL said: "It would be monstrous to say that the party against whom the application was made, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer liable." This observation commends itself so entirely to common sense that I cannot hesitate at once to accede to it.

When this passage was quoted in the argument at the bar, I doubted, and I believe I expressed a doubt, whether Lord CAMPBELL had not been wrong in attributing the liability of the person against whom the application was made, in any respect to his having held himself out to the world as a partner, for a shareholder never takes any part in managing the joint business. But on farther reflection I think the observation was just. The application of the creditor was resisted by the shareholder on the ground that he had been induced by fraud to take shares. It is a fair answer,

* by a creditor, to such a defence to say, "I know nothing [*362] of the circumstances which led you to become a shareholder; all I know is, that you in fact allowed yourself to be represented as being a shareholder, and on the faith of your being so I trusted the company." But whether the observation of Lord CAMPBELL was or was not altogether warranted, the decision itself seems to me to be incontrovertible, and the only question, therefore, is, whether the same principles ought to govern a case like the present, arising not under the Act of 7 & 8 Vict. c. 113, but under the subsequent Act of 1862.

There are important differences between the provisions of the Act of 1862 and the two Acts of 1844. In the first place, all the enactments contained in the previous Acts for enforcing a debt or demand by execution against a shareholder are repealed. The creditor must, as under the former Acts, proceed against the company; but if, on recovering judgment against the company, he was unable to obtain satisfaction, he has no power to proceed against any individual shareholder. He must obtain an order for winding up the affairs of the company, by causing all its assets to be called in and distributed among all the creditors rateably, as in a bankruptcy. But there is another very material distinction between the two statutes, arising from the power given by the Act of

1862, of constituting a company whose shareholders shall not, like partners at common law, or like shareholders under the Acts of 7 & 8 Vict. c. 110 and c. 113, be indefinitely liable for all obligations of the partnership, but whose liability shall be limited to the extent and in the manner specified in the articles under which the incorporation takes place.

Two modes of limiting the responsibility of the shareholders are provided by the Act, but we need only advert to that which is described in the Act as a limitation by shares. Any joint stock company may adopt such a limitation by making it part of its constitution that the shareholders shall be liable only to the extent of so much of their shares as has not been paid up. This was the principle of limitation on which the firm of Overend, Gurney, & Co., Limited, was formed, and with which alone we have to deal.

It may be well to remark that the Act of 1862 (so far as [* 363] we * have to deal with it) is identical with a previous Act passed in 1856, and for convenience, therefore, I will refer only to the Act of 1862.

It is obvious that when the Legislature had sanctioned the principle of limited liability, the powers given by the former Acts of taking out execution against individual shareholders necessarily fell to the ground. It would be impossible for a creditor to know to what extent his right to take the shareholder's goods in execution would exist. This difficulty, indeed, would not arise under the Act of 1862 as to companies formed with unlimited liability; but experience had shown that the system of execution against individual shareholders often operated very unfairly, and the Legislature probably thought, and correctly thought, that companies with unlimited liability would be but few in number, and the remedy by winding up, which was necessarily adopted in the case of limited companies, was equally just and efficacious where there was no limit, and the same course of proceeding was therefore prescribed in both cases.

The first question then is, whether the change in the mode in which a creditor is obliged, under the Act of 1862, to seek relief, makes any difference as to who are liable to him as shareholders? I think not. In order to bring this question to a test, we may consider how the case would have stood if there had been no change effected by the Act of 1862, except in the mode of making

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a judgment available. Suppose that the statute of 1862 had only said that, in case of a judgment recovered against the company, the creditor should not levy execution against any individual shareholder, but should proceed to wind up the affairs of the company in the manner there pointed out, I can discover nothing which would in such circumstances relieve from responsibility any person who, if there had been no such change, would have been liable to an execution. The winding-up is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called, not improperly, a statutable execution for the benefit of all creditors. The same description may be given to a winding-up, and as in the bankruptcy of an ordinary partnership every person against whom a judgment creditor of the firm could have levied execution as a partner, would be liable to have his

* estate administered in the bankruptcy, just so must every [* 364] person against whom a creditor might, under the Acts of 1844, have levied execution as a shareholder, be liable to have his estate dealt with under a winding-up order. The change, therefore, from a right in the creditor to levy execution to a right to wind up the affairs of the company, does not seem to me to affect the question who are liable to the creditors; and as, according to the principle acted on in *Henderson v. The Royal British Bank*, the appellant would certainly have been liable to have his goods taken in execution, so also he must be liable to be dealt with under a winding-up order.

But, if this change in the mode in which the creditor is to seek his remedy, makes no difference as to the persons liable to him, how is he affected by the introduction of the principle of limited liability? I cannot see that he is at all affected by it. His remedy is cut down in amount, but as to the persons liable to him the principle of limited liability has no effect. The introduction of that principle rendered necessary, as I have already stated, some substitute for the remedy by execution against individual shareholders, but it did no more. It plainly left every shareholder subject to all previous liabilities, except only that a line or boundary was fixed, beyond which his obligations could not be extended. I have, therefore, satisfied myself that if the Act of 1862 had done no more than introduce the principle of limited liability, and substitute a winding-up of the affairs of the company for execution against individual shareholders, it left the law just as it stood when *Henderson's* case was decided.

But it was argued that there are provisions in the Acts of 1844 expressly declaring the liability of shareholders to be the same as that of ordinary partners, but which provisions are not found in the Act of 1862. This difference, it was said, makes the principle of *Henderson's case* inapplicable. The clause relied on for this purpose is the 25th section of the 7 & 8 Vict. c. 110, which, after providing that the persons taking shares, forming themselves into a company, and complying with the requirements of the Act, shall become incorporated, proceeds to say that such incorporation shall not in anywise restrict the liability of any shareholder under any judgment

for payment of money recovered against the company; [* 365] * but every shareholder shall, in respect of such moneys, be and continue liable as if the company had not been incorporated. This is the provision in the general Joint Stock Companies Act of 1844, and in the Banking Act, 7 & 8 Vict. c. 113, passed on the same day, there is, in section 7, a provision to the same effect. There is no such provision in the Act of 1862, and so it was contended that the Legislature must be understood to have contemplated a change in this particular.

I cannot, however, think that this is a fair inference. The introduction of limited liability made the retention of such a provision as those which existed in the Acts of 1844, and to which I have just referred, impossible; and the question is, whether we are to suppose that the Legislature contemplated any other changes as to the liability of shareholders beyond those which were the natural, indeed the necessary, consequence of limited liability? I think not. In the first place, the object of legislation on the subject of these companies has been to enable capitalists to carry on commercial speculations in numbers beyond what the ordinary machinery of the law could deal with. Except by the introduction of the principle of limited liability, legislation has been confined to the giving facilities for carrying on businesses differing in no respect from ordinary commercial partnerships save in the vast extent of capital embarked, and the great number of the partners engaged. I cannot conceive that the Legislature intended by the Act of 1862 to introduce any rules or principles as to the acts or conduct whereby a person should render himself liable to be treated as a shareholder different from those which existed previously. The omission of the clauses declaring shareholders to be liable, as if not incorporated, was, as I have pointed out, necessary; but the

Act seems to me to contain on the face of it ample proof that the rights of creditors were not intended to be affected, except only by the introduction of the principle of limited liability.

In the first place, I will refer to the 49th section of the Act of 1844, 7 & 8 Vict. c. 110. It is there provided that the directors of every company shall keep a register of shareholders containing their names and addresses, showing also the number of shares they respectively hold, and the amount paid up; and, by the 50th section, every shareholder is to have liberty to search this register *at all reasonable times. Nobody, however, was [* 366] to be at liberty to search it who was not a shareholder.

There is a similar obligation in the Act of 1862 as to keeping a register; but there is an important change; for, by the 32nd section of that Act, it is provided that the register shall be open to the inspection not only of shareholders, but, on payment of one shilling, of all other persons, which would therefore include creditors. This seems to me strongly to indicate the intention of the Legislature that the creditors were to look to this document as showing them to what extent they might trust the company. Before the introduction of the principle of limited liability such a power of inspection was not necessary, or certainly not at all so necessary. A creditor could hardly fail to know who were some at least of the shareholders, and there was no limit to the extent to which he might obtain execution against shareholders of wealth. But when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think, very clearly that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable, would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have, or may have, an interest in knowing who are liable, and to what extent.

This view of the case is strongly confirmed by the language of

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the statute where it defines contributories. Sect. 74 defines contributories to be all persons liable to contribute to the assets in the event of the company being wound up; and sect. 38 declares that on that event every present and past member shall be liable to contribute subject to certain qualifications. In order to ascertain who are designated by the word "members" in sect. 38, we must refer to sect. 23, which states that every person who has [* 367] * agreed to become a member, and whose name is entered on the register, shall be deemed to be a member of the company.

The name of Mr. Oakes was certainly entered on the register; if, therefore, he agreed to become a member within the meaning of this 23rd section, he is a contributory. The argument is, that he did not so agree, because all which he did he did under the influence of fraud and misrepresentation. But assuming all that to be, and I believe it was, just as Mr. Oakes represents it, still he did agree to become a member, — that is, he in fact agreed. He may have full rights against those who deceived him, but with that the outer world can have no concern. The Legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors (subject, of course, to the statutable restrictions) as persons engaged in an ordinary partnership, or persons trading formerly under the Acts of 1844. In neither of those cases would it have been any answer to a creditor that the person sought to be charged had been induced by fraud to become a partner or a shareholder, and I see no reason whatever for adopting any other principle here.

It was strongly pressed upon us that a decision against Mr. Oakes would be at variance with the case of the *Venezuela Railway Company v. Kisch*, L. R., 2 H. L. 99, p. 759, *ante*, decided in this House a few months since. But there is no inconsistency between the two decisions. The question there was not one in which creditors were concerned. It was the case of a person seeking, against a company, to be relieved from a contract into which he had by fraudulent representations of that company been induced to enter. This House held, conformably with the decision of the LORDS JUSTICES, considering the fraud to be established, that the company could not compel the person thus deceived to retain the shares

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which he had thus been fraudulently induced to purchase. This decision proceeded on grounds of obvious justice and good sense, on which Courts both of law and equity, including this House, have of late frequently acted. But it has no bearing on a question between the shareholders and creditors. Great stress was laid on a part of the language which I * used in expressing my opinion, and which is supposed to be inconsistent with what I have given as my opinion in the present case; but I do not see any such inconsistency. The question there was whether, as between Kisch the respondent and the company, he was to be treated as a shareholder. This House held that he was not. He had been imposed upon by means of a fraudulent concealment of something which the company ought to have disclosed. The company contended that he must be taken to have known the facts which were concealed from him, for that those facts appeared on the face of the articles of association, and the statute provides that the articles of association shall bind every member, whether he seals them or not. Mr. Kisch did not seal them, but the company contended that he must be taken, according to the statute, to have done so, and so to be aware of their contents. I thought that such an argument did not lie in the mouth of the directors, that they could not by fraudulently concealing what they ought to have disclosed, induce a person to become a member, and then say, your membership gives you, by force of the statute, knowledge which prevents you from alleging that there was fraudulent concealment. I was then, and am still, of opinion that as between the parties then in litigation, and with reference to the clause in the statute to which I have referred, he was not a member. But such a case has evidently no bearing on a question between the shareholder and a creditor.

The conclusion at which I have thus arrived makes it not absolutely necessary that I should express any opinion on the question of fact. But it must not be supposed that because I do not investigate closely the question of fact, therefore I doubt the soundness of the opinion expressed by my noble and learned friend.

For the honour of the great mercantile community of the city of London, I wish I could have believed that the prospectus was honestly and fairly framed. But I cannot; I must believe that the truth was intentionally concealed, and hopes held out which

those who framed the prospectus must have known would deceive those who trusted to it. There were both *suggestio falsi* and *suppressio veri*. But, for the reasons I have stated, this does not, in my view of the case, affect the liability of Mr. Oakes.

[* 369] * There were two or three matters of a minor character put forward in a supplemental form to which I may advert, though I think they rest on no solid grounds. It was said Mr. Oakes never agreed to become a member of the company, whose business is indicated by the memorandum of association actually filed. A change was made in that memorandum after he had agreed to take shares and before it was filed. The change was not of any great importance, but I am far from saying that if Mr. Oakes had within a reasonable time after he agreed to take shares, examined the memorandum, and found that it differed in however small a degree, from that on the faith of which he had acted, he might not thereupon have repudiated his status as a shareholder. But it is impossible to allow a person who has taken shares, and has gone on for nearly a year taking his chance of profit, to turn round when the speculation has proved a failure, and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted. It is the duty of a person taking shares in a company to use all reasonable diligence in ascertaining the terms of the memorandum of association, which is, in fact, his title deed. It was certainly very wrong to make any change in the language of the memorandum of association, but there is no reason to suppose that that act was done otherwise than with honest intentions.

The appellant then contends that in consequence of this change there never was an incorporated company. I think that the section of the Act giving effect to the certificate of the registrar is in answer to this suggestion. But farther, if there never was a company then there could be no valid winding-up order, and the proper remedy of Mr. Oakes would be to get rid of that order, or to take such steps as might be right on the assumption that no such order exists. The same observation applies to the objection that there was no proper meeting sanctioning the winding-up.

The only point on which I think the decree of the VICE-CHANCELLOR was wrong is the mode in which he has given the costs. It was wrong to mix up together the costs of Mr. Oakes and of the other appellant, Mr. Peek. Each of these gentlemen must be

answerable for the costs incurred in his own petition, and the decree must, in that respect, be varied.

* I need say nothing as to Mr. Peek's appeal, except that [* 370] he certainly stands in no better position than Mr. Oakes.

I entirely agree with the opinion of my noble and learned friend with reference to the manner in which he recommended your Lordships to dispose of these appeals.

Lord COLONSAY: —

My Lords, in regard to one important part of the appellant's case there is, unhappily, no room to doubt. I allude to the deceptive character of the prospectus. The evidence contained in the case itself discloses a state of matters to which no Court of law, no Court of equity, no Court administering law and equity, can hesitate to attach the legal character which the VICE-CHANCELLOR has attached to it. The suggestions and arguments by which it was attempted to give to these transactions a different complexion may have a legitimate influence on the judgment to be pronounced by a more numerous tribunal out of doors on the morality of some of the actions that have been brought before us, but they were not such as could weigh with this tribunal in dealing as a Court with the rights of contending parties. Upon this part of the case I do not consider it necessary to say more.

But out of the state of matters to which I have been alluding, the fictitious origin, and the disastrous termination of this great scheme of Overend, Gurney, & Co., Limited, has arisen the important question we are now called upon to decide. The company was announced as incorporated under the Act of 1862, with limited liability. The prospectus bore date the 12th of July, 1865. The company stopped payment the 11th of May, 1866. Proceedings were adopted for having the company wound up under the Act of 1862, and on the 22nd of June, 1866, Vice-Chancellor KINDERSLEY made an order for winding up under the supervision of the Court.

Assuming, for the present, that the registration and the proceedings for winding-up, to which I shall afterwards advert, were regular, and that the company is now properly in course of being wound up under the supervision of the Court, what is the position of the appellant, Mr. Oakes? On the 16th of July, 1865, he applied for shares, which were allotted to him, on the 28th of July

* he made the stipulated payments, and his name was [* 371] placed on the register.

After the stoppage of the company in May, 1866, some of the shareholders caused investigations to be made, which resulted in certain discoveries that have led to the present litigation. It does not distinctly appear whether Mr. Oakes was or was not a party to those investigations, but I think he is entitled to have it assumed in his favour that, if he was not directly a party to those investigations, he was at least watching those proceedings, and intending to avail himself of the result of the investigations. In the meantime the liquidators had been making up a list of contributories, and had placed the name of Mr. Oakes on that list, and on, I think, the 20th of August, 1866 (there seems to be some difference in the statements as to the date, but at any rate it was about that time), they made a call of £10 per share on Mr. Oakes and others. On the 30th of October, 1866, the appellant's solicitors gave notice of a motion to have the appellant's name taken off the register, and off the list of contributories, and to stay proceedings for enforcing the call. That application was ultimately refused by Vice-Chancellor MALINS, and we are now reviewing his judgment.

The ground on which the appellant rested his application was that he had been induced to apply for, and accept shares in the company entirely through fraud on the part of the directors, the fraudulent character of the prospectus issued by them, and that as soon as he became aware of the fraud or could have become aware of it, and before he had dealt with the shares in any way, or had derived any benefit from them, he had challenged the transaction, and demanded to be relieved. He refers to the case of *Railway Company of Venezuela v. Kisch*, L. R., 2 H. L. 99, p. 759, *ante*, and other cases, as showing that, at all events, in a question with the company he would be entitled to repudiate the contract, and to have his name removed from the register. Then, starting from that point, he says, as to the creditors of the company, that there was no privity of contract between him and them; that they did not transact with him, or with the shareholders, but only with the company in its corporate capacity, and that they cannot through the liquidator subject him to any liability to which the [* 372] company could not have *subjected him; that the liquidator could only take up the rights of the company subject to such equities as could be pleaded against the company, and consequently subject to the appellant's right to be relieved from the contract to which he had been induced by the fraud of the company.

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This view is rested in some measure on the corporate character of the company, and on certain recognized principles of law as to the relative position of the creditors of corporations and the individual members of such corporations, and it is contended that the Act of 1862 must be read and construed with reference to these principles, and giving effect to them in so far as that Act has not expressly, or by necessary implication, displaced them as to companies such as this. The appellant says that certain decisions and *dûta* that have been founded on by the liquidators are inapplicable, inasmuch as they occurred under a different state of the law, and as to companies which were then governed by a different statute, — a statute that expressly provided that, in regard to such questions, they should be dealt with as if the companies were not incorporated. Farther, he examines the Act of 1862, and contends that there is nothing in the provisions of that Act when read according to their true intendment, which can be held to deprive him of the relief he demands. The case of the *Reese River Mining Company*, L. R., 2 Eq. 264 (see also L. R., 2 Ch. 604; 36 L. J. Ch. 618) is referred to as a recent and direct authority in favour of the appellant.

Such is a brief outline of the case that was presented to us on behalf of the appellant, and which was elucidated and enforced in argument with remarkable ability.

Up to a certain point the argument for the appellant commanded my assent at the time, and I have not, on reflection, seen any sufficient reason to withdraw that assent. If this case had been presented to us in circumstances similar to those which existed in the case of *Kisch* — if while Overend, Gurney, & Company, Limited, was a going company, it had made a demand on Mr. Oakes for a call, and he had resisted it on the ground of fraud, I think he might have been entitled to succeed in that resistance, and to have his name removed from the register. Whether that would have finally exempted him from any possible contingent * demand in the event of an immediate stop- [* 373] page and winding up of the company, I do not think it necessary to inquire. The case now before us has reference to a company which had stopped payment, and was in course of being wound up, while the appellant's name was still on the register, and before any challenge was made. The cases, therefore, are not the same. It may be that the decision in the case of *Kisch*

advances the appellant a step in his argument. It may even be that it gives him a resting place for the engines by which he is to endeavour to remove other obstacles. But those other obstacles required to be removed, and the question is whether they have been effectually removed by the power of the argument that was used.

Having given to the case the most careful consideration, I have come to the conclusion that the argument for the appellant ought not to prevail. I think it proceeds on an erroneous view of the nature of these companies, and of the relative positions of the creditors and the members of these companies.

This company was formed under the provisions of the Act of 1862, which was a comprehensive, repealing, and consolidating Act, collecting, as it were, into one code the provisions which were thenceforth to be applicable to such companies.

During the immediately preceding period of thirty-seven years there had been a continuous course of legislation on the subject, beginning, in 1825, with the 6 Geo. IV., c. 91, which repealed the Act of the 6 Geo. I., c. 18. After 1825 statute after statute followed in rapid succession, some fifteen or eighteen statutes having been passed on the subject before matters were brought into the position in which they have been placed by the Act of 1862.

Now, what was the tendency and scope of that course of legislation? An important part of it, indeed the great object of it, was to give to the formation of joint stock trading companies facilities and encouragement which had previously been withheld from them. The genius of the law of England, which regarded with disfavour the notion of an incorporated company having a *persona* distinguishable from its component members, was very unfavourable, if not an absolute barrier, to the formation of joint stock companies. Accordingly the efforts of the Legislature were directed to giving to these companies a separate *persona*, yet not conferring * upon them all the attributes of proper corporations without qualification. That principle pervades the whole of the legislation on the subject. I am not speaking of limited liability companies only. Limited liability is merely a step, and a recent step, in the progress. My observations apply to joint stock trading companies generally. The course of legislation was to rear up the company into a separate *persona*, with certain powers and privileges, but without conferring on it in an unqualified manner

all the attributes of a perfect corporation. The companies were said to be incorporated, but they were only incorporated to certain effects, — they were *quasi*-corporations.

In giving this position to joint stock trading companies, provisions were introduced on the one hand to preserve the members from unnecessary molestation by creditors of the company, and on the other hand to preserve the rights of creditors to ultimate payment out of the estates of the members. Among the most important of these were the provisions as to registration of the companies and of the shareholders, and the right of any one to inspect the register (which is given in the two next statutes) and the provisions for winding up, which were some of them embodied in separate statutes, of which there are two or three.

In 1855 came the first Limited Liability Act. Beyond giving power to limit the pecuniary amount of the liability of each shareholder it made no important alteration, I think, in law, in the relative position or rights of creditors or members. Indeed sect. 16 provides that it is to be taken as part of the Act of 1844, the 7 & 8 Vict. c. 110. In 1856 came an Act of the nature of a consolidating Act. In 1858 the limited liability principle was extended to banking companies.

In 1862 came the Act now in force, and which, I think, must be taken as the code applicable to these companies. It bears in the preamble of it to be intended to consolidate and extend the principles of those companies. It also sets forth the various departments into which it is divided, and seems to be a comprehensive code of law applicable to them.

Such having been the course of legislation, and such the character of the Act of 1862, we may expect to find in it a solution of the question, who are to be regarded and treated as contributories *when such companies come to be wound up? [*375] If we are not to look beyond the words of the Act of 1862 for a solution of that question, it does not appear to me that there would be much difficulty in the case. The 74th section tells us that “a ‘contributory’ shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up.” Sect. 38, which relates to the liability of members, tells us that “in the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets” of such company

And sect. 23, which defines a member, tells us that every "person who has agreed to become a member of a company under this Act, and whose name is registered on the register of members, shall be deemed to be a member of the company."

The appellant says that he cannot be held to have agreed to become a member, inasmuch as his application for an acceptance of shares was induced by fraud, and never having done anything to affirm the contract, he is still entitled to disaffirm it. I cannot agree in that. The contract was not void, it was only voidable. What does that mean? I think that point was well put by Mr. Mellish in the course of his arguments. He said, that a contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of third parties intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable. I hold that the appellant did agree to become a member of the company. He may have been induced to agree by fraud, but, having regard to the language of the statute, what we have to look to is, whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil. But when the question comes to be as to a party who has the power to act, although he may afterwards recall what he has done upon a certain footing, still in the mean time he has agreed, and what is only voidable, and not void, cannot be held as invalid until it has been rescinded. I do not very well see how that is to be got over.

In this case the appellant says that all this must [*376] be read * subject to the overruling operation of certain legal principles. First, the principle that in corporations there is no privity of contract between the individual corporators and the creditors of the corporation; second, that in such questions there is no room for the doctrine of "holding out;" and thirdly, that as the claims or rights of the creditors can only be enforced through the corporation, they must be subject to any latent equities competent to the corporator as against the incorporation. These three propositions appear to me to involve several fallacies. First, it is a fallacy to hold that the liability of the partners of these companies must rest entirely on the same principle of contract which was the foundation of the liability of the part-

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ners of unincorporated companies prior to the institution of this class of associations. The question is, not whether there was any privity of contract between the appellant and the creditors of the company, but it is, whether, under the constitution of these newly-created societies, there is a statutory liability imposed on persons in the position of the appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations as to registers of shareholders, and the publicity to be given to them, form a sufficient answer to that argument. Indeed it is plain from the reason of the thing that no credit would otherwise be given to the abstraction of a company.

It is also a mistake to hold that these companies must, to all legal effects and consequences, be regarded as unqualified corporations, and in no respect as partnerships. I have already shown that they partake in some respects of both capacities, and I have shown how and why that condition of matters came into existence. Let us for a moment relieve our minds from the trammels imposed by a technical use of words, and look to the substance and reality of the thing. Why are these companies not partnerships? They are associations of individuals for the purpose of trading with the capital they contribute, and of participating in the profits to be derived from that trade. In several of the statutes they are called partnerships, and in one, if not more of them, provision is made for a deed of partnership. As to their being corporations, I have already shown that they are so only subject to certain qualifications, and, indeed, in this very statute of 1862, the clause which *incorporates them provides that, nevertheless, they [* 377] shall be subject to certain qualifications and liabilities, and when we look to the subsequent part of the statute we find amongst those liabilities the liability of being contributories in the sense that I have described. I think it would be contrary to the tendency and scope of all the statutes to hold that these companies are stripped of all the characteristics of mercantile partnerships, and clothed with all the attributes of perfect corporations, without qualification.

I am, therefore, inclined to distrust an argument which seeks to subjugate the plain provisions of this code to the rules of law applicable to a state of things when no such companies existed.

There is another consideration which leads me to distrust this

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mode of moulding the provisions of the Act of 1862 into a different shape from that in which the statute presents them. That statute, as I have already observed, professes to consolidate into one code all the laws and rules applicable to these associations or aggregate societies. It prohibits their existence except under the cover and control of its provisions. It is a general statute, applicable to all parts of the kingdom, to Scotland as well as to England, which was not the case with several of the statutes preceding it in the series. In several of them Scotland was excepted, — and why? Your Lordships know that the law of Scotland in regard to partnerships was not the same as the law of England, — that in Scotland, as in some other countries, the separate *persona* of an unincorporated trading company was fully recognised, and that joint stock share companies for trading existed there at common law, and that the country had derived great advantage from them, as is recorded in a statute passed in the reign of George IV. There were other differences also.

Now, I apprehend that the Act of 1862 was intended to establish a uniform system of law in both ends of the island in regard to such companies. But if, in reference to joint stock companies in England, the provisions of the statute are not to be read in a literal or obvious sense, but are to be overridden, and qualified, and controlled by implications and inferences deduced from rules of the law of England applicable to a state of things antecedent to the existence of any such companies, then, by parity of reasoning in reference to joint stock companies in Scotland, the statute [* 378] would *be qualified and controlled by implications and inferences deduced from the different principles that had prevailed in Scotland; and thus there would be again produced a diversity instead of the uniformity which it was the object of the statute to establish. For these reasons I think that the line of argument which was put forward by the appellant cannot be maintained.

My Lords, reference was made to the case of *The Reese River Mining Company* as being a direct authority in point. I do not think that the decision in that case was necessarily an authority in point, for the circumstances under which that case presented itself for decision appear, from the reports that I have seen of it, to have been materially different from the present. It appears that in that case the party had made an application to have his name removed

from the register on the ground of fraud before there had been any proceedings for winding up the concern; and the import of the decision appears to have been, that the case must be dealt with in reference to the state of matters at the time that he made that application, and sought to repudiate the contract. Whether that decision was one which would, upon a consideration of the law, be upheld or not, is not a matter that I have occasion to go into now. I receive it with all the respect that is due to the Court that pronounced it; but it is, in that aspect of it, not the same as the present case. An opinion, indeed, was expressed by one of the LORDS JUSTICES which might go to an adverse view of the law to that which I have endeavoured to state, but with all the respect I must have for that opinion, and with all the deference I should be disposed to pay to it, I cannot yield up the opinion which I have now expressed as the deliberate result of a full investigation of the cases and the whole course of legislation in regard to these contracts.

As regards other objections which have been stated, and which are of a sort of subsidiary and supplementary character, I shall not add anything to the observations which have been made by my noble and learned friends who have already addressed the House on the subject. I entirely concur in their observations.

With reference to some questions that I myself put at the close of the argument, as to the effect that would be produced by *sustaining the plea of the appellant, whether it would [*379] not practically reduce the company to the mere directors who had originally issued the prospectus or not, I wish to explain that in putting those questions I did not form any opinion whatever as to the effect that would be due to that result. I had not at that time considered the whole matter of this case; but I wished to have before me all the facts which I thought might, or might not, enter as elements into the formation of my opinion. In forming my opinion I found it my duty to discharge altogether that element, and to hold that the fact of the appellant being only associated as a dupe along with others, would not be a reason why he should not have justice dealt to him in the same manner as if he had been the only dupe. In such a proceeding the number of the dupes does not affect the character of the transaction. The greater number of dupes only shows the greater dexterity of the process of inflating the bubble of these concerns.

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I therefore concur in the judgment which your Lordships have been advised to pronounce.

Orders appealed from affirmed, with variation with respect to costs ; appeals dismissed with costs.

Lords' Journals, August 15, 1867.

ENGLISH NOTES.

The case of *Addie v. Western Bank of Scotland* (1867), L. R., 1 H. L. Sc. 145, in which a decision similar to that in the principal case had been arrived at, was an appeal arising out of the failure of the Western Bank of Scotland consequent on the monetary crisis of 1857. The plaintiff (or pursuer) in the action had claimed to set aside certain transfer deeds made upon the purchase by him from the bank of their own shares, and claiming against the bank *restitutio in integrum*. He alleged that he had been induced to take the shares on the false and fraudulent representations of the directors, who issued a report stating that the bank was in a flourishing condition, at a time when they knew, or from their means of information must be presumed to have known, that the bank was insolvent. In the mean time, and before the action was commenced, the bank had closed its doors, and the company, which had previously been an incorporated partnership, had been registered under the Joint Stock Companies' Act 1856, for the purposes of liquidation. The learned Lords who heard the appeal were unanimously of opinion that the plaintiff's right to rescind the contract was destroyed by the change in the character and condition of the company. They had no doubt that the registration combined with the fact of the bank stopping payment and actually being in liquidation constituted such a complete change of character. The LORD CHANCELLOR (CHELMSFORD), L. R., 1 H. L. Sc. 160, quotes and adopts the statement of the principle which is neatly put in the case of *Clarke v. Dickson* (1858), El. Bl. & El. 148, by Mr. Justice CROMPTON, who, after adverting to the rule of law that a contract induced by fraud is not void, but voidable at the option of the party defrauded, said: "It seems to me to follow that when the party exercises his option to rescind the contract he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

The case of *Reese River Silver Mining Co. v. Smith* (1869), L. R., 4 H. L. 64, 39 L. J. Ch. 849, which was decided by the House of Lords after the decision of the principal case, shows that a plaintiff who brings his action for relief before the declared insolvency of the company is in time, although the insolvency and winding-up occur

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before his relief is worked out. But although in such a case he would be relieved from calls, any judgment against the company for repayment of deposit or otherwise would not form a preferential debt, but only a claim in the winding-up.

The rule in the principal case has been followed in the numerous cases which arose on the failure of the City of Glasgow Bank. For instance, trustees of the bank were held powerless to divest themselves of their liability after a resolution for voluntary winding-up of the bank had been passed; *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337, 40 L. T. 339, 27 W. R. 603; *Bell's case* (1879), 4 App. Cas. 547; *Alexander Mitchell's case* (1879), 4 App. Cas. 548, 40 L. T. 758, 27 W. R. 873; *Rutherford's case* (1879), 4 App. Cas. 548; *Buchan's case* (1879), 4 App. Cas. 549; *Ker's case* (1879), 4 App. Cas. 549. So after the declared insolvency of the bank shareholders were held incompetent to transfer their shares; *Nelson Mitchell v. City of Glasgow Bank* (1879), 4 App. Cas. 624, 27 W. R. 875.

In *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615, 40 L. T. 694, 27 W. R. 694, A. had appeared stock 1873 on the register of the bank as the holder of £6000 of stock. On the 2nd of October, 1878, the bank stopped payment. On the 5th of October an extraordinary general meeting of shareholders was called to pass a resolution for winding-up of the company. By the 18th of the same month investigations into the affairs of the company had proved the necessity of making large calls on the shareholders in order to meet the liabilities of the bank. On the 21st of October A. instituted a suit for rescission of his contract to take stock, on the ground that he was induced to enter into the contract through the misrepresentation of the directors, and summons was served on the company on the same day. On the following day the winding-up resolution was passed, and A. was put on the list of contributories. On a petition by A. to rectify the register, it was held that, the rights of third parties having intervened, it was too late for A. to petition for removal of the name.

The principal case was followed in *Cree v. Somerville* (1879), 4 App. Cas. 648, 41 L. T. 333, 28 W. R. 34. There A. and B., holding one hundred £100 shares in a Scotch Joint Stock Company which had no power to hold its own shares, and being anxious to sell them, the shares were purchased by the directors in the name of three of themselves in trust for the company. A transfer was executed in favour of the three directors "in trust for the company," and their names were entered upon the register of members with the same designation. The purchase-money came out of the company's funds, and the purchase was afterwards approved by a majority of the shareholders. More than fifteen months afterwards the company was wound up, and calls were

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made to pay the creditors. In an action to substitute the names of A. and B. for those of the three directors, it was held that this could not be done, the transfer to the directors being valid and effectual, and the rights of creditors having intervened.

The principal case and *Tennent v. City of Glasgow Bank* were followed in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, 42 L. T. 194, 28 W. R. 677, and it was there further decided that, the remedy by rescission of the contract being gone, any remedy by action for repayment of calls or otherwise against the company is gone also. The same principle is followed in *In re Addlestone Linoleum Company, Benson's case* (1887), 37 Ch. D. 191, 57 L. J. Ch. 249, 58 L. T. 428, 36 W. R. 227.

In re Imperial Ottoman Bank v. Trustees, Executors, and Securities Investment Corporation (Chancery Division, ROMER, J., 29 Jan. 1895), the A. Bank bought debentures in the X. Company from M. & Co. After discovering that they had been deceived by misrepresentations, the A. Bank attended and took an active part in a debenture action against the X. Company. It was held that this did not bar the bank's right to rescission of the contract.

AMERICAN NOTES.

Delay for an unreasonable time after knowledge of the fraud will defeat the right to rescind. *Pence v. Langdon*, 99 United States, 578; *Whitcomb v. Denio*, 52 Vermont, 382; *St. John v. Hendrickson*, 81 Indiana, 350; *Hammond v. Pennock*, 61 New York, 145; *Parmlee v. Adolph*, 28 Ohio State, 10; *Davis v. Betz*, 66 Alabama, 206; *Gatling v. Newell*, 9 Indiana, 572; *Hammond v. Wallace*, 85 California, 522; 20 Am. St. Rep. 239; *Pomeroy's Equity Jurisprudence*, 1240, citing the principal cases; *Beach's Equity Jurisprudence*, p. 106, citing the principal cases.

But laches is not imputable until the party has knowledge or means of knowledge of the fraud. *Brown v. Norman*, 65 Mississippi, 369; 7 Am. St. Rep. 663; *Baker v. Lever*, 67 New York, 304; 23 Am. Rep. 117.

NOTES

ON

ENGLISH RULING CASES

CASES IN 6 E. R. C.

6 E. R. C. 1, RANN v. HUGHES, 4 Bro. P. C. 27, 7 T. R. 350, note.

Specialty and simple written contracts.

Cited in Barnum v. Barnum, 9 Conn. 242, holding a non-negotiable promissory note is not a specialty but stands on footing of a parol contract; Albertson v. Halloway, 16 Ga. 377, holding a note under seal was not to be classified as a specialty; Den ex dem. Mayberry v. Johnson, 15 N. J. L. 116; Wily v. Pearson, 2 Woodw. Dec. 424; Re Weisenberg, 131 Fed. 517; Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388,—on the classification of contracts: People v. Kane, 4 Denio, 530, on the classification of obligations that may be incurred for the payment of debts; Shackamaxon Bank v. Yard, 143 Pa. 129, 24 Am. St. Rep. 521, 22 Atl. 908, 8 Pa. Co. Ct. 245, 47 Phila. Leg. Int. 200, on contracts in writing and under seal as becoming obligatory immediately on execution and delivery.

Disapproved in Purcell v. Armour Packing Co. 4 Ga. App. 253, 61 S. E. 138, questioning whether only contracts under seal can be specialties.

Consideration as essential to the validity of a contract.

Cited in Warner v. Fowler, 4 Blatchf. 311, Fed. Cas. No. 17,282, holding that a promise in writing must be supported by a consideration, but that burden of proving nature of a lack of consideration is on the defendant; Schoonmaker v. Roosa, 17 Johns. 301; Horn v. Fuller, 6 N. H. 511,—on a consideration as essential to the validity of a note as between the original parties: Winthrop v. Lane, 3 Desauss. Eq. 310; Whitehill v. Wilson, 3 Penr. & W. 405, 24 Am. Dec. 326,—on a consideration as being necessary to support a mere written contract; Jackson v. Tilghman, 1 Miles (Pa.) 31, on an order upon a person to pay to another as being non-enforceable where no consideration expressed; Dunlop v. Harris, 5 Call. (Va.) 16, on necessity of showing a consideration for an unsealed promissory note.

Cited in note in 8 E. R. C. 592, on equity not helping a volunteer.

Cited in 1 Page, Centr. 397, on history of doctrine of consideration for contract.

Sufficiency of consideration for contract.

Cited in Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83, on sufficiency of consideration for a contract; Brawn v. Lyford, 103 Me. 362, 69 Atl. 544, holding the promise of an assignee of policy of insurance on personalty to send policy to the insurance company to receive their assent thereto was without

consideration and he was not liable for a breach thereof; *Cook v. Duvall*, 9 Gill, 460, holding an action might be maintained against a husband on a promise to pay a debt contracted by wife before marriage if the creditor would wait a few days; *Lang v. Johnson*, 24 N. H. 302, holding the release of a verbal agreement that notes should be paid in lumber was not a sufficient consideration for an agreement to pay extra interest; *Smith v. Kittridge*, 21 Vt. 238, holding a promissory note the only consideration of which is the love and affection of the maker to the payee will not create a valid obligation against his representative; *Mayo v. Purcell*, 3 Munf. 243 (dissenting opinion), on necessity that a promise be co-extensive with the consideration; *Hendry v. Scott*, 9 N. S. 215, holding that memorandum not under seal in following terms, "I do hereby agree to lease to you, privilege of light, etc., for ten years at yearly rent of 25 cents per annum" constituted mere license.

— **Promises by personal representatives or trustees.**

Cited in *Germania Bank v. Michand*, 62 Minn. 459, 30 L.R.A. 286, 54 Am. St. Rep. 653, 65 N. W. 70, holding an administrator was not personally liable on a note given for the debt of the intestate without any new consideration where the time to file claims against estate had expired; *Whitaker v. Whitaker*, 6 Johns. 112, holding that in action against executor, plaintiff may state that testator being indebted, etc., executor, after death of testator, in consideration, etc., promised to pay, in order to save statute of limitations; *Carter v. Phelps*, 8 Johns. 440, holding that a count on a promise made by an executor or administrator as such, in which he is not charged as personally liable, may be joined with a count on a promise made by the intestate; *Smith v. Carroll*, 112 Pa. 390, 2 Atl. 24, 17 W. N. C. 414, 43 Phila. Leg. Int. 375, holding a verbal promise by an administrator to pay a legacy imposed no personal liability upon him.

Distinguished in *Clark v. Herring*, 5 Binn. 33, holding assets are a sufficient consideration for a personal promise by one who is an executor to pay a legacy; *Crane v. Bulloch*, R. M. Charl. (Ga.) 318, holding a trustee of the drawer of a draft who accepts a draft drawn upon him, with an agreement to pay it out of certain funds as trustee is not bound on such promise for want of consideration.

— **Promises to pay debt of another.**

Cited in *Belcher v. Cook*, 4 U. C. Q. B. 401 (dissenting opinion); *Cook v. Dunn*, 2 Clark. (Pa.) 515,—on sufficiency of consideration for a promise to pay the debt of another.

Necessity of proof of consideration for a contract.

Cited in *Robinson v. Barbour*, 5 Blackf. 468, holding if the declaration in a suit on a contract not under seal does not aver a valid consideration, the defendant may demur thereto; *Sears v. Brink*, 3 Johns. 210, 3 Am. Dec. 475; *Green v. Thornton*, 49 N. C. (4 Jones, L.) 230; *Ballard v. Walker*, 3 Johns. Cas. 60,—holding fact that contract is in writing does not remove the objection of want of consideration; *Pfaff's Estate*, 14 Pa. Dist. R. 193, 31 Pa. Co. Ct. 462, holding a person seeking to recover on a non-negotiable promissory note must prove a consideration; *Seymour v. Harvey*, 8 Conn. 63; *Waul v. Kirkman*, 13 Smedes & M. 599; *Thompson v. Blanchard*, 3 N. Y. 335; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79,—on necessity that proof of a consideration be made in the case of a mere written contract.

Instrument under seal as importing a consideration.

Cited in *Aller v. Aller*, 40 N. J. L. 446, on an instrument under seal as im-

porting a consideration; *Carter v. King*, 11 Rich. L. 25, on disability to show an instrument under seal was without consideration.

Enforcement of parol or simple contracts.

Cited in *Lawrence v. Stonington Bank*, 6 Conn. 521, on the enforcement of parol or simple contracts.

How reservation of conditional sale title may be made.

Cited in *Bennett v. Sims*, Rice, L. 421, holding that reservation of title on conditional sale is binding on parties, whether reservation is by writing or by parol.

Contract when within the statute of frauds.

Cited in *Cabill v. Bigelow*, 18 Pick. 369, holding a contract by a person to be responsible for provisions furnished a third party to whom he was indebted was within the statute of frauds.

Cited in *Browne*, Stat. Frauds, 5th ed. 239, 240, on promise to pay debt of another within statute of frauds; *Browne*, Stat. Frauds, 5th ed. 625, on necessity for defendant pleading statute of frauds as a defense; *Tiffany*, Ag. 28, on statute of frauds as affecting appointment to execute writings not under seal.

Requisites of statute of frauds as to contracts within.

Cited in *Rigby v. Norwood*, 34 Ala. 129, on the requisites of statute of frauds as to written contracts; *Terrill v. Ross*, 15 N. J. L. 466, holding a promise to pay the debt of another to be good within the statute of frauds must be in writing and made upon a sufficient consideration.

Distinguished in *Smith v. Ide*, 3 Vt. 290, holding the consideration for a promise to answer for the debt or default of another need not be expressed in writing where the promise is in writing in order to satisfy the statute of frauds.

Dual capacities of person representing others.

Cited in *Binney's Case*, 2 Bland, Ch. 99, on where the legal capacities of persons are different, such capacities are to be considered as several persons.

Right to maintain an action against an administrator or executor.

Cited in *Ten Eyck v. Vanderpoel*, 8 Johns. 120, holding an administrator was not liable on a promissory note given by him for a debt of his intestate, it imparting no consideration; *Slygheter v. Harrington*, 6 N. C. (2 Murph.) 332, holding a promise of administrator to pay debts of decedent is enforceable against him personally where he had assets at the time of the promise; *Okeson's Appeal*, 59 Pa. 99, holding an executor cannot be made liable *de bonis propriis* on an oral promise on the mere consideration of assets; *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687; *Bank of Troy v. Topping*, 9 Wend. 273,—on when personal representative of decedent personally liable on note given for the debt of intestate; *Masson v. Hill*, 5 U. C. Q. B. 60, holding on facts plea of defendant administrators to an action on their promise to pay note given by decedent was bad.

Sufficiency of averments of declaration to charge personal representative in his representative capacity.

Cited in *Brown v. Hicks*, 1 Ark. 232, on sufficiency of allegation of complaint to charge an executor in his representative capacity.

Distinguished in *Libbit v. Lloyd*, 11 N. J. L. 163, holding upon a count for money had and received by a person described as an administrator a judgment could not be rendered against him in either his representative or personal capacity.

Contracts presumed to be in writing.

Cited in *New York Trust & Loan Co. v. Helmer*, 12 Hun. 35, holding it would be presumed from an allegation in an answer of an agreement to renew notes that such agreement was in writing.

— Presumptions on motion in arrest of judgment.

Cited in *Bedell v. Stevens*, 28 N. H. 118, holding upon motion in arrest of judgment the court cannot presume a cause of action was proved where not stated in the record; *Beecker v. Beecker*, 7 Johns. 99, 5 Am. Dec. 246, holding on a motion in arrest of judgment in an action of assumpsit, the promise laid in the declaration is presumed to be an express promise.

How deed may be delivered.

Cited in *Hazell v. Dyas*, 11 N. S. 36, to the point that there may be delivery of deed without words, or by words only, without any act of delivery.

6 E. R. C. 9, *SHADWELL v. SHADWELL*, 9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. N. S. 145, 3 L. T. N. S. 628, 9 Week. Rep. 163.

Sufficiency of consideration for contract.

Cited in *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, holding that promissory note made in consideration of naming of child for maker of note is based upon sufficient consideration.

Cited in note in 34 L.R.A. 43, on performance of existing contract obligation as consideration for new promise.

Cited in *Hollingsworth*, Contr. 124, on noninquiry into adequacy of consideration for contract if it is something of value in contemplation of law; 1 Beach, Contr. 192, on existing legal obligation as a consideration; 1 Beach, Contr. 226, on promise of third person as a sufficient consideration; *Hollingsworth*, Contr. 138, on promises to do or doing that which one is already bound to do as consideration; *Hollingsworth*, Contr. 123, on what constitutes a valuable consideration for a contract.

— Acts done or omitted.

Cited in *Merrick v. Giddings*, 1 Mackey. 394, holding that when it is claimed that defendants' promise was made in consideration of past services, rendered by plaintiff at defendants' request, it must appear that those services were in fact rendered in consequence of defendants' request; *Abbott v. Doane*, 163 Mass. 433, 34 L.R.A. 33, 47 Am. St. Rep. 465, 40 N. E. 197, holding that performance of contract by party who has hesitated or refused to complete it, may constitute good consideration for promise by third person who will be benefited by such performance; *Holt v. United Secur. L. Ins. & T. Co.* 74 N. J. L. 795, 11 L.R.A.(N.S.) 100, 67 Atl. 118, 12 Ann. Cas. 1105, holding an action might be maintained on agreement to make a loan where the borrower had furnished the required security in nature of life insurance and bonds and mortgages, such acts constituting a good consideration; *Hamer v. Sidway*, 57 Hun. 229, 11 N. Y. Supp. 182, holding that promise of uncle to give \$5,000 when he reach 21 years of age, if nephew would not drink, smoke, play cards for money, or play billiards until he reached 21 years of age, is without consideration; *Wyckoff v. De Graaf*, 98 N. Y. 134, holding an agreement by defendant to waive protest and give his own notes for the amount was a sufficient consideration for plaintiff's promise to advance money and take up notes; *Hamer v. Sidway*, 124 N. Y. 538, 12 L.R.A. 463, 21 Am. St. Rep. 693, 27 N. E. 256 (reversing 57 Hun. 229, 11 N. Y. Supp. 182), holding a nephew might maintain an action on the promise of his uncle to give him a certain sum of money if he would

refrain from the use of intoxicating liquor until of age, where the nephew performed his part of the agreement.

— Marriage.

Cited in *Sarasohn v. Kamaiky*, 52 Misc. 394, 103 N. Y. Supp. 32, holding that a promise to marry made by a son to a parent, who had promised to give him property if he married in accordance with his father's desires, after the son had already entered into a valid engagement to marry, is insufficient consideration to support the promise of the father; *Phalen v. United States Trust Co.* 186 N. Y. 78, 7 L.R.A. (N.S.) 734, 78 N. E. 943, 9 Ann. Cas. 595, holding a son might maintain a suit in equity on a promise by father made in consideration of the son's marriage that he would make no distinction in the distribution of his estate, by will.

Showing of consideration for contract within statute of frauds.

Cited in *Greenham v. Watt*, 25 U. C. Q. B. 365, on how consideration for a promise within the statute of frauds must be shown.

Right to cease voluntary support.

Cited in *Pegge v. Lampeter Union*, L. R. 7 C. P. 366, holding where guardians of a lunatic had been paying his maintenance for a number of years though no legal order had been made for them to do so they could not withdraw from the implied agreement to make such payments.

6 E. R. C. 23, *EASTWOOD v. KENYON*, 11 Ad. & El. 438, 4 Jur. 1081, 9 L. J. Q. B. N. S. 409, 3 Perry & D. 276.

Sufficiency of consideration for contract.

Cited in *Re Cornwall*, 4 Nat. Bankr. Reg. 400, Fed. Cas. No. 3, 251, holding a gift is not a sufficient consideration for a promise of payment; *Davis v. Morgan*, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732, holding where a contract of employment is made for a fixed period at a stipulated salary, a promise to pay more is void in the absence of any further consideration; *Irwin v. Brown*, 44 Ill. App. 412, holding on facts no sufficient consideration appeared for an agreement to release a mortgage and cancel notes given under a contract of settlement; *Stewart v. Campbell*, 58 Me. 439, 4 Am. Rep. 296, holding a mere delay in enforcing lien on a vessel was no consideration for promise to pay the debt; *Festerman v. Parker*, 32 N. C. (10 Ired L.) 474, holding where a contract to perform services for a stipulated amount is not mutually rescinded then a promise to pay an additional sum is without consideration; *Giddings v. Giddings*, 51 Vt. 227, 31 Am. Rep. 682, on the sufficiency of consideration for a contract; *Belcher v. Cook*, 4 U. C. Q. B. 401 (dissenting opinion); *Rivers v. Roe*, 4 U. C. C. P. 21,—on sufficiency of consideration for a promise to pay.

Cited in 1 *Brandt Suretyship*, 3d ed. 69, on executed consideration to principal as insufficient consideration; 1 *Beach Contr.* 268, on trust as consideration where grantee is to sell for grantor.

— Past or voluntary consideration.

Cited in *Myers v. Dean*, 11 Misc. 368, 32 N. Y. Supp. 237, holding that promise to pay for past services rendered without request, is void for want of consideration; *Sharp v. Hoopes*, 74 N. J. L. 191, 64 Atl. 989, holding a subsequent promise to compensate a person procuring a renter for promisor's house without authority or knowledge of promisor is without a sufficient consideration; *Green v. Burch*, 1 U. C. C. P. 313, holding an assignment of a right to real estate executed under

seal by the defendant only in which the consideration is acknowledged to be paid without support an action for the purchase money; *Rees v. Howcutt*, 4 U. C. C. P. 284, holding an executed consideration not a sufficient consideration for a contract.

Cited in note in 6 Eng. Rul. Cas. 43, on expense already incurred as consideration for subsequent promise for reimbursement.

Cited in 1 Beach Contr. 192, on sufficiency of past consideration to support subsequent promise.

— **Promise to reimburse payer of money for benefit of promisor.**

Cited in *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366, holding the expenditure by a stranger for the maintenance and education of an infant is a sufficient consideration for a promise by infant after becoming of age to repay expenditures where infant came in estate out of which no expenditures were made for his support; *Ingraham v. Gilbert*, 20 Barb. 151, holding a payment by one person of the debt of another without compulsion or legal obligation is not such a consideration as will support an action in assumpsit; *Thomson v. Thomson*, 76 App. Div. 178, 78 N. Y. Supp. 389, on there being no consideration for a promise to repay one who without obligation or request to do so has paid another's debt; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588, holding a promise by a son to pay for the past support of his mother furnished without his request is without consideration.

Disapproved in *Ferguson v. Harris*, 39 S. C. 323, 39 Am. St. Rep. 731, 17 S. E. 731, holding a promise by a married woman to pay a debt contracted for her benefit was based upon a sufficient consideration to maintain an action thereon.

— **Moral obligation to pay unenforceable debt.**

Cited in *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912, holding a note given by one because he feels in honor bound to reimburse a loss incurred by the payee though in a broker recommended by the maker is without consideration; *Linz v. Schuck*, 106 Md. 220, 11 L.R.A.(N.S.) 789, 124 Am. St. Rep. 481, 67 Atl. 286, 14 Ann. Cas. 495; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Nash v. Russell*, 5 Barb. 556; *Stafford v. Bacon*, 1 Hill, 532, 37 Am. Dec. 366; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573; *Smith v. Tripp*, 14 R. I. 112; *Bates v. Watson*, 1 Sneed, 376; *Peck v. Marling*, 22 W. Va. 708; *Muir v. Kane*, 55 Wash. 131, 26 L.R.A.(N.S.) 519, 104 Pac. 153, 19 Ann. Cas. 1180; *Campbell v. Greer*, 11 U. C. C. P. 231; *Russell v. Macdonald*, 1 U. C. Q. B. 296; *Baker v. Read*, 7 N. S. 199; *Bartlett v. Orey*, 5 Iowa, 586,—on where a moral obligation is a sufficient consideration for a contract; *Kent v. Rand*, 64 N. H. 45, 5 Atl. 760; *Watkins v. Halstead*, 2 Sandf. 311; *Musiek v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780,—holding the moral obligation resting upon a married woman to make good her promises given during coverture is not sufficient to sustain a reaffirmation of such promise made after she became discover; *Lyell v. Walbach*, 113 Md. 574, 33 L.R.A.(N.S.) 741, 77 Atl. 1111, holding that moral obligation of married woman to pay for supplies furnished for use in family at time when she had no legal power to contract for them, is not sufficient to support her promise after disability is removed to make such payment.

Cited in notes in 7 L.R.A.(N.S.) 1054, on validity of new promise by woman after, to pay debt incurred during coverture; 26 L.R.A.(N.S.) 527, on moral obligation as consideration for express promise; 53 L.R.A. 355, 366, 369,—on moral obligation as consideration for promise.

Cited in 1 Page Contr. 487, on moral obligation as consideration for contract; 1 Beach Contr. 183, on moral obligation as a valuable consideration.

Distinguished in *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, holding a promise by the owner of a vacant house to pay for repairs made thereon by mistake was based upon a sufficient consideration to maintain an action thereon.

—**New promise to pay unenforceable debt.**

Cited in *Demill v. Hartford Ins. Co.* 9 N. B. 341, holding the receipt of a removal premium on the policy by the insured from the assignee is a sufficient consideration for a new promise by the insurer to the assignee; *Wiser v. Bereand*, 14 Ark. 267, holding the contract of a married woman to pay for professional services in obtaining a divorce may be enforced upon her promise to pay made after divorce granted and without any new or further consideration; *Pittman v. Eder*, 76 Ga. 371, holding a valid debt barred by the statute of limitations might be reviewed by an express promise to pay the debt without an additional consideration for the promise; *Montgomery v. Lampton*, 3 Met. (Ky.) 519, holding that when debt is discharged by voluntary act of creditor, subsequent express promise to pay debt will not be enforced; *Lewis v. Simons*, 1 Handy (Ohio) 82; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322,—holding a promise to pay a debt after it has been voluntarily released by the creditor is not supported by a sufficient consideration to make it binding; *Trumbull v. Tilton*, 21 N. H. 128, holding that if after discharge has been obtained by operation of law, insolvent makes new promise, such promise can be enforced; *Briggs v. Sutton*, 20 N. J. L. 581, holding that an express promise in writing by a bankrupt to pay a prior debt, barred by a discharge in bankruptcy is valid and enforceable; *Van Derveer v. Wright*, 6 Barb 547, holding the guarantor of a note discharged by the laches of the holder cannot be again made liable even upon his express promise; *Dixie v. Worthy*, 11 U. C. Q. B. 328, holding the renewal of a promise by a married woman after the death of her husband to indemnify plaintiff who had indorsed a bill of exchange for her was not enforceable; *Halleran v. Moon*, 28 Grant, Ch. (U. C.) 323, holding a promise barred by the statute of limitations was a sufficient consideration for a new promise.

Distinguished in *Goulding v. Davidson*, 26 N. Y. 604, 25 How. Pr. 483, holding a promise by a woman after discoverture to pay a debt contracted during coverture in her own name for her separate business, the creditors having no knowledge of her coverture was based upon a sufficient consideration; *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239, holding the promise of a married woman having a separate estate to pay for necessities furnished her upon the credit of such estate is a sufficient consideration for a new promise to pay for them made after the death of the husband.

Contract when within statute of frauds—To pay another's debt.

Cited in *Colter v. Frese*, 45 Ind. 96; *Murphy v. Merry*, 8 Blackf. 295; *Patton v. Mills*, 21 Kan. 163; *Howe v. Walker*, 4 Gray, 318; *Brown v. Brown*, 47 Mo. 130, 4 Am. Rep. 320; *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S. W. 887; *Johnson v. Greenough*, 33 N. H. 396; *Fiske v. McGregory*, 34 N. H. 414; *Hetfield v. Dow*, 27 N. J. L. 440; *Wolff v. Koppel*, 5 Hill, 458; *Shoemaker v. King*, 40 Pa. 107; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875,—on when a promise to pay the debt of another is within the statute of frauds; *Eddy v. Roberts*, 17 Ill. 505, holding a contract made with one person for the benefit of another is not within the statute of frauds; *Reid, M. & Co. v. Northern Lumber Co.* 146 Ill. App. 371; *Whitesell v. Heiney*, 58 Ind. 108; *Hardy v. Blazer*, 29 Ind. 226, 92 Am. Dec. 347; *Center v. McQuesten*, 18 Kan. 476; *Small v. Schaefer*, 24 Md. 143; *Alger v. Scoville*, 1 Gray, 391; *Goetz v. Foos*, 14 Minn. 265.

Gil. 196, 100 Am. Dec. 219; *Ware v. Allen*, 64 Miss. 545, 60 Am. Rep. 67, 1 So. 738; *Howard v. Coshaw*, 33 Mo. 118; *Green v. Estes*, 82 Mo. 337; *Beattie v. Dinnick*, 27 Ont. Rep. 85; *Crim v. Fitch*, 53 Ind. 214,—holding a contract between two persons whereby the former agreed to pay a debt which the latter owed to a third person is not within the statute of frauds; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162, holding same where defendant agreed to indemnify plaintiff from loss if he would enter a recognizance for the appearance of a third person under indictment for a felony; *Williams v. Anten*, 62 Neb. 832, 87 N. W. 1061, holding same where goods were furnished to third person at the credit and request of the promisor; *Shook v. Vanmater*, 22 Wis. 532; *Demeritt v. Bickford*, 58 N. H. 523,—holding same where person agrees to indemnify another if he becomes surety on a note; *North v. Robinson*, 1 Duv. 71, holding promise by a third person on a consideration to a subscriber of stock in a corporation to be answerable for all liability on the subscription is not within the statute of frauds; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74; *Alger v. Scoville*, 1 Gray. 391,—holding a promise by defendant to plaintiff to indemnify him against liability on notes to a corporation was not within the statute of frauds; *Aldrich v. Ames*, 9 Gray, 76, holding an oral promise to indemnify another from his liability as bail for a third person is not within the statute of frauds; *Walther v. Merrell*, 6 Mo. App. 370, holding a promise by a bank president to a depositor that if the latter will not check out his deposit he will pay the total deposit if the bank should fail is within the statute of frauds; *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748, holding where a person at the request of adjoining landowner built a party wall situated half on the land of each a promise after its completion to pay half the cost was not within the statute of frauds; *Mersereau v. Lewis*, 25 Wend. 243, holding that agreement by partner to collect debts due firm and to pay over one half to assignees of copartners, in consideration of their relinquishing to him whole control of debts due firm and assuming payment of certain bills, is not within statutes of fraud; *Fowler v. Moller*, 4 Bosw. 149, holding a promise by the assignee of the lease to the landlord to pay arrears due from lessee if the landlord will allow him to remain in possession is within the statute; *King v. Shoemaker*, 1 Pearson (Pa.) 206, holding a promise to pay all the debts of a person if he will assign certain property to promisor is not within the statute of frauds and binding; *Joiner v. Perry*, 1 Strobb. L. 76, holding a promise by defendant in consideration of cattle sold him to pay part of note given by plaintiff was not within the statute of frauds; *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711, on whether agreement for insurance of property was within the statute of frauds; *Guild & Co. v. Conrad* [1894] 2 Q. B. 885, 63 L. J. Q. B. N. S. 721, 9 Reports, 746, 71 L. T. N. S. 140, 42 Week. Rep. 642, on contract to provide funds for payment being not a contract to pay another's debt.

Cited in note in 6 Eng. Rul. Cas. 295, on promise on which promisor is intended to be primarily liable as original promise and not within statute of frauds.

Cited in 1 Beach Contr. 597, on person to whom promise must be made under statute of frauds; *Stearns, Suretyship*, 37, on person to whom special promise should be made under statute of frauds; *Browne, Stat. Frauds*, 5th ed. 238, on applicability of statute of frauds to promises to pay debt of another: 1 Brandt, *Suretyship*, 3d ed. 176, on promise not being within statute of frauds unless made through party to whom principal is liable.

—Promises by administrators or executors.

Cited in *Pratt v. Humphrey*, 22 Conn. 317, holding a promise made by the administrator of a deceased person to plaintiff to pay certain debts which he owed his creditor was not within statute of frauds; *Fehlinger v. Wood*, 134 Pa. 517. 19 Atl. 746, holding a promise by trustee of an estate to a debtor to the estate for the unpaid purchase money of lands sold to him to pay a claim against such debtor if debtor will surrender his contract of purchase and accept a lease of the premises is not within the statute.

Contract when implied.

Cited in *Raymond v. Loyl*, 10 Barb. 483; *Freeman v. Robinson*, 38 N. J. L. 383. 20 Am. Rep. 399,—holding the mere moral obligations of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by child for necessities; *McDonald v. Notman*, 25 Grant. Ch. (U. C.) 608, holding a payment on a debt after the insolvent was discharged does not revive the debt; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396, considering when a contract or promise will be implied; *Brown v. Marsh*, 1 U. C. C. P. 438, on when a promise will be implied from facts stated.

Pleading statute of frauds.

Cited in *Walker v. Hill*, 21 N. J. Eq. 191; *Feeney v. Howard*, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984,—holding a denial by defendant of a contract within the statute of frauds is sufficient to raise the question of its validity under the statute; *Williams-Hayward Shoe Co. v. Brooks*, 9 Wyo. 424. 64 Pac. 342; *Taylor v. Reid*, 13 Ont. L. Rep. 205; *Dixon v. Duke*, 85 Ind. 434,—on how statute of frauds may be pleaded to be made available as defense.

Cited in 1 Brand, *Suretyship*, 3d ed. 211, on necessity of pleading statute of frauds in suit against surety; *Browne*, Stat. Frauds, 5th ed. 630, 637, on right to rely on statute of frauds under plea of the general issue.

Pleading express and implied contracts.

Cited in *Hall v. Francis*, 4 U. C. C. P. 210, on there being no distinction between the pleading of an express and an implied promise; *Cleal v. Elliott*, 1 U. C. C. P. 252, on sufficiency of averments in pleading in action on note.

Contracts for benefit of another.

Cited in *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325, holding that where A deposits money at instance or procurement of C, money deposited becomes under control of C. immediately upon deposit; *Gurnee v. Bausemer & Co.* 80 Va. 867. on disability to create a contract for a third party without his authority.

Necessity of proof of written agreement.

Cited in *Walker v. Hill*, 21 N. J. Eq. 191, holding that if answer denies existence of any agreement, plaintiff must prove written agreement.

6 E. R. C. 43, *WARWICK v. BRUCE*, 2 Maule & S. 205, affirmed in 6 E. R. C. 47, 14 Revised Rep. 634, 6 Taunt. 118. Stay pending error denied 4 Maule & S. 140.

Right of infant—To maintain an action on a contract.

Cited in *Sustell v. Rice*, 5 Ga. 472, holding an infant may by his next friend maintain an action on a note made payable to himself; *Johannson v. Gudmundson*, 19 Manitoba L. Rep. 83, holding that infant can purchase land and enforce contract against vendor.

Cited in notes in 6 E. R. C. 52, on validity of contract by infant; 7 E. R. C. 366, on infant not being able to recover for money paid for rental of house and for

furniture bought where he had occupied the house and used the furniture, although entitled to a return of promissory note for balance of contract.

Cited in Benjamin, Sales, 5th ed. 44, on right of infant to sue for nondelivery of goods purchased by him.

— **To avoid contracts.**

Cited in Hill v. Roderick, 2 Clark (Pa.) 161, on right of ward to avoid contracts made by his guardian for his benefit on becoming of age; Fisher v. Jewett, 2 N. B. 69, on right of infant to avoid his contracts.

Cited in note in 17 E. R. C. 209, on validity of an apprenticeship deed.

Cited in Hollingsworth, Contr. 24, on who may avoid voidable acts of infant; Hollingsworth, Contr. 20, on validity of contract by infant; Benjamin, Sales, 5th ed. 42, on power of infant at common law to purchase goods; Parsons, Partn. 4th ed. 20, on avoidance of contract of partnership.

Right of person to avoid contract because of infancy or insanity of other.

Cited in Rand v. Boston, 163 Mass. 354, 41 N. E. 484, holding that insanity or infancy of one contracting party does not give to other right to avoid contract; Atwell v. Jenkins, 163 Mass. 362, 28 L.R.A. 694, 47 Am. St. Rep. 463, 40 N. E. 178, holding the insanity of one contracting party did not give the other party the right to avoid the contract.

Parol contracts for sale of emblements, crops or fixtures or improvements not within Statute of Frauds.

Cited in Zickafosse v. Hulick, Morris (Iowa) 175, 39 Am. Dec. 458, holding a parol contract for the sale of improvements on land was not within the statute of frauds; Erskine v. Plummer, 7 Me. 447, 22 Am. Dec. 216, holding a sale of timber to be cut and carried away by the vendee was not within the statute of frauds; Bryant v. Crosby, 40 Me. 9, holding the same in the case of the sale of growing crops; Clark v. Shultz, 4 Mo. 235, holding that improvement on lands of United States may be sold without writing, and is not affected by statute of frauds; Green v. Armstrong, 1 Denio, 550; Olmstead v. Niles, 7 N. H. 522,—holding a sale of timber growing upon land is a sale of an interest in land and must be in writing.

Cited in note in 23 L.R.A.(N.S.) 1219, as to whether contract for sale of growing crops or reservation thereof by a grantor must be in writing.

Cited in Browne, Stat. Frauds, 5th ed. 314, on applicability of statute of frauds to sale of growing crops.

Distinguished in Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295, holding a contract for the sale of growing trees being a contract for a sale of an interest in land is within the statute of frauds and must be in writing.

— **For sale of goods.**

Cited in Gilman v. Hill, 36 N. H. 311, on when contract for the sale of goods is within the statute of frauds.

Crops, produce, and timber as personalty.

Cited in McCoy v. Herbert, 9 Leigh, 548, 33 Am. Dec. 256, holding that by sale of timber standing, to be chosen by vendee, is a sale of personalty and interest passes which vendee may assign before election.

Cited in note in 23 L.R.A. 258, on crops as personalty for purpose of levy and sale.

Cited in 1 Devlin, Deeds, 3d ed. 87, on produce growing in ground as personalty.

— **As an interest in realty.**

Cited in *Wood v. Lang*, 5 U. C. C. P. 204, holding growing crops passed by a conveyance of land with all the rents, issues and profits; *Mills v. Peirce*, 2 N. H. 9, on sale of growing crops and the like as conveying an interest in the realty.

Cited in 1 *Devlin*, *Deeds*, 3d ed. 88, on products under denomination of *prima vestura*, comprising growing trees, etc., as interests in land.

Void and voidable contracts distinguished.

Cited in *Wright v. Steele*, 2 N. H. 51, distinguishing between void and voidable contracts.

6 E. R. C. 56, *PIKE v. FITZGIBBON*, L. R. 17 Ch. Div. 454, 50 L. J. Ch. N. S. 394, 44 L. T. N. S. 562, 29 Week. Rep. 551, modifying in part the decision of the Vice Chancellor, reported in 49 L. J. Ch. N. S. 493, L. R. 14 Ch. Div. 837, 28 Week. Rep. 667.

Equitable enforcement of contracts of married woman.

Cited in *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529, on when equity would enforce as against her the contract of a married woman; *Atkins v. Atkins*, 195 Mass. 124, 11 L.R.A.(N.S.) 273, 122 Am. St. Rep. 221, 80 N. E. 806, holding a husband as trustee for land cannot in equity enforce a promise of the wife to pay for the land; *Berry v. Zeiss*, 32 U. C. C. P. 231, holding that debts contracted by married woman in carrying on business may be sued for as if she were unmarried woman, without regard to separate estate such as courts of equity recognize as that particular class of property.

Cited in note in 12 E. R. C. 782, on married woman being entitled to an equity of settlement.

Cited in 1 *Mechem*, *Sales*, 133, on equitable doctrine concerning separate estate of married women; 1 *Beach*, *Trusts*, 645, on equitable rights of married woman; *Benjamin*, *Sales*, 5th ed. 58, on right of action against married woman purchasing property; 2 *Page*, *Contr.* 1431, on contracts of married woman in equity.

Right of married woman to contract respecting separate estate.

Cited in *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911; *Douglas v. Hutchison*, 12 Ont. App. Rep. 110; *Re Glanvil*, L. R. 31 Ch. Div. 532, 55 L. J. Ch. N. S. 325, 54 L. T. N. S. 411, 34 Week. Rep. 309; *Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L.R.A.(N.S.) 676, 93 Pac. 504,—on right of married woman to contract with reference to separate estate.

Cited in 2 *Beach*, *Contr.* 1653, on power of married woman to charge her separate estate; *Benjamin*, *Sales*, 5th ed. 55, on capacity of married woman to purchase property.

The decision of the Vice Chancellor was cited in *Clarke v. Creighton*, 45 U. C. Q. B. 514 (dissenting opinion), on extent to which a married woman may charge her separate estate.

— **Estates in futuro or freed from anticipation.**

Cited in *Eckerly v. McGhee*, 85 Tenn. 661, 4 S. W. 386, on married woman as having no power to charge separate estate which is subject to the restraint upon anticipation; *Muleahy v. Collins*, 25 Ont. Rep. 241, holding the separate estate of a married woman left her by a relative was chargeable with a note given by her sometime after his death but before the contents of will were known and proved.

Right to prevent anticipation or alienation of wife's separate estate.

Cited in *Hunter v. Conrad*, 94 Fed. 11; *Roberts v. Stevens*, 84 Me. 325, 17

L.R.A. 266, 24 Atl. 873,—on right to restrain a married woman from anticipating or alienating her separate estate.

Cited in 1 Beach, Trusts, 668, on restraints upon anticipation of married women.

Liability of married woman's separate estate for her debts.

Cited in *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997, holding the liability of a married woman on a bond does not bind her separate estate not existent at the date of the bond: *Turnbull v. Forman*, L. R. 15 Q. B. Div. 234, 54 L. J. Q. B. N. S. 489, 53 L. T. N. S. 128, 33 Week. Rep. 768; *Re Roper*, L. R. 39 Ch. Div. 482, 58 L. J. Ch. N. S. 215, 59 L. T. N. S. 203, 36 Week. Rep. 750; *Ankeney v. Hannon*, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. Rep. 206,—holding the separate estate of a married woman was not chargeable with contracts executed prior to its existence; *Smith v. Lucas*, L. R. 18 Ch. Div. 531, 45 L. T. N. S. 460, 30 Week. Rep. 451, holding a married woman could not bind her after acquired separate property by a covenant in a marriage settlement; *Re Wheeler* [1899] 2 Ch. 717, 68 L. J. Ch. N. S. 663, 48 Week. Rep. 10, 81 L. T. N. S. 172, 15 Times L. R. 545, holding separate estate of a married woman engaged in a separate business on her becoming bankrupt and on the death of her husband in her life time was assets for creditors, although a restraint on anticipation existed; *King v. Lucas*, L. R. 23 Ch. Div. 712, 49 L. T. N. S. 216, 31 Week. Rep. 904, holding a trust for the separate use of married woman was not chargeable with notes given by her before the creation of the trust; *Pelton Bros. v. Harrison* [1891] 2 Q. B. 422, 60 L. J. Q. B. N. S. 742, 65 L. T. N. S. 514, 39 Week. Rep. 689, holding the death of a married woman's husband did not make separate estate of wife, subject to a restraint upon anticipation, liable for her debts; *McLeod v. Emigh*, 12 Ont. Pr. Rep. 451; *Wishart v. McManus*, 1 Manitoba L. Rep. 213; *McQueen v. Turner*, 30 Week. Rep. 80; *Bursill v. Tanner*, L. R. 13 Q. B. Div. 691, 50 L. T. N. S. 589, 32 Week. Rep. 827; *Hood Barrs v. Catheart* [1894] 2 Q. B. 559, 63 L. J. Q. B. N. S. 602; *Price v. Planters' Nat. Bank*, 92 Va. 468, 32 L.R.A. 214, 23 S. E. 887,—on liability of separate estate of married woman for her debts; *McMichael v. Wilkie*, 18 Ont. App. Rep. 464, on right to charge the separate estate of a married woman.

Cited in note in 21 E. R. C. 563, on liability of separate estate of married woman for her debts.

Cited in 1 Beach Trusts, 692, on liability of married woman on contract and for debts; 1 Beach Trusts, 696, 697, on limitations of liability of married woman; *Benjamin Sales* 5th ed. 56, on liability of married woman's separate property for goods purchased by her.

Distinguished in *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917, holding by reason of statute a contract of a married woman binding her separate estate would bind such estate afterwards acquired; *Re Dixon*, L. R. 35 Ch. Div. 4, 56 L. J. Ch. N. S. 773, 57 L. T. N. S. 94, 35 Week. Rep. 742, holding a married woman liable to refund money she was entitled to under a will where the order of court under which it was paid to her was reversed.

The decision of the Vice Chancellor was cited in *Cox v. Bennett* [1891] 1 Ch. 617, 60 L. J. Ch. N. S. 651, 64 L. T. N. S. 380, 39 Week. Rep. 401; *Moore v. Jackson*, 19 Ont. App. Rep. 383,—on extent of liability of separate estate of married woman for her debts; *Flower v. Buller*, L. R. 15 Ch. Div. 665, 49 L. J. Ch. N. S. 784, 43 L. T. N. S. 311, 28 Week. Rep. 948, holding a married woman can give a valid charge on her expectancy under a will.

Necessity of proving existence of married woman's separate estate.

Cited in *Widmeyer v. McMahon*, 32 U. C. C. P. 187, holding that omission to prove existence of married woman's separate personal estate is not necessary to give court jurisdiction in action against her upon her note.

6 E. R. C. 71, *MOLTON v. CAMROUX*, 4 Exch. 17, 18 L. J. Exch. N. S. 356, affirming the decision of the Court of Exchequer, reported in 2 Exch. 487, 12 Jur. 800, 18 L. J. Exch. N. S. 68.

Lunacy as grounds for avoiding a contract.

Cited in *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428, holding that in action on injunction bond, for wrongful suing out of writ, it is no defense, that defendant was at time he signed bond, insane, when it appears that he transacted business, and plaintiff was not aware of his insanity; *Lincoln v. Buckmaster*, 32 Vt. 652; *McDonald v. McDonald*, 16 Grant, Ch. (U. C.) 37; *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357,—on lunacy as grounds for avoiding a contract; *Campbell v. Hill*, 23 U. C. C. P. 473, holding a mortgage would not be set aside because of the insanity of the mortgagor where the mortgagee dealt with him and advanced him money in good faith without knowledge of his insanity; *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599, 61 L. J. Q. B. N. S. 449, 66 L. T. N. S. 556, 56 J. P. 436, holding in order to set lunacy up as a defense it must be shown that the other party was aware of it.

Cited in 2 Page Contr. 1411, on restoration of consideration as requisite to disaffirmance of contract by insane person; *Hollingsworth Contr.* 43, on voidability of contracts of innocent person.

The decision of the Court of Exchequer was cited in *Coburn v. Raymond*, 76 Conn. 484, 100 Am. St. Rep. 1000, 57 Atl. 116, holding a deed entered into by a mother and an incompetent daughter could not be avoided by the administrator of daughter where purchasers had no knowledge of daughter's incompetence and the mother permitted the fraud; *Scanlan v. Cobb*, 85 Ill. 296, holding a conveyance of land cannot be avoided on the grounds of the lunacy of the grantor and of which grantee had no knowledge without a return of the consideration being made; *Flach v. Gottschalk Co.* 88 Md. 368, 42 L.R.A. 745, 71 Am. St. Rep. 418, 41 Atl. 908, holding the contract of a lunatic not so found upon inquiry was binding upon him where the other party was unaware of his lunacy and the contract was fair and the parties could not be placed in statu quo; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77, holding equity would not avoid the deed of a lunatic made in good faith where the grantee could not be put in statu quo; *Memphis Nat. Bank v. Sneed* (*Memphis Nat. Bank v. Neely*) 97 Tenn. 120, 34 L.R.A. 274, 56 Am. St. Rep. 788, 36 S. W. 716, holding the mental incompetency of an accommodation indorser at time of signing a note in renewal or one he indorsed when competent to do so is not grounds for avoiding such indorsement where received in good faith; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309 (dissenting opinion); *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Hicks v. Marshall*, 8 Hun. 327 (dissenting opinion); *Odom v. Riddick*, 104 N. C. 515, 7 L.R.A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Eccles v. Lowry*, 32 U. C. Q. B. 635; *McDonald v. McDonald*, 14 Grant, Ch. (U. C.) 545; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142,—on insanity as grounds for setting aside a contract on behalf of the insane person; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610, holding that lunatic is liable for purchase price of necessary and useful article where seller had no notice of

insanity; *Cooney v. Lincoln*, 21 R. I. 246, 79 Am. St. Rep. 799, 42 Atl. 867, on want of mental capacity as grounds for avoiding a contract; *Francis v. St. Germain*, 6 Grant, Ch. (U. C.) 636, holding that purchaser of land cannot be compelled to accept title to property where prior grantor of such property was declared to be insane when he executed deed.

The decision of the Court of Exchequer was distinguished in *Harper v. Cameron*, 2 B. C. 365, holding an action to cancel notes might be maintained where shown that at time the notes were executed the promisor was insane and that promisee was aware of such fact and that there was a want of good faith.

The decision of the Court of Exchequer was disapproved in *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705, holding the deed of an insane man not under guardianship might be avoided by his heirs though the consideration adequate and there was no fraud; *Crawford v. Seovell*, 94 Pa. 48, 39 Am. Rep. 766, 8 W. N. C. 364, holding a grantor in a deed may avoid his conveyance by proof that he was non compos mentis at time of its execution and without putting grantee in statu quo.

Validity of contract of insane person.

Cited in *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413, holding that deed to innocent purchaser from lunatic will not be set aside, if purchaser cannot be put in statu quo; *Mutual L. Ins. Co. v. Bigler*, 79 N. Y. 541, holding that obligation entered into by insane person to repay money loaned, of which he had benefit, is valid, where lender acted in good faith, and with knowledge of insanity.

Cited in notes in 16 E. R. C. 738, on lunacy disqualifying person to act as a free agent; 19 L.R.A. 492, on validity of deed of insane person.

Cited in *Tiffany Ag.* 98, on invalidity of contracts of lunatics and drunken men; *Reinhard Ag.* 26, on persons of unsound mind as principals; *Benjamin Sales* 5th ed. 51, 52, on capacity of lunatic to purchase property; *Underhill Am. Ed. Trusts*, 92, on who may be a settlor.

Distinguished in *Cook v. Parker*, 4 Phila. 265, 18 Leg. Int. 53, holding a mortgage executed by a lunatic is voidable and cannot be enforced against him.

The decision of the Court of Exchequer was cited in *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716, holding the deed of a person of unsound mind executed before a finding of lunacy and taken in good faith is voidable only; *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542, holding the deed of an insane person not adjudged insane is voidable only at the election of the lunatic on the recovery of his reason; *Fitzhugh v. Wilcox*, 12 Barb. 235, holding that contract of sale of land, executed by person who has been, upon inquisition, found to be lunatic, and of whose person and estate committee has been appointed, is absolutely void; *Cundall v. Haswell*, 23 R. I. 508, 51 Atl. 426, holding an executory contract made with a person of unsound mind is voidable at the election of the latter; *Mohr v. Tulip*, 40 Wis. 67, holding a mortgage executed by a lunatic after inquisition found was at the least voidable although mortgagee had no knowledge of his unsoundness of mind at the time; *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Matthiessen & W. Ref. Co. v. McMahon*, 38 N. J. L. 536,—on the validity of contracts entered into with lunatic.

Infancy or other incompetency as grounds for avoiding contract.

The decision of the Court of Exchequer was cited in *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209, holding an infant who purchases goods on credit and does not return them is liable for so much of the price as is equal to the benefit derived.

Drunkenness as grounds for avoiding contract.

Cited in *Travis v. Way*, 33 N. S. 551; *Jones v. Catlin*, 16 N. B. 356,—on intoxication as grounds for avoiding a contract; *Matthews v. Baxter*, L. R. 8 Exch. 132, 42 L. J. Exch. N. S. 73, 28 L. T. N. S. 169, 21 Week. Rep. 389, holding the contract of a drunken man was voidable only.

The decision of the Court of Exchequer was cited in *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271, holding a trust deed might be avoided on the grounds that grantor was intoxicated at time of execution and that grantee was aware of such fact.

Right to plead defense of insanity.

Cited in *Hickman v. North British & M. Ins. Co.* 13 N. B. 234, holding in an action against an insurance company for a loss by fire the defendants could not set up that plaintiff's deed to the premises was obtained by fraud from a lunatic.

Person entitled to avoid contract.

Distinguished in *Re London Celluloid Co.* L. R. 39 Ch. Div. 190, 57 L. J. Ch. N. S. 843, 59 L. T. N. S. 109, 36 Week. Rep. 673, 1 Meg. 45, holding the liquidator of a corporation was not debarred from requiring shareholders to pay calls though it had failed to register contract that shares were to be credited as paid up, as was essential by statute.

6 E. R. C. 80, *ADAMS v. LINDSELL*, 1 Barn. & Ald. 681, 19 Revised Rep. 415.

Contracts through offer and acceptance by mail or message.

Cited in *Wylie v. Brice*, 70 N. C. 422, on the making of contracts by correspondence and by messengers; *Williams v. Corbey*, 5 Ont. App. Rep. 626, on the relationship of parties contracting with each other through the mail.

Contract as complete when acceptance is made known.

Cited in *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43, holding that the highest bidder at a judicial sale can not insist, where his bid has not been accepted, on having a sale confirmed in him on payment of the amount of his bid; *Adams v. United States*, 1 Ct. Cl. 192, holding that a contract is completed from the time it is accepted although a formal contract has not been executed; *Coker v. Dawkins*, 20 Fla. 141, holding that the sale was complete as soon as the hammer was struck down; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, holding that contract of insurance was complete when application was approved and policy was mailed to applicant; *Anderson v. Wisconsin C. R. Co.* 107 Minn. 296, 20 L.R.A. (N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379, holding that a bid at an auction sale may be withdrawn at any time before accepted, but not after; *Maetier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262, holding that acceptance of written offer of contract of sale consummates bargain, provided offer is standing at time of acceptance.

Cited in note in 6 Eng. Rul. Cas. 131, on requisites of acceptance of offer.

Cited in *Smith Pers. Prop.* 146, on mutual assent as essential to valid contract of sale; *Benjamin Sales* 5th ed. 73, on right to withdraw offer after acceptance.

—By mailing letter of acceptance.

Cited in *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 632, holding that a contract is concluded where the acceptance is properly mailed before the revocation is made known, or is telegraphed within a reasonable time; *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187, holding that where the insurance company made known the terms

upon which they would insure, the contract was complete when the acceptance was mailed, and the insured could recover if the house burned before the letter was received; *Gordon v. Coolidge*, 1 Sumn. 537, Fed. Cas. No. 5,606, on whether the assent of creditors to an assignment for their benefit, is binding from the time mailed or when received; *Winterport Granite & Brick Co. v. Jasper*, Holmes, 99, Fed. Cas. No. 17,898, holding that the contract is complete when the acceptance of the written offer is mailed and not when the letter is received; *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. Rep. 811; *The Palo Alto*, 2 Ware, 344, Fed. Cas. No. 10,700.—holding same, even though a revocation is sent but not received before the acceptance is mailed; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775, 1 S. W. 869; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Phillips v. Moor*, 71 Me. 78; *Stockham v. Stockham*, 32 Md. 196; *Abbott v. Shepard*, 48 N. H. 14; *Vassar v. Camp*, 11 N. Y. 441; *Hamilton v. Lyeoming Mut. Ins. Co.* 5 Pa. 339,—holding that an offer made by mail is a continuing one and if accepted within a reasonable time, before notice of revocation, the contract is binding when the acceptance is mailed; *Ferrier v. Storer*, 63 Iowa, 484, 50 Am. Rep. 752, 19 N. W. 288, holding same, but if the time to accept is limited, it must be mailed within that time; *Levy v. Cohen*, 4 Ga. 1, holding that when offer is made by letter, acceptance by written reply takes effect from time when communication containing acceptance is sent; and not from time when it is received by other party; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476, holding that the mailing of the insurance policy is an acceptance, and the contract is complete from the time it is mailed; *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268, holding same where the policy is forwarded to agent for delivery; *Potts v. Whitehead*, 20 N. J. Eq. 55, holding that the contract to buy land is complete the moment a letter of acceptance is mailed, if within the time limited by the offer; *Grier v. Mutual L. Ins. Co.* 132 N. C. 542, 44 S. E. 28, on the mailing of the policy of insurance, as a completion of the contract; *Satterwaite v. Goodyear*, 137 N. C. 302, 49 S. E. 205, holding that an acceptance becomes binding from the time it is mailed; *Greer v. Chartiers R. Co.* 38 Phila. Leg. Int. 166, 11 Pittsb. L. J. N. S. 359, holding that when offer is made by mail it may be accepted in same manner and contract becomes binding if such acceptance is made before withdrawal of offer; *Blake & Co. v. Hamburg-Bremen F. Ins. Co.* 67 Tex. 160, 60 Am. Rep. 15, 2 S. W. 368, holding that where an offer is made, contemplating an acceptance by mail, the contract is complete when the letter of acceptance is mailed; *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747, holding that the mailing of a letter, where the offer is not qualified, is an acceptance of the contract from the time the acceptance is posted; *Thorne v. Barwick*, 16 U. C. C. P. 369, holding that where the offer is by mail, the contract is complete when the acceptance is mailed; *Phenix Ins. Co. v. Schultz*, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 337; *Averill v. Hedge*, 12 Conn. 424; *Ober v. Smith*, 78 N. C. 313 (dissenting opinion); *Greer v. Chartiers R. Co.* 96 Pa. 391, 42 Am. Rep. 548; *Boyd v. Merchants' & F. Peanut Co.* 25 Pa. Super. Ct. 199; *Shannon v. Hastings Mut. Ins. Co.* 2 Ont. App. Rep. 81; *Union F. Ins. Co. v. Fitzsimmons*, 32 U. C. C. P. 608,—on the acceptance by mail, where the offer is by mail, as completing the contract; *Dunlop v. Higgins*, 1 H. L. Cas. 381, 12 Jur. 295, holding that a contract is accepted by the posting of a letter declaring its acceptance; *Re Imperial Land Co.* L. R. 7 Ch. 587, 41 L. J. Ch. N. S. 621, 26 L. T. N. S. 781, 20 Week. Rep. 690, holding that a contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent; *Evans v. Nicholson*, 32 L. T. N. S. 778, on an account stated as being

made when and where the admission was mailed; *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. N. S. 373, 66 L. T. N. S. 439, 40 Week. Rep. 433, holding that where it was within the contemplation of the parties that the mail was to be used as the means of conveying the acceptance, the acceptance is complete as soon as it is posted.

Cited in 1 Page, *Contr.* 89, on acceptance of offer by mail or telegraph; Benjamin, *Sales* 5th ed. 119, on necessity for mutual assent of parties to contract; Benjamin, *Sales* 5th ed. 121, on mode of completing a bargain by correspondence; Benjamin, *Sales* 5th ed. 75, 76, on posting letter of acceptance in due course as binding contract.

Distinguished in *Lucas v. Western U. Teleg. Co.* 131 Iowa, 669, 6 L.R.A.(N.S.) 1016, 109 N. W. 191, holding that where the offer was by mail, and the acceptance by telegraph, the acceptance was not binding until received; *Robertson v. Cloud*, 47 Miss. 208, holding that revocation of agency takes effect from the time the letter is received and not from the time it is mailed; *McKee v. Harris*, 16 Phila. 149, 40 Phila. Leg. Int. 232, holding that where the letter of acceptance was given to a person to mail, and he carried it in his pocket for three days, the contract was not complete when the letter was mailed.

—Acceptance by telegraph.

Cited in *Minnesota Linseed Oil Co. v. Collier White-Lead Co.* Fed. Cas. No. 9,635, holding that the contract is complete when the telegram is deposited in the office for transmission; *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346, 49 L. J. Q. B. N. S. 701, 42 L. T. N. S. 897, 28 Week. Rep. 916, 6 Eng. Rul. Cas. 82, holding that an offer was not rejected until the receipt of the telegram by the other party, unless an unreasonable time had elapsed, and an acceptance before notification was valid, even where the withdrawal reached acceptor before acceptance reached the offeror.

Cited in 1 Beach, *Contr.* 82, on proposals and acceptance by telegraph.

—Necessity of actual receipt of letter of acceptance.

Cited in *Re Imperial Land Co.* L. R. 13 Eq. 148 41 L. J. Ch. N. S. 198, 25 L. T. N. S. 692, 20 Week. Rep. 164, holding that where a person applied for shares of stock and notice of allotment was missent, because of the incorrect address furnished by himself, the allotment was good even though he mailed a notice of revocation of the application before he received notice of allotment; *Household Fire & Carriage Acci. Ins. Co. v. Grant*, L. R. 4 Exch. Div. 216, 6 Eng. Rul. Cas. 115, 48 L. J. Exch. N. S. 577, 41 L. T. N. S. 298, 27 Week. Rep. 858, holding that where a person applied for shares in a corporation, and they were allotted to him and notice of the allotment mailed to him but never received, he was a share holder.

Distinguished in *British & A. Teleg. Co. v. Colson*, L. R. 6 Exch. 108, 40 L. J. Exch. N. S. 97, 23 L. T. N. S. 868, holding that where a person applied for shares in a company, and the letter notifying him of their allotment was never received he was not a shareholder; *Lewis v. Browning*, 130 Mass. 173, holding that where the offer requires an acceptance before a certain date or it will be considered as rejected, the acceptance must be actually received by the offeror before that time or it is not binding.

—Place of acceptance.

Cited in *O'Donohue v. Wiley*, 43 U. C. Q. B. 350, holding that where an attorney in Toronto telegraphed his offer of his service to a New York firm and they telegraphed the acceptance, the contract was accepted in New York; *Taylor v. Jones*, L. R. 1 C. P. Div. 87, 45 L. J. C. P. N. S. 110, 34 L. T. N. S. 131,

holding that where an order for goods was mailed in London, and the servant of the plaintiff delivered the goods to the defendant there, the contract was made in London.

Offer as continuing until revoked or rejected.

Cited in *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28, holding that an offer continued until notice of withdrawal reached the acceptor, and the contract was binding if accepted before; *Chesebrough v. Western U. Teleg. Co.* 76 Misc. 516, 135 N. Y. Supp. 583, holding that offer by broker to hold coffee purchased by him, if accepted immediately by customer, was presumed to continue until revoked and was not revoked by delay in delivery of telegraphic message making offer; *Maetier v. Frith*, 6 Wend. 103, *Lockwoods Rev. Cas.* 408, holding that the offer to contract is presumed to be a continuing one until revoked or rejected.

Cited in note in 6 E. R. C. 89, 90, 92, on continuance of offer for reasonable time or until notice of recall.

Cited in 1 Beach, Contr. 56, 57, on revocation of offer; Benjamin, Sales 5th ed. 74, on time for accepting offer.

Distinguished in *James v. Marion Fruit Jar & Bottle Co.* 69 Mo. App. 207, holding that where offer demanded an immediate acceptance, but the acceptance was delayed unreasonably the acceptance was not binding.

Effect of mistake in acceptance.

Cited in *William Cramp & Sons Ship & Engine Bldg. Co. v. Sloan*, 21 Fed. 561, holding that a mistake of acceptors in making the acceptance should be held against them, and they should be bound by what they said, and not what they intended.

When offer by mail goes into effect.

Cited in *Hartley Silk Mfg. Co. v. Berg*, 48 Pa. Super. Ct. 419, holding that when person uses post office to make offer, post office becomes his agent to carry offer, offer is not made when letter is posted, but when it is received.

6 E. R. C. 82, *STEVENSON, J. & CO. v. McLEAN*, 49 L. J. Q. B. N. S. 701, 42 L. T. N. S. 897, L. R. 5 Q. B. Div. 346, 28 Week. Rep. 916.

Necessity of knowledge of withdrawal of offer before acceptance.

Cited in *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. Rep. 811, 866, holding that when offer is made and accepted by posting of letter acceptance before notice of withdrawal is received, contract is not impaired by fact that revocation had been mailed before letter of acceptance; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775, 1 S. W. 869, holding that offer made by letter which is to be answered in same way cannot be withdrawn unless withdrawal reaches party before offer is accepted; *Brauer v. Shaw*, 168 Mass. 198, 60 Am. St. Rep. 387, 46 N. E. 617, holding that offer accepted by telegraph before telegram revoking it has been sent, acceptance being received before revocation of offer is received, makes completed contract; *Sherley v. Peehl*, 84 Wis. 46, 54 N. W. 267, holding that offer to sell must be considered as continuing until notice of withdrawal is given to person to whom offer was made; *Re Scottish Petroleum Co.* 51 L. J. Ch. N. S. 841, 46 L. T. N. S. 880, holding that where a person applied for shares in a company, and the letter allotting them to him was mailed before he wrote withdrawing his application, but before he received it, the contract was complete; *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. N. S. 373, 66 L. T. N. S. 439, 40 Week. Rep. 433, holding that the person withdrawing the offer must bring it to the knowledge of the person to whom made, before the acceptance is made, and if not the contract is complete.

Cited in note in 6 E. R. C. 89, on continuance of offer for reasonable time or until notice of recall.

Cited in Benjamin, Sales 5th ed. 77, on necessity of revocation of offer being made before posting or telegraphing or acceptance; Benjamin, Sales 5th ed. 70; 1 Mechem, Sales, 237,—on necessity for communication of revocation of offer of sale; 1 Mechem, Sales, 234, on right to withdraw offer of sale; 1 Mechem Sales, 215, on what constitutes a counter proposition which will operate as rejection of offer; 1 Mechem, Sales, 238, on insufficiency of making of letter revoking offer of sale.

Requisites of acceptance of offer.

Cited in *Turner v. McCormick*, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28, holding that acceptance in writing of formal option of sale of land, using formal words "according to terms of option given me" to which there is added by conjunction "and" request for departure from its terms as to time and place of performance, is unconditional.

Cited in notes in 50 L.R.A. 247, 248, 251, on making of contracts by telegrams or by telegrams and letters; 21 L.R.A. 127, on rights conferred by a "refusal" or "option;" 6 Eng. Rul. Cas. 132, 197, on requisites of acceptance of offer; 6 Eng. Rul. Cas. 154, on effect of introducing new terms in acceptance of offer.

Cited in Benjamin Sales 5th ed. 65, on inquiry as to terms of offer as not a rejection; Benjamin, Sales, 5th ed. 67, on invalidity of promise to leave offer open in absence of consideration; Benjamin, Sales, 5th ed. 121, on mode of completing a bargain by correspondence.

When acceptance of offer is effectual.

Cited in *Shea v. Massachusetts Ben. Asso.* 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855, to the point that doctrine establishing acceptance of offer as effectual from time acceptance is mailed is limited to cases where acceptance by post is expressly or impliedly authorized.

Cited in note in 6 Eng. Rul. Cas. 539, on necessity of accepting offer within prescribed time.

Cited in Benjamin, Sales, 5th ed. 73, as to when acceptance of offer is complete.

Necessity of a consideration to constitute a valid contract.

Cited in *Gordon v. Darnell*, 5 Colo. 302, 2 Mor. Min. Rep. 220, holding that bond to convey mining claim upon payment of certain sum, not signed by obligee, and containing no clause granting possession, is nudum pactum and subject to revocation, until acceptance by obligee; *Pattle v. Simpson*, Rap. Jud. Quebec 14 B. R. 178 (dissenting opinion), on the necessity of consideration to constitute a valid contract.

6 E. R. C. 94, *BROGDEN v. METROPOLITAN R. CO.* L. R. 2 App. Cas. 666.

Completion of contract by acts of assent by the parties.

Cited in *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17, holding that where no final assent has been given, but the negotiations contemplate the execution of a formal contract, the assent may be given by the acts of the parties; *Bell-Irving v. Vancouver*, 4 B. C. 219, on contracts as binding though unsigned; *West v. Rutledge*, 17 N. B. 674, holding that the actual conduct of the parties established the existence of a contract, though there was none formally executed; *Fairweather v. Lloyd*, 36 N. B. 548, on the conduct of the parties as establishing a contract; *National Malleable Castings Co. v. Smith's Falls Malleable*

Castings Co. 14 Ont. L. Rep. 22, on the existence of a contract by the conduct of the parties in acting on it; *Union F. Ins. Co. v. Fitzsimmons*, 32 U. C. C. P. 602, holding that when some act of assent is done the contract is complete.

Cited in note in 29 L.R.A. 436, on sufficiency of contract by offer and acceptance without execution of contemplated instrument.

Cited in 1 Mechem, Sales, 203, on necessity that mutual assent of parties to sale be express; 1 Mechem, Sales, 220, on effect of negotiations for sale in contemplation of mere formal contract; 1 Beach, Contr. 87, on certainty of proposal and acceptance; Smith, Pers. Prop. 145, on mutual assent as essential to valid contract of sale; 1 Beach, Contr. 74; Hollingsworth, Contr. 10,—on acceptance of offer by conduct; Benjamin, Sales, 5th ed. 62, on mutual assent, express or implied, being essential to contract of sale; Benjamin Sales, 5th ed. 73, as to when acceptance of offer is complete; Hollingsworth, Contr. 11, on mere mental conception of an offer as insufficient to make a contract.

—By complying with terms thereof.

Cited in *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, on the completion of a contract by acting under the terms of the offer; *Coates v. First Nat. Bank*, 91 N. Y. 20, holding that a contract was completed the moment some overt act of assent was done, such as mailing a letter of acceptance; *Bigelow v. Craigellachie-Glenlivet Distillery Co.* 37 Can. S. C. 55, on the compliance with an offer as completing the contract; *St. Helen's Smelting Co. v. Dominion Antimony Co.* 42 N. S. 385, holding that where the defendants telegraphed an offer and the plaintiffs shipped the ore under the order, there was an acceptance of the contract.

Distinguished in *Boston v. Toronto Fruit Vinegar Co.* 4 Ont. L. Rep. 20, holding that where the letter was merely an expression of willingness to contract and not an offer, compliance with the terms thereof did not constitute a contract.

—Necessity of notice of acceptance to the offeror.

Cited in *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275, holding that if the offeree acts upon the offer in the manner contemplated, it constitutes an acceptance whether known to the offeror or not; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644, on the necessity of the communication of the acceptance to the offeror to make a binding contract; *Farnum v. Whitman*, 187 Mass. 381, 73 N. E. 473, holding that an unexpressed intention to contract of a party cannot bind the other party, unless it is communicated to him and he accepts; *Rockwell v. Wood*, 39 N. S. 423, holding that mere mental assent to the terms of the contract was not sufficient but it must be shown by some overt act; *Household, Fire & Carriage Acci. Ins. Co. v. Grant*, 6 E. R. C. 121, L. R. 4 Exch. Div. 216, 48 L. J. Exch. N. S. 577, 41 L. T. N. S. 298, 27 Week. Rep. 858, holding notice of allotment of shares according to subscription was binding though never received.

Cited in 1 Mechem, Sales, 223; Benjamin, Sales, 5th ed. 71,—on necessity for communication of acceptance of offer; Benjamin, Sales, 5th ed. 63, on necessity that assent to contract of sale be unconditional and communicated.

Notice of revocation before acceptance.

Cited in *Larkin v. Gardiner*, 27 Ont. Rep. 25, holding that where a person signed an agreement to buy land, and left it with the vendor's agent, who took it to the vendor who signed it, but after the former had notified the agent that he withdrew the offer, the contract was not binding.

Cited in 1 Beach, Contr. 76, on revocability of acceptance of offer.

Necessity of consideration to insure validity of contract.

Cited in *Pattle v. Simpson*, Rap. Jud. Quebec, 14 B. R. 178 (dissenting opinion), on the necessity of a consideration to constitute a valid contract.

Nonratification of unauthorized act of agent in making contract.

Cited in *Keighley, M. & Co. v. Durant* [1901] A. C. 240, 1 B. R. C. 351, 70 L. J. K. B. N. S. 662, 84 L. T. N. S. 777, 17 Times L. R. 527, holding that contract made by person intending to contract on behalf of third party but without authority, cannot be ratified by third party so as to render him liable on contract, where person who made contract did not profess to be acting on behalf of principal.

6 E. R. C. 115, *HOUSEHOLD, FIRE & CARRIAGE ACCI. INS. CO. v. GRANT*, L. R. 4 Exch. Div. 216, 48 L. J. Exch. N. S. 577, 41 L. T. N. S. 298, 27 Week. Rep. 858.

When contract is complete.

Cited in *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, holding that contract is to be deemed conclusive when offer is accepted within reasonable time, either by telegram or by letter duly posted, before offer is withdrawn to knowledge of party; *Western U. Teleg. Co. v. Allen*, 30 Okla. 233, 38 L.R.A.(N.S.) 348, 119 Pac. 981, holding that where a party making an offer of a contract has stipulated the method of acceptance, he is bound by an acceptance in that method, whether he receives it or not; *Shea v. Massachusetts Ben. Asso.* 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Perry v. Mt. Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Nasmith v. Manning*, 5 Ont. App. Rep. 126; *Williams v. Corbey*, 5 Ont. App. Rep. 626,—on the mailing of the acceptance as completing the contract; *Empire Oil Co. v. Vallerand*, 17 Ont. Pr. Rep. 27, holding that a proposal was accepted as soon as the letter of acceptance was mailed; *Union F. Ins. Co. v. Fitzsimmons*, 32 U. C. C. P. 602, on the mailing of an acceptance in good time as a good delivery thereof; *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. N. S. 373, 66 L. T. N. S. 439, 40 Week. Rep. 433, holding that where an offer is made through the mail, and the acceptance is made in the same manner, it is binding from the time the acceptance is mailed.

Cited in notes in 6 Eng. Rul. Cas. 89, on acceptance of an application of shares in a company by letter of allotment; 6 Eng. Rul. Cas. 135, on offerer being bound by method of communication pointed out by him; 6 E. R. C. 131, 132, on requisites of acceptance of offer.

Cited in 1 Page, Contr. 92, on acceptance of offer by mail or telegraph; *Hollingsworth*, Contr. 14, on necessity for communication of acceptance of offer; 1 Mechem, Sales, 229, on communication by mail, telegraph, etc., of acceptance of offer of sale, although not received; *Benjamin*, Sales, 5th ed. 76, on posting letter of acceptance in due course as binding contract; *Benjamin*, Sales, 5th ed. 72, 73, on mode of acceptance of offer.

Distinguished in *Lucas v. Western U. Teleg. Co.* 131 Iowa. 669, 6 L.R.A. (N.S.) 1016, 109 N. W. 191, holding that where the offer is made by letter, and the acceptance by telegraph, the contract is not complete until the acceptance is received; *McKee v. Harris*, 16 Phila. 149, 40 Phila. Leg. Int. 232, holding that where the person put the letter of acceptance in his pocket and carried it for two days, it was unreasonably delayed so as not to be binding when mailed.

—Necessity of the receipt of the acceptance by the offerer.

Cited in *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634, holding that a contract is completed the moment the acceptance is mailed, whether received or not, unless all of the details are not settled and then the acceptance must be received.

Distinguished in *Lewis v. Browning*, 130 Mass. 173, holding that where the offer demands an answer within a certain time or the offer will be deemed rejected, the contract is made to depend upon the receipt of the letter of acceptance, and not on its mailing.

Right to revoke offer.

Cited in *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770, holding that where the reply to the offer, was a qualified acceptance, the offeror could revoke the offer before the receipt of the qualified acceptance.

Cited in 1 *Beach*, Contr. 57, on revocation of offer; *Benjamin*, Sales, 5th ed. 74, on right to withdraw offer after acceptance.

—How made.

Cited in 1 *Meehem*, Sales, 238, on insufficiency of mailing of letter revoking offer of sale.

The mails as the common agent of the contracting parties.

Cited in *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530, holding that where one party wrote out a promissory note and sent it to the other to be signed, and he signed it and returned it by mail as it was sent, the note was delivered where mailed; *Ross v. Machar*, 8 Ont. Rep. 417 (dissenting opinion), on the postoffice as the common agent of the parties to the contract.

Effect of failure to receive letter allotting shares of stock.

Cited in *Carta Para Gold Min. Co. v. Fastnedge*, 30 Week. Rep. 880, on the failure to receive a letter of allotment of shares, as a defense in an action to collect calls made on it.

Binding force of prior judgments of the court.

Cited in *Levi v. Reed*, 6 Can. S. C. 482, on the binding force of prior judgments of the court.

Method of making payment.

Cited in *Benjamin*, Sales, 5th ed. 761, on validity of payment when made in mode requested by seller; 2 *Bolles*, Banking, 551, on possibility of risking remittance by mail.

6 E. R. C. 133, *WILLIAMS v. CARWARDINE*, 4 Barn. & Ad. 621, 5 Car. & P. 566, 2 L. J. K. B. N. S. 101, 1 Nev. & M. 418.

Compliance with the terms of a reward offered as creating a contract.

Cited in *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634, holding that an offer of reward, becomes a written contract upon compliance with its terms. *Furman v. Parke*, 21 N. J. L. 310, holding that an offer of a reward enures as a contract to any person who performs the stipulated service; *Kinn v. First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012, 95 N. W. 969, holding that offer of reward for "arrest and conviction" of unknown criminal is complied with by person who obtains possession of facts necessary to secure arrest and conviction, and gives them to some proper person interested, although he does not himself make arrest; *Fortier v. Wilson*, 11 U. C. C. P. 495, on the right of a party to recover a reward offered after complying with its terms; *Carlili v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. 484 [1893] 1 Q. B. 256. 61 L.

J. Q. B. N. S. 696, 56 J. P. 665, 4 Reports, 176, 67 L. T. N. S. 837, 41 Week. Rep. 210, 57 J. P. 325, 62 L. J. Q. B. N. S. 257, holding that where a patent medicine company offered a reward if a person was not cured after using their preparation for a certain time, and the plaintiff, after following the conditions, was not cured, he was entitled to the reward.

Cited in note in 23 L. ed. U. S. 699, on rewards for apprehension or conviction of criminals.

Cited in 1 Beach, Contr. 54, on general nature of contract by offer and acceptance; 1 Beach, Contr. 60, on effect of a general offer and its acceptance as a contract; 1 Dillon, Mun. Corp. 5th ed. 552, on liability of city on reward for apprehension of offenders; Hollingsworth, Contr. 11, on necessity of acceptance of offer of reward; Benjamin, Sales, 5th ed. 7172, on sufficiency of acceptance of offer of reward.

—Effect of motives.

Cited in *Fargo v. Arthur*, 43 How. Pr. 193, holding that motives of person claiming reward offered for capture of criminal, are immaterial.

—Necessity of acting in reliance upon the reward.

Cited in *Drummond v. United States*, 35 Ct. Cl. 356; *Dawkins v. Sappington*, 26 Ind. 199; *Eserman v. Hyman*, 26 Ind. App. 165, 84 Am. St. Rep. 284, 28 N. E. 1022,—holding that to recover a reward offered it is not necessary that the person acted in reliance thereon; *Smith v. Vernon County*, 188 Mo. 501, 70 L.R.A. 59, 107 Am. St. Rep. 324, 87 N. W. 949, holding that the party must act in reliance on the reward in furnishing the information, or he cannot recover the same; *Williams v. West Chicago Street R. Co.* 94 Ill. App. 385; *Hoboken v. Bailey*, 36 N. J. L. 490,—on the necessity of knowledge of the reward and acting thereunder, to entitle the person to recover it; *Eagle v. Smith*, 4 Houst. (Del.) 293, holding that person who finds lost goods and returns them to owner, is entitled to reward offered for their return, although at time of returning them he was not aware that reward had been offered; *Fink v. Meyers*, 4 Kulp, 145, holding that to entitle person to award, such person must show rendition of services required after knowledge of and in view of obtaining offered reward; *Vitty v. Eley*, 51 App. Div. 44, 64 N. Y. Supp. 397, holding that judgment for defendant in action for reward will not be disturbed where information given by plaintiff leading to arrest of burglar was not voluntarily given, but was extorted by threat of arrest as accomplice; *Oldfield v. Reading*, 18 Pa. Dist. R. 833, 14 Luzerne Leg. Reg. 241, holding that reward offered for information leading to arrest and conviction of person who shot police officer, should be equitably divided between persons who were factors in accomplishing desired result, although some of those were not aware of offer; *Broadnax v. Ledbetter*, 100 Tex. 375, 9 L.R.A.(N.S.) 1057, 99 S. W. 1111, holding that in order to recover a reward offered for the capture of a fugitive from justice, the person claiming it must show that he acted relying upon the reward.

Cited in note in 9 L.R.A.(N.S.) 1057, on prior knowledge of, as condition of earning reward.

Distinguished in *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791, holding that where the person who caused the arrest, never saw the offer of the reward until after the arrest, he could not recover, unless he did some further act to entitle him to it.

Contracts created by action invited by other party.

Cited in *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, holding that where one party acts in such a manner as to invite another person to act in a certain

manner, and that person acts in such manner, it constitutes a contract; *Gurvin v. Cromartie*, 33 N. C. (11 Ired. L.) 174, 53 Am. Dec. 406, holding that where one party promises another, that if he will marry a certain woman, and have a child by this wife, he will pay a certain sum of money a valid contract arises upon the happening of the event; *Jackman v. New Haven*, 42 Vt. 591; *Davis v. Landgrove*, 43 Vt. 442,—holding that where soldier, by re-enlisting and applying on quota of town, complied with terms of vote of town constituting general offer of bounty, he is entitled to bounty, although he did not enlist in reliance upon offer; *Chandler v. Bristol*, 45 Vt. 330, holding that where a town offered a bounty to secure volunteers for the army, that the act of volunteering created a contract with the town; *Merchants' Bank v. Winter*, Newfoundl. Rep. (1897-1903) 30; *Bank of Montreal v. Thomas*, 16 Ont. Rep. 503; *Ex parte Asiatic Bkg. Corp.* L. R. 2 Ch. 391, 36 L. J. Ch. N. S. 222, 16 L. T. N. S. 162, 15 Week. Rep. 414, 4 Eng. Rul. Cas. 612, on the acceptance of a letter of credit as establishing a contract between the drawer and the acceptor.

6 E. R. C. 139, *HYDE v. WRENCH*, 3 Beav. 334, 4 Jur. 1106.

Conditional acceptance as a rejection of the offer.

Cited in *Metropolitan Coal Co. v. Boutell Transp. & Towing Co.* 185 Mass. 391, 40 N. E. 421; *Shickle v. Chouteau, H. & V. Iron Co.* 10 Mo. App. 241,—holding that a qualified acceptance amounts to a rejection of the offer; *Cangas v. Rumsey Mfg. Co.* 37 Mo. App. 297, holding that if the acceptance differs in any material way from the offer it amounts to a rejection of the offer; *New York L. Ins. Co. v. Levy*, 122 Ky. 457, 5 L.R.A.(N.S.) 739, 92 S. W. 325, holding same and that if the party wishes to accept it thereafter, it must be renewed; *Canneyer v. United German Lutheran Church*, 2 Sandf. Ch. 186, holding that an offer to sell land is an offer to sell for cash, and to bind the seller must be unconditionally accepted; *Washington v. Rosario Min. & Mill. Co.* 28 Tex. Civ. App. 430, 67 S. W. 459, holding that where the acceptance of the offer is a conditional one, it amounts to a rejection of it, and the submission of a new one; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Fulton v. Upper Canada Furniture Co.* 32 U. C. C. P. 422,—on the submission of a new offer as rejecting a former one; *Elmsley v. Harrison*, 17 Ont. Pr. Rep. 525 (affirming 17 Ont. Pr. Rep. 425), holding that unconditional acceptance of offer is necessary in order to make binding contract.

Cited in *Pomeroy Spec. Perf.* 2d ed. 84, on termination of offer by refusal to accept; *Hollingsworth Contr.* 8, on necessity that acceptance of offer be of the very thing offered; *Benjamin Sales* 5th ed. 65; 1 *Meechem Sales*, 214, 215,—on counter proposition as rejection of offer.

Distinguished in *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346, 49 L. J. Q. B. N. S. 701, 42 L. T. N. S. 897, 28 Week. Rep. 916, 6 Eng. Rul. Cas. 82, holding that where the state of the market was very unsettled, an inquiry as to what was the longest limit offerers could give and whether they would accept a certain lower sum was not a rejection of the offer, which could be accepted thereafter.

—Necessity of acceptance of new offer to constitute a contract.

Cited in *Patton v. Rucker*, 29 Tex. 402, holding that the minds of both parties must assent to the same thing before there is a binding contract; *Sumner v. Cole*, 33 N. S. 179, holding that refusal of offer made by telegram will not end offer sent by telegram, where subsequent offer modifying first offer is sent by telegraph and accepted; *Marshall v. Jamieson*, 42 U. C. Q. B. 115, holding that

if at the time of the rejection of the first offer, the other party makes an offer, this latter must be accepted before there can be a contract.

Right thereafter to accept first offer.

Cited in *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840,—holding that where the party submits a counter-proposal it amounts to a rejection of the former proposal, and he cannot thereafter accept the first proposal except it is renewed by the first party; *McLean v. Pastime Gymnasium Asso.* 64 Mo. App. 55, holding that the submission of a new proposition amounts to a rejection of the former, which must be renewed in order that it may be thereafter accepted.

Making of contract by unqualified acceptance of offer.

Cited in *Arnold v. McLean*, 4 Grant, Ch. (U. C.) 337, holding that unqualified acceptance contained in letter in answer to proposal by letter makes complete contract, where acceptance is made before withdrawal of offer.

6 E. R. C. 142, *JORDAN v. NORTON*, 4 Mees. & W. 155, 1 Horn & H. 234, 7 L. J. Exch. N. S. 281.

Effect of a conditional acceptance of an offer.

Cited in *Esmay v. Gorton*, 18 Ill. 483; *Rugg v. Davis*, 15 Ill. App. 647,—holding that a provisional acceptance becomes a new proposition, and is not a binding acceptance; *Shickle v. Chouteau, H. & V. Iron Co.* 10 Mo. App. 241, holding that a qualified acceptance is a rejection of the proposal; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378,—holding that an acceptance of a proposal coupled with a qualification or condition is not such an acceptance as will bind the other party; *Hills v. Lynch*, 3 Robt. 42, holding that in order to pass title to property offered for sale acceptance of offer must be unconditional; *McIntosh v. Brill*, 20 U. C. C. P. 426, holding that if a condition is affixed by the acceptor it must be assented to by the other before there can be a binding contract; *Re Hamilton & N. W. R. Co.* 39 U. C. Q. B. 93, to the point that acceptance of offer to be binding must be simply acceptance and not introduction of new stipulation; *Marshall v. Jamieson*, 42 U. C. Q. B. 115, holding second offer after mutual declinations was on facts unconditionally accepted.

Cited in 1 *Mechem Sales*, 210, 212; *Benjamin Sales* 5th ed. 64,—on necessity that acceptance be in terms of offer; *Browne Stat. Frauds* 5th ed. 451, on what constitutes a valid acceptance and receipt of goods sold upon verbal contract; *Smith Pers. Prop.* 145, on mutual assent to same thing, in same sense, and at same instant of time as essential to valid contract of sale.

—Necessity of strict compliance with the offer.

Cited in *Loyd v. Wight*, 20 Ga. 574, 65 Am. Dec. 636, holding that if one party orders goods from another, and the latter delivers them to a carrier, and they are lost, the goods are not delivered to the party ordering them, unless it was customary to ship them in that manner.

Necessity of notice of intention not to accept property, within a reasonable time.

Cited in *Dailey v. Green*, 15 Pa. 118, holding that where timber was contracted for, and delivered, but not completely accepted, the party receiving it must give notice of his intention not to keep it, within a reasonable time thereafter or he will be deemed to have accepted it.

Authority of special agent.

Cited in *Sprague v. Train*, 34 Vt. 150, holding that where the party repudiated his proposal of the previous day, and the agent of the other, accepted the terms of the new contract, which he had no authority to do, the first party was not bound; *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179, on the authority of a special agent to bind his principal, by acts beyond his authority.

Cited in 1 Devlin Deeds 3d ed. 573, on delivery of escrow without authority or obtaining it fraudulently as not passing title.

6 E. R. C. 149, *RE ABERAMAN IRON WORKS*, L. R. 4 Ch. 532, 20 L. T. N. S. 340, 17 Week. Rep. 508.

Right of shareholder to repudiate his allotment of shares.

Cited in *Harris's Case*, L. R. 7 Ch. 589, note, holding that where a corporation upon application by letter for shares of stock mailed letter of acceptance there was a binding contract although the letter stated that interest would be charged on the balance due on the shares if not paid by a certain date.

Distinguished in *Ex parte British Nation Life Assur. Asso.* L. R. 8 Ch. Div. 679, 48 L. J. Ch. N. S. 118, 39 L. T. N. S. 136, 27 Week. Rep. 88, holding that where a person had not been induced to become a shareholder by fraud, but by the ultra vires act of the corporation, they could repudiate their position as shareholders and elect to be strangers.

6 E. R. C. 155, *HUSSEY v. HORNE-PAYNE*, L. R. 4 App. Cas. 311, 48 L. J. Ch. N. S. 846, 41 L. T. N. S. 1, 27 Week. Rep. 587, affirming the decision of the Court of Appeal, reported in 47 L. J. Ch. N. S. 751, L. R. 8 Ch. Div. 670, 38 L. T. N. S. 543, 26 Week. Rep. 703.

What constitutes a contract.

Cited in note in 29 L.R.A. 434, on sufficiency of contract by offer and acceptance without execution of contemplated instrument.

Cited in *Benjamin Sales* 5th ed. 78, on essentials of contract by offer and acceptance; 1 Page Contr. 39, on requisites of an offer.

Distinguished in *Beach & C. Co. v. American Steam Gauge & Valve Mfg. Co.* 202 Mass. 177, 88 N. E. 924, holding that offer made by one corporation to buy certain land from another corporation, setting forth terms and conditions, when accepted, constituted binding contract and not merely preliminary proposal.

The decision of the Court of Appeals was cited in *Metropolitan Coal Co. v. Bontell Transp. & Towing Co.* 185 Mass. 391, 70 N. E. 421, holding that an offer followed by an unconditional acceptance makes and completes a contract.

Contract made by letters.

Cited in *Hite v. Savannah Electric Co.* 90 C. C. A. 348, 164 Fed. 944; *Appelby v. Black*, 24 N. B. 598,—on the establishment of a contract not of letters; *Lloy v. Wells*, 3 D. L. R. 315, to the point that contract between parties may be shown from correspondence; *Hoofstetter v. Rooper*, 22 Ont. App. Rep. 175, on the reference in a letter to future contract as negating the existence of a present one; *Beaudoin v. Watterson*, Rep. Jud. Quebec 19 B. R. 530 (dissenting opinion), on being immaterial whether certain letters constituted a completed contract where parties in later letters negotiated on a different basis; *Lever v. Koffler* [1901] 1 Ch. 543, 70 L. J. Ch. N. S. 395, 49 Week. Rep. 506, 84 L. T. N. S. 584, on a contract arising out of correspondence.

— **Necessity of considering whole of correspondence.**

Cited in *Williams v. Smith*, 161 Mass. 248, 37 N. E. 455; *Gates v. Dudgeon*, 72 App. Div. 562, 76 N. Y. Supp. 561,—holding that the whole of the correspondence that has passed between the parties must be considered in determining whether a contract has been established; *North-West Transp. Co. v. McKenzie*, 25 Can. S. C. 38; *North West Transp. Co. v. McKenzie*, 25 Can. S. C. 38; *Pearson v. O'Brien*, 4 D. L. R. 413; *Sayre v. Rhodes*, 39 N. B. 150; *Jones v. De Wolf*, 23 N. B. 356,—holding that the whole of the correspondence must be looked at in establishing a contract from the letters; *Queen's College v. Jayne*, 10 Ont. L. Rep. 319, holding that if it appeared from the whole of the correspondence that there was no completed contract, then none would be established from the letters; *Midland R. Co. v. Ontario Rolling Mills Co.* 2 Ont. Rep. 1, holding that the whole of the correspondence must be read together and if it appear that the contract was not completed, then there will be none established although it may appear from one or two that there was; *Koksilah Quarry Co. v. R.* 5 B. C. 525, holding same, but in this case one was established; *Morang v. Le Sueur*, 45 Can. S. C. 95, Ann. Cas. 1912B, 602; *Abell v. Anderson*, 2 N. B. Eq. Rep. 136; *Laird v. Adams*, 1 Sask. L. R. 352; *Fulton v. Upper Canada Furniture Co.* 32 U. C. C. P. 422; *Wilson v. Dunn*, L. R. 34 Ch. Div. 569, 56 L. J. Ch. N. S. 855, 56 L. T. N. S. 192, 35 Week. Rep. 405, 51 J. P. 452; *Wood v. Aylward*, 57 L. T. N. S. 54,—on the necessity of considering the whole of the correspondence in establishing a contract out of letters; *May v. Thomson*, L. R. 20 Ch. Div. 705, 51 L. J. Ch. N. S. 917, 47 L. T. N. S. 295; *Williams v. Briscoe*, L. R. 22 Ch. Div. 441, 48 L. T. N. S. 198, 31 Week. Rep. 907,—holding that in establishing a contract out of letters, the whole of the correspondence must be considered and not only part; *Bolton v. Lambert*, L. R. 41 Ch. Div. 295, 58 L. J. Ch. N. S. 425, 60 L. T. N. S. 687, 37 Week. Rep. 434, on the introduction of letters subsequent to the acceptance as to whether there had been a completed contract; *Bristol, C. & S. Aerated Bread Co. v. Maggs*, L. R. 44 Ch. Div. 616, 59 L. J. Ch. N. S. 472, 62 L. T. N. S. 416, 38 Week. Rep. 393, holding that the whole of the correspondence must be considered, and if by subsequent letters the parties treated the contract as shown by the two letters of offer and acceptance, as not being closed, it will be held that no concluded contract had been established; *Bellamy v. Debenham*, L. R. 45 Ch. Div. 481, 60 L. J. Ch. N. S. 166, 63 L. T. N. S. 220, 39 Week. Rep. 257, holding that, when a contract is contained in letters, the whole correspondence must be looked at, but if a contract has been made, subsequent correspondence cannot affect it.

Cited in *Benjamin Sales* 5th ed. 77, on determination from correspondence as to whether complete contract has been entered into; 1 *Beach Contr.* 55, on necessity of looking at all of the letters regarding a transaction where it is sought to establish a contract by letters.

Contract as incomplete where conditions are left open for further negotiations.

Cited in *Weldon v. Vaughan*, 5 Can. S. C. 35; *McIntyre v. Hood*, 9 Can. S. C. 556 (dissenting opinion).—on a contract as incomplete where by its terms, something further is left to be done; *Houss v. Brown*, 14 Ont. L. Rep. 500, holding that a failure to fix a time for payment in a written contract for the sale of goods, and which shows upon its face that this is to be fixed later by further negotiations, makes the contract incomplete.

Distinguished in *Calori v. Andrews*, 12 B. C. 236, holding that where a writ-

ten instrument contained all the terms of the offer, and these were accepted in terms, they could not be affected by evidence of subsequent negotiations.

— **Provisos for legality or marketableness of titles or the like.**

Cited in *Trowbridge v. New York City*, 24 Misc. 517, 53 N. Y. Supp. 616, on the words in a bid for bonds "subject to approval of the legality of the issues by our counsel," as affecting the acceptance of the offer; *Eadie v. Addison*, 52 L. J. Ch. N. S. 80, 47 L. T. N. S. 543, 31 Week. Rep. 320, holding that where the words, "to be approved by me and my solicitor" were used in a letter used in establishing a contract, they did not add a new term to the contract.

Distinguished in *Wilcox v. Redhead*, 49 L. J. Ch. N. S. 539, 28 Week. Rep. 795, holding that the words "provided the lease in our estimation is reasonable" and "containing the usual conditions," do not mean the same so that there was no completed contract established by the letters.

Clauses adding new terms to the contract.

Cited in *Andrews v. Calori*, 38 Can. S. C. 588, holding that offer to sell cannot be said to be refused because acceptance contained clause "so soon as title is evidence to our satisfaction."

Cited in note in 6 Eug. Rul. Cas. 154, on effect of introducing new term in acceptance of offer.

The decision of the Court of Appeals was cited in *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37, holding that there is no acceptance where the party accepting couples it with conditions that essentially change the offer or vary its effect; *James v. Marion Fruit Jar & Bottle Co.* 69 Mo. App. 207, holding that the assent must be to the offer as proposed and not impose new terms or there would be no contract; *Batavia v. St. Louis S. W. R. Co.* 126 Mo. App. 13, 103 S. W. 140, holding that where the one party agreed to accept a sum if the voucher was issued at once, and the letter said that it had been issued and would reach him in about fifteen days, there was no contract.

Admissibility of parol evidence to vary or rectify contract.

Cited in notes in 15 E. R. C. 555, on custom as affecting interpretation of contracts; 8 E. R. C. 356, on right to contradict terms of express contract by custom or otherwise; 14 E. R. C. 668, on parol evidence as to usage in interpretation of written contracts; 22 E. R. C. 866, on parol evidence as to contract sought to be specifically enforced; 6 E. R. C. 227, on inadmissibility of parol evidence to vary adopted contract.

Cited in *Benjamin Sales* 5th ed. 234, on parol evidence to show that writing produced is not the record of a contract; 1 *Mechem Sales*, 369, on defendant's right to show that note or memorandum set up by plaintiff is incomplete.

Costs on appeal.

The decision of the Court of Appeals was cited in *Wolley v. Lowenberg, H. & Co.* 3 B. C. 416, holding that where the decision on appeal turns in favor of the appellant on a point not raised by him he is not entitled to costs.

Sufficiency of memorandum of sale of land.

Cited in *Fenske v. Farbacher*, 2 D. L. R. 634, holding that memorandum of sale of land that does not state terms of payment is insufficient; *Maybury v. O'Brien*, 25 Ont. L. Rep. 229, holding that memorandum in writing may be sufficient to satisfy statute of frauds although it does not disclose name of real vendor, if it discloses name of agent who has authority to bind vendor.

Cited in note in 33 L.R.A.(N.S.) 85, 86, on necessity of specifying time of payment in contract for sale of realty.

Cited in Browne, Stat. Frauds, 5th ed. 507, on contents of memorandum required by statute of frauds.

6 E. R. C. 171, WINN v. BULL, L. R. 7 Ch. Div. 29, 47 L. J. Ch. N. S. 139, 26 Week. Rep. 230.

What constitutes a contract.

Cited in Munroe v. Heubach, 18 Manitoba L. Rep. 450, holding that option containing all requisites of contract, and acceptance thereof, constitute completed contract; Conley v. Paterson, 2 D. L. R. 94, holding that receipt given purchaser of land for his first payment, which states all terms of sale is binding agreement.

Cited in Browne, Stat. Frauds, 5th ed. 507, on necessity that memorandum required by statute of frauds contain terms as completed; 1 Page, Contr. 41, on necessity that terms of offer be complete.

Agreement to contract as a complete contract.

Cited in Wills v. Carpenter, 75 Md. 80, 25 Atl. 415, holding letters showing a complete agreement to enter into a contract, do not constitute a complete contract; Seanlan v. Oliver, 42 Minn. 538, 44 N. W. 1031, holding that a writing which is a mere expression of an agreement to make a contract in the future does not constitute a contract; Lennox v. Westney, 17 Ont. Rep. 472, holding that agreement to make written lease is not binding as lease.

Cited in note in 29 L.R.A. 437, on sufficiency of contract by offer and acceptance without execution of contemplated instrument.

Cited in 1 Page, Contr. 95, on effect of intending to reduce contract to writing.

— Containing stipulation for formal contract.

Cited in Bissinger v. Prince, 117 Ala. 480, 23 So. 67, holding that if during oral negotiations it is intended that the agreement is to be reduced to writing, there is no completed contract until the writing is executed; Boisseau v. Fuller, 96 Va. 45, 30 S. E. 457, holding that an agreement signed by all the parties, providing "That the above to be covered by a regular lease subject to approval by all parties," did not constitute a concluded contract; Bell-Irving v. Vancouver, 4 B. C. 219, on the formal execution of contracts as necessary to its validity; Hobbs Esquimalt & N. R. Co. 6 B. C. 228, on the stipulation for a formal contract as affecting the written agreement as a complete contract; Bromet v. Neville, 53 Sol. Jo. 321, holding that where an agreement by letters is made subject to the approval of a formal contract, there can be no concluded contract until such formal contract is approved; Hawkesworth v. Chaffey, 55 L. J. Ch. N. S. 335, 54 L. T. N. S. 72, holding that where a written memorandum of an agreement for the sale of land contained a provision that the sale, was subject to a formal contract between the parties, there was no complete agreement of which performance could be enforced.

Cited in note in 6 E. R. C. 195, on effect of intent to embody in more formal contract, grant entered into in a binding manner.

Cited in 1 Underhill, Land. & T. 388, on invalidity of signed agreement for lease where given subject to preparation and approval of formal contract.

Distinguished in Eadie v. Addison, 52 L. J. Ch. N. S. 80, 47 L. T. N. S. 543, 31 Week. Rep. 320, holding that where the letter containing the provisions of the agreement for a lease contained the words, "a proper lease to be drawn up with all proper clauses, and to be approved by me and my solicitor," that there was a complete contract when accepted.

— Specific performance.

Cited in *Lennox v. Westney*, 17 Ont. Rep. 472, on the specific performance of an incomplete contract.

Incompleted contract as binding upon the parties.

Cited in *J. H. Duker Box Co. v. Dixon*, 106 Md. 59, 66 Atl. 611; *Hand v. Evans Marble Co.* 88 Md. 226, 40 Atl. 899,—holding that where the contract is established by letters and they show that the parties, though agreed up to a certain point, did not intend to be bound by it, there is no complete contract; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528, 49 N. E. 918, on an agreement to contract in the future as a complete contract; *Brauer v. Oceanic Steam Nav. Co.* 178 N. Y. 339, 70 N. E. 863, holding that where a telegraphic message purporting to confirm an oral agreement omits essential and important parts, such correspondence does not constitute a written contract; *Stow v. Currie*, 21 Ont. L. Rep. 486, holding that offer in writing to sell mining claim stating terms incompletely, and acceptance of offer did not constitute binding contract; *Clark v. Robinson*, 51 Week. Rep. 443, on the contract by letters, made subject to the conditions of sale and an agreement, as being a concluded contract; *Bertel v. Neveux*, 39 L. T. N. S. 257, holding that where it appears from the correspondence between the parties that some of the terms of an agreement have been arrived at but that others remain unsettled, there is no contract between the parties.

6 E. R. C. 174, *ROSSITER v. MILLER*, L. R. 3 App. Cas. 1124, 48 L. J. Ch. N. S. 10, 39 L. T. N. S. 173, 26 Week. Rep. 865, reversing the decision of the Court of Appeal, reported in L. R. 5 Ch. Div. 648, 46 L. J. Ch. N. S. 737.

What constitutes a completed contract.

Cited in *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67, 54 U. S. App. 685, on what constituted a completed contract; *Beach & C. Co. v. American Steam Gauge & Valve Mfg. Co.* 202 Mass. 177, 88 N. E. 924, holding that offer made by one corporation to buy certain land of another corporation setting forth terms and conditions, when accepted constituted binding contract and not merely preliminary proposal; *Harris v. Darroch*, 1 Sask. L. R. 116; *Wallace Bell Co. v. Moose Jaw*, 3 D. L. R. 273; *Munroe v. Heubach*, 18 Manitoba L. Rep. 450,—holding that option containing all requisites of contract and acceptance thereof constitute completed contract, although arrangements were made for more formal contract; *Johnson v. G. & G. Flewelling Mfg. Co.* 36 N. B. 397, holding that any one applying for insurance could withdraw before his application had been accepted; *Calhoun v. Brewster*, 1 N. B. Eq. Rep. 529, on the necessity of a final arrangement of all details to constitute a complete contract.

The decision of the Court of Appeals was cited in *Strobridge Lithographic Co. v. Randall*, 73 Fed. 619, 19 C. C. A. 611, 43 U. S. App. 160, holding that an inquiry and answer in the affirmative did not constitute a completed contract; *McClung v. McCracken*, 3 Ont. Rep. 596, holding that offer in writing to sell certain property, and acceptance of same in writing completes contract of sale; *Stow v. Currie*, 21 Ont. L. Rep. 486, holding that offer in writing to sell mining claim stating terms incompletely, and acceptance of same did not constitute binding contract.

Execution of a formal agreement as a condition precedent to a completed contract.

Cited in *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528,

49 N. E. 918, holding that where proposal for doing public work, and award made thereon, look to future execution of contract, such award is not necessarily contract of any kind, nor agreement to enter into contract based on proposal; *Mississippi & D. S. S. Co. v. Swift*, 86 Me. 248, 41 Am. St. Rep. 545, 29 Atl. 1063, holding that if the formal contract is to be the consummation of negotiations then there is no complete contract until it is executed; *Hobbs v. Esquimalt & N. R. Co.* 6 B. C. 228, on the effect of a stipulation for a formal contract; *Wallace Bell Co. v. Moose Jaw*, 4 D. L. R. 438, holding that mere acceptance of proposal to modify terms of contract, will not have that effect when proposal was made subject to express condition that it should not have legal effect on contract, until its terms were reduced to new written agreement; *Fairweather v. Lloyd*, 36 N. B. 548 (reversing 2 N. B. Eq. Rep. 412), on the execution of a formal contract as a condition precedent to a completed contract, where provided for in the memorandum; *Hawkesworth v. Chaffrey*, 55 L. J. Ch. N. S. 335, 54 L. T. N. S. 72, holding that where the contract was sought to be established by letters, and they stated that the agreement was subject to a formal contract being prepared and signed by both parties as approved by their solicitors, there was no completed contract until such formal contract was executed; *Gray v. Smith*, L. R. 43 Ch. Div. 208, 59 L. J. Ch. N. S. 145, 62 L. T. N. S. 335, 38 Week. Rep. 310, on the execution of a formal contract as a condition precedent to a completed contract; *Lloyd v. Nowell* [1895] 2 Ch. 744, 64 L. J. Ch. N. S. 744, 73 L. T. N. S. 154, 44 Week. Rep. 43, 13 Reports, 712, holding that where the memorandum contained a clause, that the agreement was subject to the preparation of a formal contract, there was no completed contract until such was done; *Filby v. Hounsell* [1896] 2 Ch. 737, 65 L. J. Ch. N. S. 852, 75 L. T. N. S. 270, 45 Week. Rep. 232, holding that where the offer was accepted subject to contract as embodied in contract as agreed, there was a completed contract; *North v. Percival* [1898] 2 Ch. 128, 67 L. J. Ch. N. S. 321, 78 L. T. N. S. 615, 46 Week. Rep. 522, holding that where at the head of the letter containing the agreement the words, "subject to approval of conditions and form of agreement by purchaser's solicitor," were printed, the formal contract was not a condition precedent to a completed contract, but it could be shown by letters.

Cited in notes in 29 L.R.A. 433, on sufficiency of contract by offer and acceptance without execution of contemplated instrument; 6 E. R. C. 197, on effect of intent to embody in more formal contract, grant entered into in a binding manner.

Cited in 1 Mechem, Sales, 220, on effect of negotiations for sale in contemplation of mere formal contract; *Benjamin*, Sales, 5th ed. 64, on apparent acceptance of offer not intended by parties as final where merely formal written contract is contemplated.

Distinguished in *Dennison v. People's Cafe Co.* 45 L. T. N. S. 187, holding that where the letter stated that the offer was accepted, and they would forward a contract as soon as possible there was no completed contract shown.

The decision of the Court of Appeal was cited in *Fairweather v. Robertson*, 2 N. B. Eq. 412, holding that drafts of agreements may indicate that parties intended to reduce agreement to more formal writing whenever terms were agreed upon; *Hoofstetter v. Rooker*, 22 Ont. App. Rep. 175, on the reference to a future contract as showing that there is no completed contract; *Winn v. Bull*, L. R. 7 Ch. Div. 29, 47 L. J. Ch. N. S. 139, 26 Week. Rep. 230, 6 Eng. Rul. Cas. 171, holding that where by the written agreement, it was subject to the preparation and approval of a formal contract, there was no final completed agreement; *Bertel v. Neveux*, 39 L. T. N. S. 257, holding that where it appears

from the letter that there are some terms to fix afterward, there is no completed contract, but not because there is no formal contract.

The decision of the Court of Appeals was distinguished in *Lewis v. Brass*, L. R. 3 Q. B. Div. 667, 37 L. T. N. S. 738, 26 Week. Rep. 152, holding that mere reference to a future contract does not prevent a written offer and acceptance from being treated as a completed contract, where the reference is merely for the purpose of expressing the agreement already arrived at in formal language; *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70, 47 L. J. Ch. N. S. 758, 26 Week. Rep. 294, 38 L. T. N. S. 581, holding that letters constitute a complete contract even though there was a reference to a future contract.

Sufficiency of memorandum to satisfy the statute of frauds.

Cited in *Bailey v. Dawson*, 1 D. L. R. 487, holding that particulars required to make complete memorandum for purposes of statute of frauds, need not be contained in the document; *Borland v. Coote*, 10 B. C. 493; *Calori v. Andrews*, 12 B. C. 236; *Lewis v. Hughes*, 13 B. C. 228,—on the sufficiency of a memorandum to satisfy the statute; *McClung v. McCracken*, 3 Ont. Rep. 596, on the sufficiency of written memorandum consisting of two parts, to satisfy the statute; *Bailey v. Dawson*, 25 Ont. L. Rep. 387, holding that particulars required to make complete memorandum of agreement to sell land, need not all be contained in one document; *Jarrett v. Hunter*, L. R. 34 Ch. Div. 182, 56 L. J. Ch. N. S. 141, 55 L. T. N. S. 727, 35 Week. Rep. 132, 51 J. P. 165, on the sufficiency of a memorandum to satisfy the statute of frauds.

Cited in note in 6 Eng. Rul. Cas. 249, on requisites of memorandum required by statute of frauds.

Cited in *Thornton, Oil & Gas*, 2nd edition, 343, 345, on sufficiency of writing in contract for lease to satisfy statute.

The decision of the Court of Appeal was cited in *McClung v. McCracken*, 2 Ont. Rep. 609, holding that letter and reply stating "If you will assume my mortgage, and pay me in cash \$3,750, I will assume your mortgage of \$5,000 on leasehold," to which reply was made, "Your offer for exchange property is accepted on your terms," were not sufficient to constitute contract under statute.

—Sufficient designation of parties or subject matter.

Cited in *Rogers v. Hewer*, 1 D. L. R. 747, holding that receipt signed by real estate agent, which contained stipulation that sale was "subject to confirmation by owner," such reference is sufficient to describe joint owners as vendors to satisfy statute of frauds; *Conley v. Paterson*, 2 D. L. R. 94, holding that contract for sale of land which is signed by person "as agents for owner," sufficiently satisfies statute of frauds in that regard; *McCarthy v. Cooper*, 12 Ont. App. Rep. 284, on the sufficiency of a writing to satisfy the statute as to naming the parties; *McIntosh v. Moynihan*, 18 Ont. App. Rep. 237, holding that a letter addressed to one but unsigned and in no way showing the purchaser's name nor identifying him is insufficient; *Clergue v. Preston*, 8 Ont. L. Rep. 84, holding that the statement, a client of ours who owns an undivided two thirds interest in two certain lots, is a sufficient designation of the name to satisfy the statute; *White v. Tomalin*, 19 Ont. Rep. 513, holding that where the agreement did not designate the person to whom it was supposed to be made nor could be ascertained from it, the memorandum was not sufficient under the statute; *Bland v. Eaton*, 6 Ont. App. Rep. 73, on the sufficiency of a memorandum as to the designation of the subject matter; *Maybury v. O'Brien*, 25 Ont. L. Rep. 229, holding that memorandum in writing may be sufficient to satisfy statute of frauds, although it does not disclose name

of vendor, if it did disclose name of agent who has authority to bind him: *Shardlow v. Cotterell*, L. R. 18 Ch. Div. 280, holding that where the property was described on the poster, advertising the auction, but not in the receipt, the two could not be read together to form a memorandum under the statute of frauds, where they did not refer to each other.

Cited in *1 Mechem Sales*, 362, on sufficiency of description in note or memorandum.

The decision of the Court of Appeals was cited in *McGovern v. Hern*, 153 Mass. 308, 10 L.R.A. 815, 25 Am. St. Rep. 632, 26 N. E. 861, holding that a memorandum of sale, signed by the purchaser at an auction of real estate, which refers to the seller, but does not name him is not sufficient; *Wilmot v. Stalker*, 2 Ont. Rep. 78, holding that word "vendor" is not sufficient description of party selling to satisfy statute of frauds.

Admissibility of parol evidence to aid insufficient memorandum of sale of land.

Cited in *Doherty v. Hill*, 144 Mass. 465, 11 N. E. 581, holding that in an action for breach of agreement to sell land, in which answer sets up statute of frauds, draft of deed of land is admissible in connection with evidence that it was offered to defendant for execution, to show breach, but not to aid memorandum of sale previously executed, which was insufficient; *Morgan v. Johnson*, 4 D. L. R. 643, holding that it is competent to show that one or both contracting parties were agents for other persons, and acted as such agents, in making contract.

Reference to all the correspondence in establishing a contract by letters.

Cited in *Abell v. Anderson*, 2 N. B. Eq. Rep. 136, on the reference to all of the correspondence in establishing a contract by letters.

Waiver of conditions of a contract.

Cited in *Tomlinson v. Morris*, 12 Ont. Rep. 311, on the waiver of the conditions of a contract.

Meaning of the word, proprietor.

Cited in *Conway v. Canada P. R. Co.* 7 Ont. Rep. 673, on the meaning of the term proprietor.

6 E. R. C. 198, *RAFFLES v. WICHELIHAUS*, 2 Hurlst. & C. 906, 33 L. J. Exch. N. S. 160.

Necessity of an agreement of the minds to make a valid contract.

Cited in *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765, holding that in order to constitute a binding contract, there must be a meeting of the minds upon the terms of the contract; *Baker v. Lyman*, 38 U. C. Q. B. 498; *Smith v. Hughes*, L. R. 6 Q. B. 597, 40 L. J. Q. B. N. S. 221, 25 L. T. N. S. 329, 19 Week. Rep. 1059,—on the necessity of the parties agreeing to the same thing in order to have a contract.

—Effect of misunderstanding.

Cited in *Burton, B. & P. Co. v. London Street R. Co.* 7 Ont. L. Rep. 717, holding that if without fault of either party a misunderstanding arose, no contract resulted; *Melady v. Jenkins* S. S. Co. 18 Ont. L. Rep. 251 (dissenting opinion); *Riley v. Spotswood*, 23 U. C. C. P. 318,—on the effect of a misunderstanding as to the terms of a contract; *Van Praagh v. Everidge* [1902] 2 Ch. 266, 71 L. J. Ch. N. S. 598, 87 L. T. N. S. 42, 18 Times L. R. 593, holding that it was no defense to an action for specific performance that through the purchaser's negligent mistake, he purchased a lot of land different from the one he intended to purchase.

Cited in note in 6 Eng. Rul. Cas. 224, 228, on effect of misunderstanding of parties as to subject matter of contract.

Cited in 1 Mechem, Sales, 256; Benjamin, Sales, 5th ed. 101,—on effect of mistake as to identity of property contracted for; 1 Page, Contr. 127, on mistake as to identity of subject matter or consideration of contract; Hollingsworth, Contr. 154, on effect and validity of contract of mistake as to the subject matter; 2 Mechem, Sales, 700, 703, on avoidance of contract for buyer's mistake as to quality where seller was ignorant of such mistake; Benjamin Sales, 5th ed. 104, on effect of mistake as to price of property purchased.

Distinguished in *Hanley v. Canadian Packing Co.* 21 Ont. App. Rep. 119, holding that where there was a mistake as to the meaning of trade term, if the party acted upon it in a way consistent with its accepted meaning, the other party was bound.

— **Parol evidence to show construction placed on it by the parties.**

Cited in *Inman Mfg. Co. v. American Cereal Co.* 133 Iowa, 71, 8 L.R.A.(N.S.) 1140, 110 N. W. 287, 12 Ann. Cas. 387, on the introduction of parol evidence as to the proper construction of a contract where its meaning is not clear.

Mistake of proper names.

Cited in *Hanson v. Globe Newspaper Co.* 159 Mass. 293, 20 L.R.A. 856, 34 N. E. 462 (dissenting opinion), on distinction or identity of persons or things bearing identical names.

6 E. R. C. 202, THOROUGHGOOD'S CASE, 2 Coke. 9a.

Validity of instrument executed by an illiterate person without having same read to them.

Cited in *Smentek v. Cornhauser*, 17 Ill. App. 266; *Owings's Case*, 1 Bland, Ch. 370, 17 Am. Dec. 311; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38,—on the validity of a deed executed by an illiterate person without having same read to him; *Clifton v. Murray*, 7 Ga. 564, 50 Am. Dec. 411; *Hemphill v. Hemphill*, 13 N. C. 291, (2 Dev. L.) 21 Am. Dec. 331,—on the necessity of reading a will to a blind illiterate testator; *Letourneau v. Carbonneau*, 35 Can. S. C. 110, holding that illiterate person signing mortgage which was not read over to him on request may have same set aside where he was misled; *Owens v. Thomas*, 6 U. C. C. P. 383, holding that it was not a sufficient execution of a chattel mortgage, where an illiterate Indian was induced to sign it, though it was not read to him after he requested it; *Doe ex dem. Chiverie v. Knight*, 1 Has. & W. (Pr. Edw. Isl.) 448, on the right of an illiterate person to have a deed read to him, and his duty to have it read; *National Provincial Bank v. Jackson*, L. R. 33 Ch. Div. 1, 55 L. T. N. S. 458, 34 Week. Rep. 597, holding that where two sisters signed deeds which they knew in some way related to their property, but did not read nor ask to have them read, the deeds were not void but voidable except as against a purchaser for value without notice.

Distinguished in *Dorsheimer v. Rorback*, 23 N. J. Eq. 46, holding that where a party who can not read is sought to be bound by a writing under seal, it must appear that he had it read to him or he knew its contents.

— **Effect of mistake, fraud, or the like.**

Cited in *Leach v. Nichols*, 55 Ill. 273, holding that exercise of due care and diligence and attention on part of signer of negotiable paper, is necessary element in his defense that execution of instrument was obtained by fraud when such defense is set up against innocent assignee before maturity; *Eldorado*

Jewelry Co. v. Darnell, 135 Iowa, 555, 124 Am. St. Rep. 309, 113 N. W. 344, holding that order for purchase of goods, which by reason of defective eyesight purchaser is unable to read, but without negligence signs under belief that same is contract to receive goods to sell on commission, is void; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747, holding that where an old illiterate man signed a receipt in full for all claims, which he declared to be a receipt for the land alone, the receipt was invalid as a receipt in full; *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765, holding that where party signs paper supposing it to be of different nature, without negligence upon his part, no valid contract results as minds of parties have not met; *Schuylkill County v. Copley*, 28 Phila. Leg. Int. 180, 3 Legal Gaz. 59, holding that where an illiterate person was induced to sign a bond as surety upon the representation that it was a petition, such bond was void although the obligee had no notice of the fraud; *Herehmer v. Elliott*, 14 Ont. Rep. 714, holding that where a person was induced to sign an assignment of a mortgage upon a misrepresentation that it was an extension of time which was granted, the assignment was void even as to bona fide holders; *Burrows v. Leavens*, 29 Grant, Ch. U. C. 475, holding that where a married woman, who was illiterate, was induced to join her husband in a mortgage which made them jointly liable, the mortgage was invalid as against her.

Cited in notes in 36 L.R.A.(N.S.) 538, 542, on right, as against subsequent bona fide purchaser, to avoid deed because of deception as to contents or character of paper signed; 13 Eng. Rul. Cas. 489; on effect of insurance slip, where policy varies therefrom by mistake; 6 E. R. C. 228, on effect of fraud inducing execution of contract.

Cited in 1 Mechem, Sales, 249, on effect on contract of sale of mistake as to nature of transaction; Benjamin, Sales, 5th ed. 100, on effect of executing document different from kind contemplated; 1 Devlin, Deeds, 3d ed. 322, on necessity of reading deed.

—By one who could read.

Cited in *Wheeler & W. Mfg. Co. v. Long*, 8 Ill. App. 463; *Gourley v. West Chicago Street R. Co.* 96 Ill. App. 68,—holding that where a person signed an instrument which he did not read, though he could have done so, and it was different from what he supposed it to be, though it was not misrepresented to him, he was bound by it; *Hazard v. Griswold*, 21 Fed. 178, holding same, unless another instrument was substituted for the one he supposed he was signing; *Nebeker v. Cutsinger*, 48 Ind. 436, holding that where one, who can read without difficulty, signs a note without reading it, trusting to the representations of another, he is bound, as to an innocent holder.

Distinguished in *Merchants' Bank v. Moffatt*, 5 Ont. Rep. 122, holding that where the party was well educated, and signed the instrument without reading it and relying upon misrepresentations made by one of his joint obligors more than a month before, he was bound by the instrument.

Validity of deed procured through fraudulent representations.

Cited in *Strand v. Griffith*, 38 C. C. A. 444, 97 Fed. 854, on the validity of an instrument procured through fraudulent representations; *Maxfield v. Schwartz*, 45 Minn. 150, 10 L.R.A. 606, 47 N. W. 448, holding that where a party was induced to sign a writing on the representation that it contained their agreement, and it did not, they could defend against its enforcement, though they lacked prudence in signing it; *Smith v. Ryan*, 191 N. Y. 452, 19 L.R.A.(N.S.) 461, 123 Am. St. Rep. 609, 84 N. E. 402, 14 Ann. Cas. 505, on the right to have a deed declared void for fraud in the procurement of it; *Murray v. Jenkins*, 28 Can. S. C. 565, holding that where the party was induced to authorize her agent to accept an offer for swamp lands, it was not binding, where the offer included

certain other higher land; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Week. Rep. 1105, holding that if a party was induced to indorse a bill of exchange upon a representation that he was signing a guarantee, he was not bound unless he was negligent, even as against a bona fide holder for value.

Distinguished in *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596, holding that a note executed by a married woman under threats of violence by the husband was good in the hands of a bona fide holder.

6 E. R. C. 204, *COUTURIER v. HASTIE*, 5 H. L. Cas. 673, 2 Jur. N. S. 1241, 25 L. J. Exch. N. S. 253, affirming the decision of the Exchequer Chamber, reported in 9 Exch. 102, which reverses the decision of the Court of Exchequer, reported in 8 Exch. 40, 22 L. J. Exch. N. S. 97.

Validity of contract as affected by nonexistence of subject matter.

Cited in *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689, holding that there was no contract of insurance, where the applicant died before the application was received and accepted; *Jacksonville M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Cutts v. Guild*, 57 N. Y. 229,—on the validity of a contract made in contemplation of the existence of the subject-matter at the time of contract, but which in fact did not exist; *Gibson v. Pelkie*, 37 Mich. 380; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249,—holding a contract of no effect where the subject matter was not in existence at the time of contract, though its existence was contemplated by the parties; *Riegel v. American L. Ins. Co.* 153 Pa. 134, 19 L.R.A. 166, 25 Atl. 1070, 31 W. N. C. 533, holding that a contract is void if it relates to a subject-matter contemplated by the parties to be in existence at the time the contract was made, but which was not; *McKenna v. McNamee*, 14 Ont. App. Rep. 339, holding that where the subject-matter of a contract is destroyed by an act of God or vis major, while the contract is still executory, the parties are relieved therefrom.

Cited in notes in 62 L.R.A. 798, on effect of contract to ship goods f. o. b. or "to arrive"; 40 L. ed. (U. S.) 517, on act of God as excuse for nonperformance of obligation; 6 Eng. Rul. Cas. 611, on impossibility as excuse for nonperformance of contract; 22 E. R. C. 901, on right to rescind or reform contract on ground of mistake.

Cited in 1 Page, Contr. 122, on mistake as to existence of subject-matter or consideration of contract.

The decision of the Exchequer Chamber was cited in *Whitman v. Parker*, 18 N. S. 155, holding that partial destruction of vessel which had taken place just prior to sale, did not constitute such total failure of consideration as to form defense to bill given for purchase price; *Peuchen v. Imperial Bank*, 20 Ont. Rep. 325, on the failure of the consideration for a contract, because of the nonexistence of the subject matter; *Jolliffe v. Baker*, L. R. 11 Q. B. Div. 255, 52 L. J. Q. B. N. S. 609, 48 L. T. N. S. 966, 32 Week. Rep. 59, 47 J. P. 678, on the effect of a contract, where the subject matter is not in existence at the time of contracting; *Griffith v. Brymer*, 19 Times L. R. 434, holding that where the parties had contracted in regard to the letting of a room from which to view a procession, not knowing that the procession had been abandoned, the party could recover the amount paid down for the use of the room.

Contract to guarantee the debt of another, under the statute of frauds.

Cited in note in 6 E. R. C. 296, on promise of a del credere agent as original promise and not within statute of frauds.

Cited in 1 Brandt, Suretyship, 3d ed. 174, on promise of del credere agent as not within statute of frauds.

The decision of the Court of Exchequer was cited in *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190, holding that factor acting under del credere commission is liable although agreement is not in writing; *Suman v. Inman*, 6 Mo. App. 384, holding that promise of factor, who sells under del credere commission, agreeing to guarantee sales, rests upon consideration of his duty, growing out of employment, and is not within statute of frauds; *Fullam v. Adams*, 37 Vt. 391, to the point that factor's agreement to guarantee sales, is not within statute of frauds and need not be in writing; *Simpson v. Dolan*, 16 Ont. L. Rep. 459, on a contract to guarantee the debt of another as being in writing under the statute; *Sutton & Co. v. Grey* [1894] 1 Q. B. 285, 63 L. J. Q. B. N. S. 633, 9 Reports, 106, 69 L. T. N. S. 673, 42 Week. Rep. 195, holding that where the parties entered into an oral agreement, whereby the one was to introduce customers to the other, the latter to pay the former one half of the commissions earned, and the former to pay one half the losses to the latter, the agreement was not within the statute of frauds.

— Del credere commission.

The decision of the Court of Exchequer was cited in *Osborne v. Baker*, 34 Minn. 307, 57 Am. Rep. 55, 25 N. W. 606, holding that a del credere commission was an original obligation and not within the statute of frauds; *Fleet v. Murton*, L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97; *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K. B. 778, 71 L. J. K. B. N. S. 529, 86 L. T. N. S. 505, 50 Week. Rep. 449, 18 Times L. R. 428,—on the contract of a del credere agent as being within the statute of frauds.

Powers of a del credere agent as affected by usage of market.

The decision of the Court of Exchequer was cited in *Mollett v. Robinson*, L. R. 7 C. P. 81, on the powers of a del credere agent being affected by the usages and customs of a market.

Effect on title as between consignee and underwriter of a transfer of bill of lading.

Cited in *The John Bellamy*, L. R. 3 Adm. Eccl. 129, 39 L. J. Prob. N. S. 28, 22 L. T. N. S. 244, on the title to goods in transit being affected by a transfer of the bill of lading, as between the underwriter and the transferee.

Cited in *Porter, Bills of L.* 307, on bill of lading as evidence of insurable interest in cargo in prize courts of England.

Risk of loss of goods in transit.

Cited in *Corby v. Williams*, 7 Can. S. C. 470, on the risk of loss in the shipment of goods as falling upon the vendor or vendee.

Effect of mutual mistake as to solvency of third person.

The decision of the Exchequer Chamber was cited in *Bicknell v. Waterman*, 5 R. I. 43, holding that agreement to take note of third person for certain quantity of cotton, is enforceable although at time such third person was insolvent, neither party being aware of fact.

6 E. R. C. 211, *CUNDY v. LINDSAY*, L. R. 3 App. Cas. 459, 14 Cox, C. C. 93, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, affirming the decision of the Court of Appeal, reported in 13 Cox, C. C. 583, 46 L. J. Q. B. N. S. 233, 36 L. T. N. S. 345, L. R. 2 Q. B. Div. 96, 25 Week. Rep. 417, which reverses the decision of the Court of Queen's Bench, reported in 13 Cox, C. C. 162, 45 L. J. Q. B. N. S. 381, 34 L. T. N. S. 314, L. R. 1 Q. B. Div. 348, 24 Week. Rep. 730.

Title acquired by purchase from one having no title.

Cited in *Parish v. Morey*, 40 Mich. 417, holding that a purchaser in good faith from one who is in possession of the chattels without the authority or consent of the owner, acquires no title; *Loeffel v. Pohlman*, 47 Mo. App. 574, holding that where one who by false pretenses is induced to part with the possession of goods without intending to pass title, no sale or transfer of title is affected, and he can give no title; *Hoopes & T. Co. v. Ebel*, 16 Pa. Dist. R. 271, holding that the purchaser from one having no title, got no title, even though he be a bona fide purchaser for value; *Collins v. Ralli*, 20 Hun, 246, holding same as to purchase from a thief; *Ray v. Wilson*, 45 Can. S. C. 401, to the point that note given to agent to be used for special purpose upon happening of specified event, is void in hands of purchaser from agent prior to that time; *Trueman v. Bain*, 25 N. B. 298, holding that a purchaser of personal property acquired no better title than the person selling it, unless the principle of estoppel interfered; *Crossman v. Shears*, 3 Ont. App. Rep. 583, on the title acquired by an innocent purchaser from one having a defective title; *Towers v. Dominion Iron & Metal Co.* 11 Ont. App. Rep. 315, on the title acquired by purchase from one who had no title.

Cited in note in 16 Eng. Rul. Cas. 7, on original owner's right to stolen goods as against purchaser.

Cited in 1 *Meechem, Sales*, 147, on invalidity to convey better title to a chattel than seller has regardless of innocent motives or of valuable consideration; 2 *Cooley, Torts*, 3d ed. 867, on purchaser's duty to ascertain ownership of property bought; *Benjamin, Sales*, 5th ed. 10, on right of owner only to sell property; *Benjamin, Sales*, 5th ed. 30, 59, on validity of sale of goods by one having a voidable title thereto.

Distinguished in *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568, holding that one person purchased chattels for another, advancing the money therefore they retained title until reimbursed, as against one dealing with the second parties in regard to the goods.

— From one having possession fraudulently.

Cited in *Reid v. Sheffy*, 99 Ill. App. 189, holding that an innocent purchaser from one in possession by means of fraud, sufficient to render the sale void acquires no title; *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, holding that an innocent purchaser of personal property from a fraudulent possessor is liable to the owner for conversion; *Ashton v. Allen*, 70 N. J. L. 117, 56 Atl. 165, holding that a purchaser in good faith from one in possession of property through fraud, acquired no title; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519, holding that where one representing himself as the agent of a third party, and procures goods upon the credit of such third party, no title to the goods passes to him; *Jack v. Jack*, 12 Ont. App. Rep. 476, on the title acquired by an innocent third party from one who has procured it by fraudulent pretenses; *Duggan v. London & C. Loan & Agency Co.* 18 Ont. App. Rep. 305, on the title acquired by purchase from a factor who sells in fraud of his principal; *Bush v. Fry*, 15 Ont. Rep. 122, as to whether title passed by reason of the fraudulent pledging of a piano by the plaintiff's agent; *Baillie's Case* [1898] 1 Ch. 110, 67 L. J. Ch. N. S. 81, 77 L. T. N. S. 523, 46 Week. Rep. 187, holding that where the party supposed that he was dealing with one company and in fact was dealing with another, and those with whom he was dealing knew of his belief and did not tell him different but encouraged it, the contract entered into was void ab initio; *Great Western R. Co. v. London & County Bkg. Co.* [1901] A. C. 414, 70 L. J. K. B. N. S. 915, 50 Week. Rep. 50, 85 L. T. N. S. 152, 17 Times L. R. 700, 6 Com. Cas. 275, holding that the bank acquired no title to a cheque marked

non-negotiable, from a person who had fraudulently acquired possession of it, and as he was not a customer of the bank, they were not protected by the negotiable instrument law.

Cited in note in 2 Eng. Rul. Cas. 433, on title of purchaser from one obtaining property from owner by fraud.

Cited in 1 Meechem, Sales, 148, on possession alone as insufficient evidence of title to chattels; 1 Meechem, Sales, 144, on validity of sale by person who obtained goods by trick without a sale.

Distinguished in *Troop v. Everett*, 32 N. B. 147, holding that representations were not such as to prevent the passing of title to the property to bona fide purchasers from the one making the representations; *Ex parte Barnett*, L. R. 3 Ch. Div. 123, 45 L. J. Bankr. N. S. 120, 34 L. T. N. S. 664, 24 Week. Rep. 904, holding that where a bankrupt engaged in trade before his discharge in bankruptcy, and ordered goods, which were sent by the wholesale house, believing they were dealing with another firm, the insolvent got no title which his trustee could claim.

— By sale in market overt.

Cited in *Moyce v. Newington*, L. R. 4 Q. B. Div. 32, 48 L. J. Q. B. N. S. 125, 39 L. T. N. S. 535, 27 Week. Rep. 319, holding that where a party obtained possession of some sheep through fraudulent representations, and sold them to another the latter got good title to them as against the real owner, if he did not have knowledge of the fraud; *Bentley v. Vilmont*, L. R. 12 App. Cas. 471, 57 L. J. Q. B. N. S. 18, 57 L. T. N. S. 854, 36 Week. Rep. 481 (affirming L. R. 18 Q. B. Div. 322), holding that where parties obtained a voluntary contract of sale of goods by fraudulent representations, and sold them in market overt, the owner could recover them from the innocent purchasers, after a conviction of the former for fraud in obtaining the goods; *Henderson & Co. v. Williams* [1895] 1 Q. B. 521, 64 L. J. Q. B. N. S. 308, 72 L. T. N. S. 98, 43 Week. Rep. 274, 11 Eng. Rul. Cas. 105, on the sale in market overt by one having no title as giving vendee a good title as against true owner.

— Implied warranty of title.

Cited in *Turriff v. McHugh*, 1 Terr. L. Rep. 186, holding that where there is a known defect in the vendor's title, there is no implied warranty of title to the vendee.

What constitutes conversion.

Cited in *Harlan v. Brown*, 4 Ind. App. 319, 30 N. E. 928, holding that where a party obtained a promissory note from one who was intoxicated, and transferred it to a third, the latter in dealing with it was guilty of conversion; *Moore v. Hill*, 38 Fed. 330 (dissenting opinion); *Troop v. Everett*, 32 N. B. 147,—on what constitutes conversion.

The decision of the Court of Appeal was cited in *McDougall v. Peterson*, 40 U. C. Q. B. 95, holding that by retaining two promissory notes which came into his possession as clerk of the peace, the defendant did not convert them where he thought that it was his duty to retain them; *Drifill v. McFall*, 41 U. C. Q. B. 313, on what constitutes conversion.

Right of one selling or contracting to know with whom he is dealing.

Cited in *Roof v. Morrison*, 37 Ill. App. 372, holding that where one attempts to make himself the purchaser against the will and understanding of the seller, title does not pass; *Brighton Packing Co. v. Butchers' Slaughtering & Melting Asso.* 211 Mass. 398, 97 N. E. 780, holding that agreement made with corporation, party believing and having reason to believe that agreement was being made with

another corporation of same name, is void as minds of parties never met; *Fifer v. Clearfield & C. Coal & Coke Co.* 103 Md. 1, 62 Atl. 1122, holding that where the defendant was mistaken as to the identity of the person with whom it was dealing, it could repudiate its agreement; *Consumers Ice Co. v. E. Webster Son & Co.* 79 App. Div. 350, 79 N. Y. Supp. 385, on the right of the vendor to know with whom he is dealing in an executory contract for sale of chattels; *Mercantile Nat. Bank v. Silverman*, 148 App. Div. 1, 132 N. Y. Supp. 1017, to the point that no title passes on sale of goods by correspondence to one impersonating another on whose credit vendor intends to sell; *Smith v. Commercial Bkg. Co.* 11 C. L. R. (Austr.) 667, holding that promise to accept draft can only be enforced where bank making it was not mistaken as to identity of person to whom promise was made; *Laidlaw v. Vaughan-Rhys*, 44 Can. S. C. 458, 21 Ann. Cas. 948, to the point that where purchaser of chattels procures delivery by fraud, in deceiving owner as to purchaser's identity, no title passes.

Cited in note in 13 L.R.A.(N.S.) 415, 416, on seller's mistake as to identity of vendee as affecting passing of title.

Cited in 1 *Mechem, Sales*, 254, on invalidity of sale to assumed agent who has no authority to purchase; *Benjamin, Sales*, 5th ed. 98, on title passing where offer or acceptance is addressed to one present in person although a mistake as to his identity is made; *Hollingsworth, Contr.* 151, on effect of mistake as to person of other party to contract on its validity; *Benjamin, Sales*, 5th ed. 93, on passing of title to goods sent to one ordering in name of another person; *Benjamin, Sales*, 5th ed. 92, on personal communication of acceptance of offer; 1 *Page, Contr.* 125, on mistake as to identity of adverse party; 1 *Page, Contr.* 111, on misrepresentations as to identity of adverse party fraud as to an essential element of a contract.

Which of two innocent persons must suffer.

Cited in *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394, 48 L. J. Q. B. N. S. 524, 27 *Week. Rep.* 886, holding that where of two innocent persons one must suffer, the one who has made the injury possible should be the one; *Farquharson Bros. & Co. v. King & Co.* [1902] A. C. 325, 71 L. J. K. B. N. S. 667, 51 *Week. Rep.* 94, 86 L. T. N. S. 810, 18 *Times L. R.* 665, as to which of two innocent persons should suffer.

The decision of The Court of Queen's Bench was cited in *Samuel v. Cheney*, 135 *Mass.* 278, 46 *Am. Rep.* 467, on question whether title to goods passes to person who represents himself as another, so that bona fide purchaser could hold them against owner.

Mutual assent in contract of sale.

Cited in *Woods v. Ayres*, 39 *Mich.* 345, 33 *Am. Rep.* 396, on the necessity of consent of the party to constitute contract of sale.

Rights of owner in property stolen or fraudulently obtained.

Cited in *Benjamin, Sales*, 5th ed. 21, on restoration of stolen property to owner where his title has never been divested; *Benjamin, Sales*, 5th ed. 22, on reversion of property in owner on conviction of offender; *Benjamin, Sales*, 5th ed. 458, on effect of fraud on seller in passing of property; *Benjamin, Sales*, 5th ed. 462, 463, on fraud of purchaser nullifying seller's assent to contract.

Rescission or reformation of contract.

Cited in note in 22 *E. R. C.* 866, 901, on right to rescind or reform contract on ground of mistake.

6 E. R. C. 231, *WAIN v. WARLTERS*, 5 East, 10, 7 Revised Rep. 645, 1 Smith, 299.

Sufficiency of memorandum to satisfy statute of frauds.

Cited in *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, holding that where memorandum is signed by one party only, the other party must be sufficiently described to be identified without parol evidence; *Davis v. Shields*, 26 Wend. 341; *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376,—holding that memorandum under statute of frauds must be signed at the end thereof where statute requires it to be “subscribed;” *Turner v. Lorillard Co.* 100 Ga. 645, 62 Am. St. Rep. 345, 28 S. E. 383, holding that memorandum of the purchase of goods for “fifty dollars or more” must designate the price where it appears that the parties intended to contract specifically as to price; *Fall v. Hazlerigg*, 45 Ind. 576, 15 Am. Rep. 278, holding that the fifth section of the statute applies only to contracts which do not by their terms admit of performance within a year; *Getchell v. Jewett*, 4 Me. 350, on mutuality as not being necessary, it being sufficient if signed by the party to be changed; *McWilliams v. Lawless*, 15 Neb. 131, 17 N. W. 349, holding that where agent is authorized to make land contracts in his own name, memorandum signed in name of such agent by one duly authorized is sufficient.

Cited in note in 25 E. R. C. 463, on sufficiency of memorandum to satisfy statute of frauds.

Cited in *Benjamin*, Sales, 5th ed. 247, on what note or memorandum required by statute of frauds must contain.

Distinguished in *Bank of British North America v. Simpson*, 24 U. C. C. P. 354, holding that agreement containing names of the parties, the subject matter, the promise and consideration is binding on the party signing it though not signed by the other party.

— Meaning of “agreement” or promise.

Cited in *Emery v. Smith*, 46 N. H. 151, holding that “agreement” includes what is to be done by both contracting parties; *Jones v. Watkins*, 1 Stew. (Ala.) 81, on agreement as including both promise and consideration; *Marey v. Marey*, 9 Allens, 8; *Broadwell v. Getman*, 2 Denio, 87; *Andrews v. Pontne*, 24 Wend. 285; *Cunnard v. Plummer*, 4 N. B. 418,—on “agreement” in statute as meaning a mutual contract upon consideration, between two or more parties; *Greenham v. Watt*, 25 U. C. Q. B. 365, on meaning of “agreement” in statute of frauds.

— Sufficiency of memorandum of promise to answer for the debt of another.

Cited in *Hodgkins v. Bond*, 1 N. H. 284; *Emerick v. Sanders*, 1 Wis. 77,—holding that promise must be in writing and based upon a good consideration; *Johnson v. Brooks*, 14 Jones & S. 13, holding that agent using his own name in written contract to purchase stock, is bound to deliver to principal, and statute of frauds does not avoid transaction; *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714, Ann. Cas. 1913B, 982, holding that negotiable note, made by third person and given to creditor as payment of debt due by another is sufficient compliance with statute of frauds.

Disapproved in *Griffin & Co. v. Rembert*, 2 S. C. 410, holding that the name of the party to whom promise is given need not appear in the memorandum.

— For sale of land.

Cited in *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47, holding that memorandum of contract for the sale of land must show who are the parties there-

to; *Wright v. Weeks*, 25 N. Y. 153, holding contract for sale of land void where the terms were not specified in the writing.

— **Expression of consideration in writing itself.**

Referred to as leading case in *Manrow v. Durham*, 3 Hill, 584 (dissenting opinion), on necessity that consideration appear in writing.

Cited in *Watson v. Dunlap*, 2 Cranch, C. C. 14, Fed. Cas. No. 17,282, on necessity of consideration where promise is in writing; *Rigby v. Norwood*, 34 Ala. 129; *Henderson v. Johnson*, 6 Ga. 390; *Hargroves v. Cooke*, 15 Ga. 321; *Taylor v. Pratt*, 3 Wis. 674; *Evans v. Robinson*, 16 U. C. Q. B. 169,—holding that the writing must show the consideration as well as the promise itself; *Harwood v. Johnson*, 20 Ill. 367; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Lecat v. Tavel*, 3 McCord. L. 158; *How v. Kemball*, 2 McLean, 103, Fed. Cas. No. 6,748; *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233; *Lerow v. Clark*, 9 U. C. Q. B. 219,—on same point; *Perrin v. Bingham*, 12 U. C. C. P. 206, holding same and that consideration cannot be supplied by parol; *Bennett v. Pratt*, 4 Denio, 275; *Packer v. Willson*, 15 Wend. 343,—holding that the consideration must be expressed in terms under statute so providing and cannot be implied; *Emerson v. C. Aultman & Co.* 69 Md. 125, 14 Atl. 671; *Douglass v. Howland*, 24 Wend. 35; *Osborne v. Baker*, 34 Minn. 307, 57 Am. Rep. 55, 25 N. W. 606,—holding that “for value received” sufficiently expresses the consideration; *Neelson v. Sanborne*, 2 N. H. 413, 9 Am. Dec. 108, holding that forbearance to sue implied from the terms of a guaranty of payment of a note is sufficient as consideration; *Schneider v. Turner*, 27 Ill. App. 220, holding that word “agree” in contract imports consideration, and it is competent to show by parol evidence want of consideration; *Childs v. Barnum*, 11 Barb. 14, holding writing under seal expressing the consideration as “one dollar” sufficient though the dollar was not, in fact, paid; *Rogers v. Kneeland*, 10 Wend. 218, holding that consideration implied or inferred from terms of instrument is as effectual as if expressly appearing on its face; *Union Bank v. Coster*, 1 Sandf. 563, holding letter of credit and guaranty sufficient where a valid consideration can be gathered from the whole writing; *Simons v. Steele*, 36 N. H. 73, holding it sufficient if consideration can be implied from the writing; *O’Bannon v. Chumascero*, 3 Mont. 419; *Laing v. Lee*, 20 N. J. L. 337; *Rogers v. Kneeland*, 13 Wend. 114 (affirming 10 Wend. 218),—holding writing sufficient where the consideration must be necessarily implied from its terms; *Brumm v. Gilbert*, 27 Misc. 421, 59 N. Y. Supp. 237; *Staats v. Howlett*, 4 Denio, 559; *D’Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227,—holding that consideration must appear either in express terms or by necessary implication; *Taylor v. Fleckenstein*, 30 Fed. 99, holding same, but that the discharge of a person from arrest in a civil action is sufficient consideration; *Neville v. Joseph*, 1 N. B. 345, holding that the writing must express the consideration, but that forbearance to sue is sufficient; *Hall v. Farmer*, 5 Denio, 484, holding that guaranty of payment endorsed on a promissory note must express the consideration on which it is made; *Lines v. Smith*, 4 Fla. 47, holding that the debt of another is sufficient consideration for a promise to pay which contains the words “value received” as expressing the consideration; *Brown v. Curtiss*, 2 N. Y. 225; *Durham v. Manrow*, 2 N. Y. 533 (dissenting opinion),—on necessity of expressing the consideration in guaranteeing the payment of a note; *Phillips v. Adams*, 70 Ala. 373; *Underwood v. Campbell*, 14 N. H. 393; *Chellis v. Grimes*, 72 N. H. 337, 56 Atl. 742; *Sears v. Brink*, 3 Johns. 210, 3 Am. Dec. 475,—holding that memorandum of contract for the sale of land must express the consideration; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Soles*

v. Hickman, 20 Pa. 180,—holding that memorandum of sale of land must contain the price and terms of sale; *Seymour v. Warren*, 59 App. Div. 120, 69 N. Y. Supp. 236, holding that consideration must appear in terms or by implication in memorandum of lease for more than one year; *Ogden v. Ogden*, 1 Bland, Ch. 284, holding that consideration must be expressed in agreement to give marriage portion; *Peck v. Vandermark*, 33 Hun, 214, holding agreement in consideration of marriage valid, where its terms including consideration, could be gathered from letters of the party bound; *Simons v. Steele*, 36 N. H. 73, holding that guaranty of debt of third person is within statute of frauds, so as to require consideration to appear on face of instrument, and it is sufficient if such consideration may be fairly implied from terms of guaranty itself; *Drake v. Seaman*, 97 N. Y. 230, on necessity of expressing the consideration in memorandum of agreement not to be performed within a year; *Sheehy v. Adarene*, 41 Vt. 548, note; *Neilson's Estate*, 17 W. N. C. 326,—holding that consideration of promise to pay debt of another need not appear on face of writing.

Cited in note in 6 Eng. Rul. Cas. 691, on necessity of completeness and certainty of contract to entitle to specific performance.

Cited in *Browne Stat. Frauds*, 5th ed. 524; *Hollingsworth Contr.* 119, 120; 2 *Page Contr.* 1061, 1062; 1 *Beach Contr.* 682, 683,—as to whether memorandum required by statute of frauds must show the consideration; *Browne Stat. Frauds*, 5th ed. 242, on necessity for separate and special consideration for written guarantee.

Distinguished in *Baker v. Herndon*, 17 Ga. 568, holding that writing need not express the consideration where statute provides that it need not be expressed; *Jones v. Palmer*, 1 Dougl. (Mich.) 379, holding that consideration need not be expressed in guaranty which is not within the statute; *Thompson v. Hall*, 16 Ala. 204; *Taylor v. Ross*, 3 Yerg. 330,—holding that where the word "promise" is used in the statute, the consideration need not be expressed; *Britton v. Angier*, 48 N. H. 420, holding that consideration need not be expressed where statute uses words "promise or agreement;" *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317, holding that where a third party wrote a guaranty of a note upon it as part of the transaction in which the note was given, the guaranty was valid though it expressed no consideration; *Wait v. Wait*, 28 Vt. 350, holding that parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands is not within the statute; *Hoofstetter v. Rooker*, 22 Ont. App. Rep. 175, holding that debtor's agreement with his creditor to give additional security for forbearance in enforcing existing mortgage need express no other consideration.

Disapproved in *Sage v. Wilcox*, 6 Conn. 81; *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123; *Speyer v. Lambert*, 6 Abb. Pr. N. S. 309, 37 How. Pr. 315, 1 Sweeny, 335; *Woodward v. Pickett*, Dud. L. 30; *Fyler v. Givens*, Riley, L. 656, 3 Hill, 48; *Briant v. Tomlinson*, 3 Hill, L. 50; *Ellett v. Britton*, 10 Tex. 208; *Smith v. Ide*, 3 Vt. 290; *Shively v. Black*, 45 Pa. 345, 20 Phila. Leg. Int. 252; *Gregory, T. & Co. v. Gleed*, 33 Vt. 405,—holding that the consideration for the promise need not appear in the writing; *Bayard's Estate*, 21 Pa. Co. Ct. 49, 7 Pa. Dist. R. 279; *Neilson's Estate*, 18 Phila. 47, 43 Phila. Leg. Int. 119; *Houghton v. Ely*, 26 Wis. 181, 7 Am. Rep. 52,—on same point; *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683; *Bean v. Valle*, 2 Mo. 126; *Ivory v. Murphy*, 36 Mo. 534; *Miller v. Irvine*, 18 N. C. (1 Dev. & B. L.) 103,—holding that

consideration for contract for sale of land need not be expressed in the memorandum; *Marie v. Garrison*, 13 Abb. N. C. 210, on same point; *Whitby v. Whitby*, 4 Sneed, 473, holding that the consideration for a bond for the conveyance of land need not be expressed in the writing.

Construction generally, and purpose of statute of frauds.

Cited in *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67, on requirement of statute that certain agreements must be in writing and signed; *Schneider v. Turner*, 130 Ill. 287, 6 L.R.A. 164, 22 N. E. 497 (affirming 27 Ill. App. 220), on memorandum signed by one party only but delivered to and accepted by the other, as being a contract; *Leddon v. Rosenbaum*, 85 Va. 928, 3 L.R.A. 337, 9 S. E. 326, on the vast number of decisions upon the construction of the statute of frauds; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623, holding that verbal contract to be performed by one party within a year, may be enforced against him though he cannot enforce it against the other party who was not to perform within the year; *Walker v. Boulton*, 3 U. C. Q. B. O. S. 252, on entire writing being considered in deciding sufficiency under statute.

Cited in 1 Beach Contr. 590, on origin and purpose of statute of frauds.

Sufficiency of consideration for promise to pay another's debt.

Cited in *Morse v. Massachusetts Nat. Bank*, Holmes, 209, Fed. Cas. No. 9,857, on necessity of new consideration to sustain promise to pay the debt of another; *Sunol School Dist. v. Chipman*, 139 Cal. 251, 71 Pac. 340, holding that no consideration is necessary as between payee of note and surety where contract of suretyship is contemporaneous with contract between payee and principal; *Kerr v. Lucas*, 1 Allen, 279, holding release of right, title and interest to be sufficient consideration for a promise to pay, though the release was in fact of no value; *Watriss v. Pierce*, 32 N. H. 560, on sufficiency of consideration for a guaranty as a collateral undertaking; *Gray v. Whitman*, 3 N. S. 157, holding parol evidence of the consideration for a note inadmissible where it was given in part payment under a parol contract for the sale of land; *Strong v. Bent*, 31 N. S. 1, holding parol evidence inadmissible to supplement the writing.

Construing several writings relating to same transaction together.

Cited in *Brickell v. Batchelder*, 62 Cal. 623, holding that several contracts relating to same subject matter, and made substantially as part of one transaction, must be construed together; *Noell v. Gaines*, 68 Mo. 649 (dissenting opinion), on construction of several writings relating to same subject matter executed at same time between same parties.

Effect of verbal extension of time for arbitrators to make award.

Cited in *Hull v. Alway*, 4 U. C. Q. B. O. S. 375, holding that where verbal extension of term for arbitrators to make award under written submission is made such verbal extension amounts to a parol submission, authorizing maintenance of assumpsit on award made.

Weight of Plowden's reports.

Cited in *Atty.-Gen. v. McLachlin*, 5 Ont. Pr. Rep. 63, on the weight of Plowden's Reports as authority.

Recovery by indorsees of bill or note.

Cited in *Gardiner v. Jones*, 6 N. C. (2 Murph.) 429, to the point that what is reasonable notice to indorser, is question compounded of law and fact.

6 E. R. C. 239, *LAYTHOARP v. BRYANT*, 2 Bing. N. C. 735, 2 Hodges, 25, 5 L. J. C. P. N. S. 217, 3 Scott, 238.

Statute of frauds—Sufficiency of memorandum of sale of land.

Cited in *Farwell v. Lowther*, 18 Ill. 252; *Shirley v. Shirley*, 7 Blackf. 452; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; *Dennis Simmons Lumber Co. v. Corey*, 140 N. C. 462, 6 L.R.A.(N.S.) 468, 53 S. E. 300; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500; *Wily v. Pearson*, 2 Woodw. Dec. 424,—on memorandum under statute being required rather as evidence than as essential parts of the contract itself; *Charlton v. Columbia Real Estate Co.* 67 N. J. Eq. 629, 69 L.R.A. 394, 110 Am. St. Rep. 495, 60 Atl. 192, 3 Ann. Cas. 402, holding that if previously signed memorandum of agreement for lease, and signed but undelivered lease taken together, show completed agreement upon terms of lease, statute of frauds is satisfied; *Maybury v. O'Brien*, 25 Ont. L. Rep. 229, holding that memorandum in writing may be sufficient to satisfy statute of frauds, although it does not disclose name of real vendor, if it discloses name of agent who has authority to bind vendor; *Smith v. Mitchell*, 3 B. C. 450, holding that letters which together show all requisites of contract are sufficient to satisfy statute of frauds; *Taylor v. Reid*, 13 Ont. L. Rep. 205, on history and evolution of doctrines under the statute of frauds; *Brunskill v. Metcalf*, 3 U. C. C. P. 143, on necessity that agreement under statute of frauds, be in writing, where it is desired to substitute for earlier agreement required to be in writing.

Cited in notes in 6 E. R. C. 254, on requisites of memorandum required by statute of frauds; 6 E. R. C. 691, on necessity of completeness and certainty of contract to entitle to specific performance.

Cited in *Thornton Oil & Gas*, 314, on sufficiency of writing in contract for lease; *Browne Stat. Frauds*, 5th ed. 470, on memorandum required by statute of frauds being contained in more than one paper; *Browne Stat. Frauds*, 5th ed. 509, on necessity that memorandum show who are parties to the contract by reference sufficient to identify them.

Distinguished in *Fox v. Easter*, 10 Okla. 527, 62 Pac. 283, holding memorandum insufficient unless it shows the entire contract on its face or by reference.

—Sufficiency of memorandum of sale of goods.

Cited in *Smith v. Smith*, 8 Blackf. 208; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576,—holding agreement to deliver goods at a specified price valid and binding though signed by vendor alone; *Swope v. Forney*, 17 Ind. 385, on same point.

Cited in *Benjamin, Sales*, 5th ed. 248, on what note or memorandum required by statute of frauds must contain; *Benjamin, Sales*, 5th ed. 245, on necessity for consistency that papers constitute memorandum within statute of frauds.

—Signatures.

Cited in *Marqueze v. Caldwell*, 48 Miss. 23; *Fenly v. Stewart*, 5 Sandf. 101; *Mizell v. Burnett*, 49 N. C. (4 Jones, L.) 249, 69 Am. Dec. 744; *Creigh v. Boggs*, 19 W. Va. 240; *Bank of British N. A. v. Simpson*, 24 U. C. C. P. 354; *Crutehfield v. Donathon*, 49 Tex. 691, 30 Am. Rep. 112,—holding that memorandum of contract for the sale of land need not be signed by both parties thereto, but only by the party to be bound; *Barickman v. Kuykendall*, 6 Blackf. 21; *McDermott v. Palmer*, 11 Barb. 9; *More v. Smedburgh*, 8 Paige, 600,—on same point; *McLean v. Arnold*, 6 Grant, Ch. (U. C.) 242; *Pope v. Pictore S. B. Co.* 6 N. S. 18; *Dominion Bank v. Knowlton*, 25 Grant, Ch. (U. C.) 125,—to the point that under statute of frauds it is only necessary that party to be charged

sign memorandum in writing; *Brumfield v. Carson*, 33 Ind. 94, 5 Am. Rep. 184, holding that agreement concerning sale of land cannot be enforced against the party not signing it; *Love v. Atkinson*, 131 N. C. 544, 42 S. E. 966, holding that vendor who signs contract for sale of land cannot enforce payment of purchase money by vendee if he has not signed contract, though part purchase price has been paid and vendee put in possession.

Cited in note in 28 L.R.A.(N.S.) 694, as to who must sign memorandum of executory sale contract within statute of frauds.

Cited in *Benjamin, Sales*, 5th ed. 269, on validity or invalidity of contract at election of party who has not signed same; 1 *Brandt, Suretyship*, 3d ed. 209; *Browne Stat. Frauds*, 5th ed. 495, on necessity that only party to be charged sign memorandum required by statute of frauds; *Pomeroy Spec. Perf.* 2d ed. 109, by what parties memorandum required by statute of frauds is to be signed.

Distinguished in *Groover v. Warfield*, 50 Ga. 644, holding contract for the sale of goods not enforceable against the party not signing the memorandum.

— Construction generally of statutes.

Cited in *Crane v. Gough*, 4 Md. 316, holding that agreement in consideration of marriage where fulfilled and executed is valid though not in writing; *Fenson v. Shore*, 6 D. L. R. 376, holding that statute of frauds, 4th section does not affect validity of verbal contract but only remedy upon such contract.

What constitutes a consideration.

Cited in *Bank of British N. A. v. McComb*, 21 Manitoba L. Rep. 58, holding that where note has been given in respect of indebtedness incurred, that indebtedness will not furnish consideration for another simple contract made during currency of note; *Stack v. Dowd*, 15 Ont. L. Rep. 331, on definition of "consideration;" *Pattle v. Simpson*, Rap. Jud. Quebec 14 B. R. 178 (dissenting opinion), on presumption of consideration in case of offer of sale and acceptance.

Necessity that agreement for sale of land be in writing.

Cited in *Rice v. Carter*, 33 N. C. (11 Fred. L.) 298, holding that verbal promise to pay debt of vendor of land to third person must be reduced to writing in order to make valid contract for sale of land; *Brown v. Hobbs*, 154 N. C. 544, 70 S. E. 906, holding that parol executory agreement to convey lands is not enforceable by vendor under statute of frauds.

Cited in note in 15 E. R. C. 357, on validity of oral lease.

6 E. R. C. 256, *CATON v. CATON*, 36 L. J. Ch. N. S. 886, L. R. 2 H. L. 127, 16 Week. Rep. 1, affirming the decision of the Lord Chancellor, reported in 12 Jur. N. S. 171, 35 L. J. Ch. N. S. 292, L. R. 1 Ch. 137. 14 L. T. N. S. 34, 14 Week. Rep. 267, which reverses the decision of the Vice Chancellor, reported in 34 L. J. Ch. N. S. 564.

Statute of frauds, signature to memorandum.

Cited in *Borland v. Coote*, 10 B. C. 493, holding that memorandum of sale of land signed by party to be charged is enforceable although certain blanks were authorized to be filled in after signature was attached; *Coote v. Borland*, 35 Can. S. C. 282, holding signature to receipt as also authenticating words following the name signed were placed there at the same time; *Re Miller*, 1 Sask. L. R. 91, holding that signature inserted in such manner as to govern whole instrument is sufficient signature; *Campbell v. Denniston*, 23 U. C. C. P. 339, holding that agreement to purchase land signed by purchaser and letter by the

vendor stating that he had made the sale, together make the memorandum sufficiently signed to be binding on both; *Kronheim v. Johnson*, L. R. 7 Ch. Div. 60, 47 L. J. Ch. N. S. 132, 37 L. T. N. S. 751, 26 Week. Rep. 142, holding writing not sufficiently signed by signature to letter, where it was marked "supplement" and enclosed with the letter but was unsigned and did not sufficiently refer to the letter so as to be identified with it.

Cited in 1 *Beach Contr.* 688, on necessity for signature to contract required by statute of frauds; *Pomeroy Spec. Perf.* 2d ed. 106, as to when memorandum required by statute of frauds should be executed; 1 *Underhill Land. & T.* 388, on necessity and sufficiency of signing of instrument to satisfy statute of frauds.

—Nuptial agreements.

Cited in *Viret v. Viret*, 50 L. J. Ch. N. S. 69, L. R. 17 Ch. Div. 365, note, 43 L. T. N. S. 493, holding that agreement for marriage settlement must be in writing and signed by the party to be charged.

The decision of the Lord Chancellor was cited in *Cowdrey v. Cowdrey*, 71 N. J. Eq. 353, 64 Atl. 98, holding that unsealed writing by husband to wife, reciting that he gave his wife certain house and lot, writing being executed in pursuance of antenuptial oral promise, is sufficient to authorize recovery of property by widow in suit in equity.

—Name in body of writing.

Cited in *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164, holding that the name of a party in a writing prepared by himself is not a sufficient signature where not placed there for that purpose; *Hazard v. Day*, 14 Allen, 87, 92 Am. Dec. 790, holding that written contract containing name of party at beginning but drawn up as a form is not sufficiently signed; *McCarthy v. Cooper*, 12 Ont. App. Rep. 284, holding memorandum of sale of land sufficiently signed by vendor whose name appeared therein where he made affidavit of its execution for the purpose of registration; *Fielding v. Mott*, 18 N. S. 339, holding that in signing lease it is not incumbent upon commissioner of mines to attach to his signature his title of office if capacity in which he signs appears from body of instrument; *Campbell v. Dennistoun*, 23 U. C. C. P. 339, holding that defendant's name need not be at foot or end of writing upon which action is based; *Dyas v. Stafford, Jr.* L. R. 7 Eq. 590, holding that name of party inserted in the body of the instrument by the party or his authorized agent is sufficient.

Distinguished in *Re Booth*, 127 N. Y. 109, 12 L.R.A. 452, 24 Am. St. Rep. 429, 27 N. E. 826, holding that name in the body of an instrument is not a signature thereto in the absence of evidence showing that it was so intended.

—Part performance.

Cited in *Bennett v. Dyer*, 89 Me. 17, 35 Atl. 1004, holding that part performance must be made by party seeking to enforce the contract.

Cited in notes in 6 E. R. C. 745, on right to specific performance of oral contract for land in case of part performance; 14 L.R.A. 863, on will as part performance.

Cited in *Pomeroy Spec. Perf.* 2d ed. 158, on particular acts which do not amount to sufficient part performance of contract within statute of frauds; 1 *Devlin Deeds*, 3d ed. 213, on necessity of part performance of verbal contract to convey realty being done by party seeking enforcement; 1 *Devlin Deeds*, 3d ed. 212, on possession of realty as ground for enforcement of parol agreement of purchase; *Pomeroy Spec. Perf.* 2d ed. 145, 148, 149, on fraud as prin-

eipal foundation for specific performance of partly performed contract within statute of frauds.

Distinguished in *Coles v. Pilkington*, L. R. 19 Eq. 174, 44 L. J. Ch. N. S. 381, 31 L. T. N. S. 423, 23 Week. Rep. 41, holding change of possession, affecting the mode of living of the party, sufficient part performance of verbal contract for sale of land to take it out of the statute.

The decision of the Lord Chancellor, cited in *Wallace v. Rappleye*, 103 Ill. 229, holding that part performance to take agreement out of the statute must be such as would render it an injury to him amounting to fraud, if it is not enforced; *McKinley v. Hessen*, 135 App. Div. 832, 120 N. Y. Supp. 257; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418,—holding that the part performance must be by the party seeking to enforce the contract; *McManus v. Cooke*, L. R. 35 Ch. Div. 681, 56 L. J. Ch. N. S. 662, 56 L. T. N. S. 900, 35 Week. Rep. 754, 51 J. P. 708, holding verbal agreement for an easement enforceable where there has been part performance; *Dickinson v. Barrow* [1904] 2 Ch. 339, 73 L. J. Ch. N. S. 701, 91 L. T. N. S. 161, holding verbal contract for purchase of land enforceable on ground of part performance where vendor was, as part of the contract, to build a house thereon, and vendee visited it frequently during the building, and made suggestions as to alterations and improvements; *Whittaker v. Welch*, 15 N. B. 436; *Fairweather v. Lloyd*, 36 N. B. 548, on part performance as taking oral agreement out of the statute.

—**Marriage as part performance of agreement on such consideration.**

Cited in *Hunt v. Hunt*, 171 N. Y. 396, 59 L.R.A. 306, 64 N. E. 159, holding that marriage is not such part performance as to take a contract made in consideration thereof out of the statute; *Deshon v. Wood*, 148 Mass. 132, 1 L.R.A. 518, 19 N. E. 1, on voluntary performance of oral agreement in consideration of marriage as being void as against creditors.

Distinguished in *Williams v. Williams*, 37 L. J. Ch. N. S. 854, 18 L. T. N. S. 785, holding verbal promise to make marriage settlement valid and binding where marriage took place in reliance thereon.

The decision of the Lord Chancellor was cited in *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810, holding marriage not to be sufficient performance to take oral antenuptial contract out of the statute; *Russell v. Russell*, 60 N. J. Eq. 282, 47 Atl. 37, holding that marriage is not such part performance as will take a contract in consideration of marriage out of the statute; *Davidson v. McGuire*, 27 Grant. Ch. (U. C.) 483, holding part performance of oral contract in consideration of marriage sufficient to make it binding on the party to be charged where such performance is by the other party; *Strahan v. Graham*, 16 L. T. N. S. 87, 15 Week. Rep. 487, on marriage as not being part performance of contract to make marriage settlement though entered into in reliance thereon.

Agreement to execute will.

Cited in *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573, holding that oral agreement to leave real property to a person by will in consideration of a similar promise by him, is a contract for the sale of land and is within the statute of frauds; *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148, holding that memorandum of contract to give property by will must show a promise and not only a declaration of intention; *White v. Bigelow*, 154 Mass. 593, 28 N. E. 904, on same point; *Alderson v. Maddison*, L. R. 5 Exch. Div. 293, 49 L. J. Exch. N. S. 801, 43 L. T. N. S. 349, 29 Week. Rep. 105, holding verbal promise to make a will in favor of a person in consideration of his services, enforceable where the services had been fully performed.

Cited in 1 Devlin Deeds, 3d ed. 81, on promise to make will of realty as contract for conveyance of lands.

The decision of the Lord Chancellor was cited in Cawley's Appeal, 6 Pa. Co. Ct. 550, on binding effect of contract to execute a will, where based on good consideration: *Gilpin v. Scovil*, 12 N. B. 379, on representations by father to provide for daughters in his will in consideration of the transfer of property to him, as an irrevocable contract.

Misdescription of property.

Cited in *Coote v. Borland*, 35 Can. S. C. 282, holding that mere discrepancy in description of city lots in contract for sale will be disregarded where property may be conveniently identified.

Duty or right to set up statute of frauds as defence.

Cited in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, on estoppel to set up statute as defense where the other party has been induced to act upon the agreement.

The decision of the Vice Chancellor cited in *Re Garratt*, 18 Week. Rep. 684, holding administrator not bound to set up the statute of frauds in respect to payment of marriage portion promised by deceased upon the marriage of his daughter.

Costs.

Cited in *Bishop of Columbia v. Cridge*, 1 B. C. pt. 1, p. 5, on right of court to grant costs where parties in action in equity acted in good faith but contrary to law: *Hately v. Merchants' Despatch Transp. Co.* 12 Ont. App. Rep. 201e, on costs in cases of hardship to a party.

The decision of the Lord Chancellor was cited in *Gilpin v. Scovil*, 12 N. B. 379; *Jardine v. McWilliams*, 12 N. B. 589,—holding that where plaintiff's bill was dismissed in consequence of usury, court on appeal refused to interfere with judgment for costs granted in court below.

Waiver of performance of agreement within statute of frauds.

Cited in *Pomeroy Spec. Perf.* 2d ed. 100, on non-enforceability of agreement within Statute of Frauds where agreement is waived and abandoned with the consent of the parties.

6 E. R. C. 272. *JONES v. VICTORIA GRAVING DOCK CO.* L. R. 2 Q. B. Div. 314, 46 L. J. Q. B. N. S. 219, 36 L. T. N. S. 144, 25 Week. Rep. 348, appeal dismissed in 36 L. T. N. S. 347, L. R. 2 Q. B. Div. 325, 25 Week. Rep. 501.

Statute of frauds, sufficiency of signature to memorandum.

Cited in *McMeekin v. Furray*, 13 B. C. 20, on position of a signature as not affecting its sufficiency; *Farquhar v. Billman*, 40 N. S. 289, holding that memorandum is "signed" within statute of frauds, if only surname of purchaser is written on it by auctioneer; *Stammers v. O'Donohoe*, 28 Grant, Ch. (U. C.) 207, holding that written and signed admission that agreement was made is as effective as signing the agreement itself.

Cited in 2 Page Contr. 1033; *Browne Stat. Frauds*, 5th ed. 466,—on form of memorandum required by statute of frauds.

—Signing by agent.

Cited in *Clark County v. Howell*, 21 Ind. App. 495, 52 N. E. 769, holding that signature to memorandum must be made by the party or by one shown to have authority to sign for him; *Evans v. Hoare* [1892] 1 Q. B. 593, 61 L. J. Q. B. N. S. 470, 66 L. T. N. S. 345, 40 Week. Rep. 442, 56 J. P. 664, holding mem-

orandum sufficiently signed by principal where his name was placed at the head of a writing prepared by his agent and presented to and signed by the other party; *John Griffiths Cycle Corp. v. Humber* [1899] 2 Q. B. 414, 68 L. J. Q. B. N. S. 958, 81 L. T. N. S. 310, holding that a letter written and signed by an agent within the scope of his authority, referring to and recognizing an unsigned document as containing the terms of a contract made by his principal, is sufficient though agent was not specifically authorized to sign it as such.

Cited in 2 Page Contr. 1045, on nature of authority of agent signing memorandum required by statute of frauds; 1 Elliott Railr. 2d ed. 384, on record entries as proof of proceedings of directors, where duly signed by proper officers.

Jurisdiction on appeal.

Cited in *Donovan v. Haldane*, 14 Ont. Pr. Rep. 106, holding that where judgment contains undertaking by plaintiff not to appeal, an attempted appeal does not deprive the court rendering the judgment from jurisdiction to prevent the appeal.

Effect of Statute of Frauds.

Cited in *Fenson v. Shore*, 6 D. L. R. 376, holding that fourth section of statute of frauds does not affect validity of verbal contract but only remedy upon such contract.

6 E. R. C. 285, *LAKEMAN v. MOUNTSTEPHEN*, 43 L. J. Q. B. N. S. 188, L. R. 7 H. L. 17, 30 L. T. N. S. 437, 22 Week. Rep. 617, affirming the decision of the Exchequer Chamber, reported in 41 L. J. Q. B. N. S. 67, L. R. 7 Q. B. 196, which reverses the decision of the Court of Queen's Bench, reported in 39 L. J. Q. B. N. S. 275, L. R. 5 Q. B. 613.

Original and collateral contracts to answer for debt of another.

Cited in *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582, holding that if vendor sells goods solely on credit of one person and at his request, delivers them to another, former alone is liable, and his liability is not affected by statute of frauds; *Clark v. Howard*, 150 N. Y. 232, 44 N. E. 695, holding a promise by the transferee of debtor's property to pay another creditor rendered such promisor primarily liable on such promise; *Black v. Doherty*, 22 N. B. 215, holding a sale of goods to a person on his credit although the goods were purchased for another created a personal liability on the part of the purchaser; *Petrie v. Hunter*, 10 Ont. App. Rep. 127, holding a person was primarily liable on a promise to pay builders employed to complete a building where he had discharged others under the terms of the contract for their failure to do so; *Simpson v. Dolan*, 16 Ont. L. Rep. 459, on when liability on promise for the debt of another is a primary one; *James v. Balfour*, 7 Ont. App. Rep. 461, holding a promise to pay a debt of another for wages due the promisee in order that promisee would continue in the employment of defendant was within the statute of frauds; *Bond v. Treahay*, 37 U. C. Q. B. 360, holding a promise by the owner of premises to a subcontractor to see that he was paid if contractor did not pay him was within the statute of frauds; *Lighbound v. Warnock*, 4 Ont. Rep. 187 (dissenting opinion); *Whitelaw v. Taylor*, 45 U. C. Q. B. 446; *Trotter v. McKinnon*, 42 N. S. 406,—on when promise to answer for the debt of another is within the statute of frauds; *Wildes v. Dudlow*, L. R. 19 Eq. 198, 44 L. J. Ch. N. S. 341, 23 Week. Rep. 435, holding a verbal agreement to indemnify a person if he would join in a joint and promissory note was not within the statute of frauds.

Distinguished in *Bent v. Arrowhead*, 18 Manitoba L. Rep. 632, holding that neither a corporation nor its president was liable for brokerage fees for sale of its property because of engagement of brokers by director who afterwards became president without authority to sell such property; *Boorstein v. Moffatt*, 36 N. S. 81, holding a promise by a person building a house for another to pay a third person doing some work on it, if the owner did not, was within the statute of frauds.

The decision of the Exchequer Chamber was cited in *Martin's Estate*, 131 Pa. 638, 18 Atl. 987, on when the liability on a promise to answer for the debt of another is a primary one; *Hull v. Brown*, 35 Wis. 652, holding an oral contract of agent with purchaser on his own accord in reference to chattels sold for his principal, to return the note given by the purchaser was an original undertaking and not void as within the statute of frauds; *Conant v. Alvord*, 166 Mass. 311, 44 N. E. 250, holding a party representing to be the agent of another, and who induces third party to surrender securities and receive a draft on such principal accepted by the agent, was liable for breach of such representations.

— Question of primary liability as being for jury.

Cited in *Browne Stat. Frauds*, 5th ed. 255, on mode of determining to whom credit was given in case of guaranty.

The decision of the Exchequer Chamber was cited in *Sumner v. Chandler*, 18 N. B. 175; *Holmes v. Small*, 157 Mass. 221, 32 N. E. 3, on it being a question for the jury whether a promise to answer for the debt of another was a primary undertaking.

Evidence of primary liability on a debt.

The decision of the Exchequer Chamber was cited in *Raymond v. Cummings*, 17 N. B. 544; *Smith v. Andrews*, 17 N. B. 541,—holding evidence that plaintiff charged the goods in his books and made out his bills to the person who got them is not conclusive of such person's primary liability.

Principal debt as basis for cause of action against surety.

The decision of the Exchequer Chamber was cited in *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585, holding a cause of action could not be deemed to have accrued as against a surety before the discovery of the existence of a cause of action against the principal; *Bernd v. Lynes*, 71 Conn. 733, 43 Atl. 189, on the liability of a surety as measured by that of the principal.

Elements of novation.

Cited in *Strong v. Hesson*, 5 B. C. 217, on the elements necessary to constitute a novation.

6 E. R. C. 298, *PETER v. COMPTON*, *Skinner*, 353.

Parol contract when within statute of frauds.

Cited in *Julin v. Bauer*, 82 Ill. App. 157, on when parol agreement void as within statute of frauds; *Lower v. Winters*, 7 Cow. 263, holding a parol contract payable "one year from March next" was void; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623, holding that if action is brought against person who was to perform his part of verbal contract within year, statute of frauds would not apply, but if brought against party whose agreement was not to be performed within year, then statute would be bar.

— Agreement not to be performed within year.

Cited in *Jackson Iron Co. v. Negaunee Concentrating Co.* 12 C. C. A. 636, 31 U. S. App. 1, 65 Fed. 298, holding that verbal agreement, in consideration of forbearance of immediate enforcement of payment or forfeiture of existing contract, to pay certain sum each year for 16 years was void under statute of frauds; *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 12 S. E. 1052; *Meyer v. Roberts*, 46 Ark. 80, 55 Am. Rep. 567,—holding a parol contract for personal services for a longer period than a year is within the statute of frauds; *Birnbaum v. Salomon*, 22 Fla. 610, holding that verbal agreement to lease for one year, if it was to commence at future day, is void under statute of frauds; *Kleeman v. Collins*, 9 Bush. 460, holding that contract for year's service, to commence some days hence, must be in writing; *Marey v. Marey*, 9 Allen, 8, holding that no action lies in oral promise to pay, at time more than one year from making of promise, for land conveyed to promisor; *Emery v. Smith*, 46 N. H. 151, holding a contract to work for another for two years the first year for a certain amount and the second year for a larger amount was void as within the statute of frauds; *Bartlett v. Wheeler*, 44 Barb. 162, holding that oral agreement to deliver certain number of sheep in four years, which was accepted in lieu of former agreement to deliver certain number of sheep at time of making latter contract is within statute of frauds; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100, holding a parol promise to pay for past services was not within statute though not to be performed within year; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746; *Thompson v. Gordon*, 3 Strobb. L. 196,—on verbal agreement not to be performed within the year as being void within the statute of frauds; *Meek v. Gass*, 11 N. S. 243, holding that agreement to sell good will of business purchased with stock in trade to effect that vendor would not engage in business within five years, was void as to latter clause because not in writing; *Davies v. Appleton*, 25 U. C. C. P. 376, holding that oral agreement to canvass for subscribers for book, in certain territory which would require two years to perform, was void.

Cited in notes in 41 L. ed. U. S. 499, on agreements not to be performed within one year; 17 Eng. Rul. Cas. 183, on oral contracts not to be performed within a year.

Cited in 1 Beach Contr. 647, 650, on agreements not to be performed within a year.

— Agreements possible of performance within year.

Cited in *Wooldridge v. Stern*, 9 L.R.A. 129, 42 Fed. 311, holding that promise to provide for support and education of minor fourteen years old until he becomes 21 years of age is not contract "not to be performed within a year," within meaning of statute of frauds; *Warner v. Texas & P. R. Co.* 164 U. S. 418, 41 L. ed. 495, 17 Sup. Ct. Rep. 147, holding an oral agreement to lay track to mill and maintain it there if owner of mill will furnish the ties and grade the ground for a switch was not within statute; *Adams v. Adams*, 26 Ala. 272, on agreement the performance of which is possible within a year as not being within the statute of frauds; *Arkansas Midland R. Co. v. Whitley*, 54 Ark. 199, 11 L.R.A. 621, 15 S. W. 465, holding an agreement of railroad company to keep and maintain cattle guards on each side of a person's land is not within the statute of frauds; *Valley Planting Co. v. Wise*, 93 Ark. 1, 26 L.R.A.(N.S.) 403, 123 S. W. 768, holding that verbal contract made early in December in one year, to superintend making and gathering crop of cotton, is not within statute of frauds, since work may all be done within year; *Clark v. Pendleton*, 20 Com.

495, holding mutual promises to marry was not within the statute of frauds; *Blair Town Lot & Land Co. v. Walker*, 39 Iowa, 406, holding that to exclude evidence not in writing to prove contract, on ground that it is not to be performed within year from making thereof, contract must show, that its performance within year is prohibited or impossible; *Cole v. Singler*, 60 Md. 348, holding a parol contract for personal services was not void as within the statute of frauds where there was a possibility of performance within the year; *Kent v. Kent*, 18 Pick. 569, holding a parol agreement that one person may cut trees upon the land of another at any time within ten years was not void as within the statute of frauds; *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, holding a parol agreement to support a person for a certain number of years was not within the statute of frauds; *Blake v. Cole*, 22 Pick. 97, holding a verbal promise to save a surety on a bond harmless was not void as within the statute of frauds; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210, holding a contract for the sale of wood of which as much as possible was to be delivered that winter was not within the statute although the parties believed it could not all be delivered until the next winter; *Eiseman v. Schneider*, 60 N. J. L. 291, 37 Atl. 623, holding a parol contract with a servant for her support during her lifetime or return for her services was not within the statute of frauds; *Richardson v. Pierce*, 7 R. I. 330, holding a parol contract not to carry on the trade of butcher in and around a certain village was not within the statute; *Blanchard v. Weeks*, 34 Vt. 589, holding same in case of agreement to refrain from the practice of medicine and surgery at a certain place; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 857, holding that statute of frauds does not extend to actions for payment upon contracts which have been wholly executed within one year by one of parties; *Weatherford M. W. & N. W. R. Co. v. Wood*, 88 Tex. 191, 28 L.R.A. 526, 30 S. W. 859, holding a parol promise by a railroad company upon a sufficient consideration to issue on the first of each year an annual pass for ten years was not within the statute of frauds; *McDonnell v. Home Bitters Co.* 1 Tex. App. Civ. Cas. (White & W.) 660; *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; *Hedges v. Strong*, 3 Or. 18,—holding that to bring contract within statute of frauds relating to agreements not to be performed within year, it must appear to be necessarily incapable of performance within that time.

Cited in notes in 35 L.R.A. 514, on applicability of statute of frauds to contracts for permanent employment, and similar agreements; 6 E. R. C. 305-307, on validity of agreement to be performed on a contingency which may take place within a year.

Cited in *Browne*, Stat. Frauds, 5th ed. 361, 385, on applicability of statute of frauds where thing promised is to be done when a certain event occurs which may happen within a year; 2 Page, Contr. 1014, on applicability of statute of frauds to contracts to be performed during life.

Right to recover on quantum meruit under void agreement.

Cited in *Kimmins v. Oldham*, 27 W. Va. 258, holding that where one has paid consideration, which has inured to benefit of defendant, recovery may be had on quantum meruit, where contract is void because not in writing; *Roller v. Murray*, 112 Va. 780, 38 L.R.A.(N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088, on the point that there may be a recovery on quantum meruit for services rendered although the contract is void because not in writing.

What takes agreement out of the operation of the statute of frauds—payment of consideration.

Cited in *Reinheimer v. Carter*, 31 Ohio St. 579, holding that part payment of

consideration of parol promise not to be performed within year, does not withdraw agreement from operation of statute of frauds; *Pierce v. Paine*, 28 Vt. 34, holding that if agreement for non-performance of which action was brought, was not to be performed within one year no recovery can be had upon, although that which former consideration of agreement was to have been paid, and was paid within that period.

6 E. R. C. 298, *DONELLAN v. READ*, 3 Barn. & Ad. 899, 1 L. J. K. B. N. S. 269.

Parol contracts not to be performed within year.

Cited in *Wilson v. Ray*, 13 Ind. 1, holding that promise to pay money after expiration of year is as much within statute of frauds as promise to do any other act; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278, holding that verbal contract for sale of land, under which possession was taken and improvements made, and by which payment was to be made in two years, was not within statute of frauds; *Davies v. Appleton*, 25 U. C. C. P. 376, holding a verbal contract to solicit subscription to a book was void as within the statute where by its terms it appeared impossible of performance by either party within the year.

Cited in note in 17 Eng. Rul. Cas. 184-186, on oral contracts not to be performed within a year.

—Where performance possible within the year.

Cited in *Johnson v. Watson*, 1 Ga. 348, holding a contract for the sale of goods to be delivered within the year was not within the statute although not necessary that payment be made within the year; *Ellicott v. Turner*, 4 Md. 476, holding a parol agreement of a grandfather to pay for the education of his grandchildren was not within the statute; *Foster v. Mc O'Brien*, 18 Mo. 88, holding that verbal agreement not thereafter to run carriages on particular route is not void by statute of frauds, as contract not to be performed within one year from making thereof; *Biest v. Ver Steeg Shoe Co.* 97 Mo. App. 137, 70 S. W. 1081, holding that a contract for services for more than one year from date is within the statute of Frauds, although the employee has an option permitting him to end it during the first year; *Blake v. Voigt*, 134 N. Y. 69, 30 Am. St. Rep. 622, 31 N. E. 256, holding that verbal contract to perform services for one year commencing in future, but giving option to either party to sooner terminate contract is not within statute of frauds; *Seddon v. Rosenbaum*, 85 Va. 928, 3 L.R.A. 337, 9 S. E. 326, holding a verbal contract to sell stock at the end of three years with an option to the purchaser to call it at any time is not within the statute; *Rogers v. Brightman*, 10 Wis. 56, holding a verbal contract for the sawing of logs was not within the statute of frauds it not being impossible to perform contract within the year; *Bennett v. Peck*, 15 N. B. 316, holding an agreement to convey property in consideration of the other party securing a certain employment for him was not within the statute, its performance being possible within the year.

Cited in *Browne*, Stat. Frauds, 5th ed. 378, 381, on inapplicability of statute of frauds where all that is to be performed is to be done within a year.

—When executed on one side.

Cited in *Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61, 5 S. W. 887, holding that under oral agreement to pay for use of party wall, party making use of it is bound to pay amount agreed upon as enjoyment of use took it out of statute of frauds; *Lowman v. Sheets*, 124 Ind. 416, 7 L.R.A. 784, 24 N. E. 351; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Suggett v. Cason*, 26 Mo. 221; *Jackson v. Yeomans*, 39 U. C. Q. B. 280;

Pixley v. Western P. R. Co. 33 Cal. 183, 91 Am. Dec. 623,—on execution of parol contract by one of parties thereto as taking it out of statute of frauds: *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133; *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1051; *Duff v. Snider*, 54 Miss. 245; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852; *Bartlett v. Wheeler*, 44 Barb. 162; *Reinheimer v. Carter*, 31 Ohio St. 579; *Brazee v. Woods*, 35 Tex. 302; *Tyler v. St. Louis S. W. R. Co.* 99 Tex. 491, 91 S. W. 1, 13 Ann. Cas. 911; *McDonnell v. Home Bitters Co.* 1 Tex. Civ. App. Cas. (White & W.) 660; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623; *Whittaker v. Welch*, 15 N. B. 436; *Miles v. New Zealand Alford Estate Co.* L. R. 32 Ch. Div. 266, 54 L. J. Ch. N. S. 1035, 53 L. T. N. S. 219, 34 Week. Rep. 669; *Mackey v. Thisher*, 7 Kan. App. 276, 53 Pac. 767,—on performance by one of parties of verbal contract within year of making thereof as taking out of operation of statute of frauds; *Rake v. Pope*, 7 Ala. 161, holding a parol contract was not within the statute of frauds where fully performed on one side although the money for the services was not to be paid until after the expiration of the year; *Hodgens v. Shultz*, 92 Ill. App. 84, holding an oral contract to pay a subscription of a specific sum in five annual payments is not within the statute of frauds where the other party performs within the year; *Reed v. Gold*, 102 Va. 37, 45 S. E. 868, holding a verbal subscription to stock to be paid for in instalments covering a period of years is not within the statute where the corporation accepts the stockholder and enrolls his name on the list of stockholders; *Meek v. Cass*, 11 N. S. 243, holding where as part of the consideration for the sale of a business the seller orally agreed not to set up business in that particular place within the next five years, such oral agreement was not within the statute; *Trimble v. Lanktree*, 25 Ont. Rep. 109, upholding a verbal contract for the delivery of sheep to be redelivered in double the number at the end of three years where the number to be doubled was delivered within the year; *Christie v. Dowker*, 10 Grant. Ch. (U. C.) 199, on right to enforce verbal contract not to be performed within one year where one party has fully performed his part of agreement.

Cited in 2 Page, Contr. 1112, on part performance as applied to contracts not to be performed within a year on one side; *Pomeroy*, Spec. Perf. 2d ed. 141 on effect of full performance by one party within the year, the promise of the other party being simply for the payment of consideration after the year; 2 Page, Contr. 1005, 1007, on inapplicability of statute of frauds to contracts to be performed on one side within the year; 1 Beach, Contr. 655, on effect of performance of oral contract on one side within a year.

Distinguished in *Nicholls v. Nordheimer*, 22 U. C. C. P. 48, holding a verbal agreement to purchase a piano on condition that if it became defective within a specific time he should have the right to return it was void as within the statute of frauds.

Disapproved in *Emery v. Smith*, 46 N. H. 151, holding a verbal contract for work for two years was not taken out of the statute by its performance by one of the parties; *Broadwell v. Getman*, 2 Denio, 87, holding a verbal contract for the clearing of woodland in a period of over a year was not taken out of the statute although the other party has performed his part of the contract.

Criticized in *Pierce v. Paine*, 28 Vt. 34; *Whipple v. Parker*, 29 Mich. 369,—on the point that performance by one of parties to a verbal contract within the year would take contract within statute of frauds.

Notes on E. R. C.—41.

— Oral leases and promises collateral to land transactions.

Cited in *Berry v. Graddy*, 1 Met. (Ky.) 553, holding a verbal promise to pay part of consideration for the purchase of a farm in three annual payments if another party would not remove to another state was not within statute of frauds where the other party immediately acted on such offer; *Holbrook v. Armstrong*, 10 Me. 31, holding a verbal sale of chattels to be paid for in two years unless the purchaser was dissatisfied with a land trade he had made with seller was not within the statute; *Winters v. Cherry*, 78 Mo. 344, holding a verbal lease of a building for two years was not within the statute where one of parties had performed the required conditions of the lease within the year; *Compton v. Martin*, 5 Rich. L. 14, holding a verbal contract of hiring of a negro for two years was not within the statute where the party hiring was put in possession; *McClellan v. Sanford*, 26 Wis. 595, holding a verbal promise to pay a mortgage debt when due was not within the statute of frauds where the assignment of stock and conveyance of land made in consideration of it was made within the year.

Parol agreement related to but not passing interest in lands.

Cited in *McDowell v. Miller*, 1 Kan. App. 666, 42 Pac. 402, holding a verbal agreement to pay a mortgage on land whereupon the land was conveyed to such promisor was not within the statute of frauds; *Talmadge v. Rensselaer & S. R. Co.* 13 Barb. 493, holding that parol agreement between owners of adjoining land, that one of them will, for adequate consideration, erect and keep up division fence is not within statute of frauds which renders void agreement not to be performed within year; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 867, upholding verbal contract to build a house; *Quart v. Eager*, 18 Ont. L. Rep. 181 (dissenting opinion), on nature of covenant in deed to pay a further consideration if grantees should convey the property; 1 *Underhill, Land & T.* 381, on contract to make improvements on premises leased in writing in consideration of payment of increased rent as not relating to an interest in land; 1 *Underhill, Land & T.* 265, on validity of agreement by landlord with tenant for term of years to make improvements in consideration of increased rent, although not signed by the parties; *Browne, Stat. Frauds*, 5th ed. 26, on verbal proof of agreement to pay an increased rent.

Effect of verbal lease of property.

Cited in *Brougham v. Balfour*, 3 U. C. C. P. 72, holding a person entering premises under a verbal lease for a term of years was only a tenant at will.

Rent.

Cited in *McLean v. Young*, 1 U. C. C. P. 62, holding money required to be paid in advance on the making of a lease was not to be regarded as rent.

What constitutes a valid surrender of leased premises by act and operation of law.

Cited in *Browne, Stat. Frauds*, 5th ed. 62, on necessity that second lease be for term equal to unexpired term of first to have surrender of first lease valid; *Browne, Stat. Frauds*, 5th ed. 60, on what constitutes a valid surrender by act and operation of law.

6 E. R. C. 308, *LUDLOW v. CHARLTON*, 6 Mees. & W. 815, 9 Car. & P. 242, 4 Jur. 657, 10 L. J. Exch. N. S. 75.

Seal as essential to corporate acts.

Cited in *Lynch v. William Richards Co.* 37 N. B. 549; *Lawrence v. Truro*, 26

N. S. 231; *Mellish v. Brantford*, 2 U. C. C. P. 35; *Hughes v. Canada Permanent Loan & Sav. Soc.* 39 U. C. Q. B. 221; *Davis v. Canada Farmers' Mut. Ins. Co.* 39 U. C. Q. B. 452; *Whitemore v. Ridout*, 2 Grant, Ch. (U. C.) 525; *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402, 44 L. J. C. P. N. S. 257, 32 L. T. N. S. 615, 23 Week. Rep. 562; *London L. Ins. Co. v. Wright*, 5 Can. S. C. 466 (dissenting opinion),—on a sale as essential to validity of acts of a corporation; *Buffalo & L. H. R. Co. v. Whitehead*, 8 Grant, Ch. (U. C.) 157, to the point that corporation cannot bind itself by executory contract not under seal of corporation; *Whaley v. O'Grady*, 1 L. R. 224, holding that agreements made with corporation, which are not within ordinary business of corporation must be under corporate seal; *Forrest v. Great Northwest C. R. Co.* 12 Manitoba L. Rep. 472, on the earlier strict rule requiring acts of corporation to be under seal; *Seelye v. Lancaster Mill Co.* 3 N. B. 377, holding that contract by corporation involving payment of £600, for cutting, rafting and driving lumber must be under corporate seal; *Whitehead v. Buffalo & L. H. R. Co.* 7 Grant, Ch. (U. C.) 351, holding that contract to keep railroad in repair need not be under corporate seal; *Churcher v. Cousins*, 28 U. C. Q. B. 540, on necessity that by-law, where in nature a contract, be under seal.

Cited in note in 6 E. R. C. 323-325, on requisites of contracts by corporation.

Distinguished in *Blue v. Gas & Water Co.* 6 U. C. Q. B. 174, holding an action would lie against defendant corporation for not fulfilling a parol agreement to supply of water; *Clark v. Hamilton & Gore Mechanics' Institute*, 12 U. C. Q. B. 178, holding a corporation could not refuse to pay for work done for it because there was no contract under seal where the work was such as was evidently contemplated by their charter.

— Municipal corporations' acts.

Cited in *Holland v. San Francisco*, 7 Cal. 361 (dissenting opinion), on corporations as having right at common law to contract only by deed under seal; *San Antonio v. Gould*, 34 Tex. 49, holding it was essential that a municipal corporation use its seal in the issuing of bonds for the liquidation of its subscription to stock; *Bernardin v. North Dufferin*, 6 Manitoba L. Rep. 88, holding a contract of a municipal corporation for the construction of a bridge, not being under seal or adopted by by-laws was not enforceable against it; *Marshall v. School Trustees*, 4 U. C. C. P. 373, holding trustees of school section were not liable to pay for a school house erected by them the contract for such erection not being under seal; *Brown v. Lindsay*, 35 U. C. Q. B. 509, holding town was not liable on an agreement to purchase hose where such agreement was not under seal; *Young v. Royal Leamington Spa*, L. R. 8 App. Cas. 517, 52 L. J. Q. B. N. S. 713, 49 L. T. N. S. 1, 31 Week. Rep. 925, 47 J. P. 660, 16 Eng. Rul. Cas. 654, holding the necessity that corporate acts of municipal corporation be under seal applies to an executed contract; *Pim v. Municipal Council*, 9 U. C. C. P. 304; *Leslie v. Malahide Twp.* 15 Ont. L. Rep. 4; *Lawford v. Billericay Rural Dist. Council* [1903] 1 K. B. 772, 72 L. J. K. B. N. S. 554, 67 J. P. 245, 51 Week. Rep. 630, 88 L. T. N. S. 317, 19 Times L. R. 322, 7 L. G. R. 535; *Hunt v. Wimbledon Local Bd.* L. R. 3 C. P. Div. 208, 16 Eng. Rul. Cas. 637, L. R. 4 C. P. Div. 48, 47 L. J. C. P. N. S. 540, 48 L. J. C. P. N. S. 207, 40 L. T. N. S. 115, 27 Week. Rep. 123; *Girvan v. St. John*, 11 N. B. 411,—on necessity of corporate seal to the validity of corporate acts.

Distinguished in *Bernardin v. North Dufferin*, 19 Can. S. C. 581, holding a municipal corporation was bound on a contract which had been performed for its benefit although not executed under the corporate seal.

—Corporate leases.

Cited in *St. Andrew's College v. Griffin*, 1 Has. & W. (Pr. Edw. Isl.) 80, holding a parol demise by a corporation was void; *Kidderminster v. Hardwick*, L. R. 9 Exch. 13, 43 L. J. Exch. N. S. 9, 29 L. T. N. S. 612, 22 Week. Rep. 160, holding a municipal corporation was not bound by a contract of leasing executed without the corporate seals.

—Appointment of officers or agents without seal.

Cited in *Planters' Bank v. Bivingsville Cotton Mfg. Co.* 10 Rich. L. 96, holding the appointment of an agent to bind the corporation need not be under seal; *Armstrong v. Portage W. & N. W. R. Co.* 1 Manitoba L. Rep. 344, holding the engagement of a civil engineer by a corporation was not binding upon it where not under its corporate seal; *Quinn v. School Trustees*, 7 U. C. Q. B. 130, holding a declaration in an action by a school teacher against trustees for salary was bad in not setting out that the agreement was made with the defendants by their corporate seal; *Dyte v. St. Pancras*, 27 L. T. N. S. 342, holding the contract of board of poor law guardians appointing a person to be a medical officer to the corporation must be under seal; *Austin v. Bethnal Green*, L. R. 9 C. P. 91, 43 L. J. C. P. N. S. 100, 29 L. T. N. S. 807, 22 Week. Rep. 406, holding a contract for the engagement of a clerk to the master of a workhouse, by a board of guardians, must be under seal; *Arnold v. Poole Corp.* 12 L. J. C. P. N. S. 97, 4 Mann. & G. 860, 5 Scott N. R. 741, 2 Dowl. N. S. 574, 7 Jur. 653, holding an appointment of an attorney to conduct suits for a corporation must be under seal.

Corporations as bound by the acts of their agents.

Cited in *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334, holding the cashier of a bank acting in conformity with its rules and regulations may release a mortgage executed in its favor; *Manning v. Winnipeg*, 21 Manitoba L. Rep. 203, holding that city was not liable for fees of barrister employed by resolution of council only, in absence of acceptance of his work by council; *Ramsay v. Western Dist. Council*, 4 U. C. Q. B. 374, holding the clerk of a district council could not bind the council for school books, where such purchaser had not the right to make such purchases.

Proof of official records.

Cited in *Re Christern*, 11 Jones & S. 523, 56 How. Pr. 5, holding the preliminary proofs having thereon the initials of the presiding judge on being filed with the clerk with the oath of allegiance, constituted a record of judgment admitting to citizenship.

6 E. R. C. 315. *SOUTH OF IRELAND COLLIERY CO. v. WADDLE*, L. R. 4 C. P. 617, 38 L. J. C. P. N. S. 338, 17 Week. Rep. 896, affirming the decision of the Court of Common Pleas, reported in L. R. 3 C. P. 463, 37 L. J. C. P. N. S. 211, 18 L. T. N. S. 405, 16 Week. Rep. 756.

Necessity of corporate seal to the validity of acts of trading corporation.

Cited in *Canadian P. Nav. Co. v. Victoria Packing Co.* 3 B. C. 490, holding a contract of a corporation to ship all goods consigned to them by plaintiff's steamers is not void because of want of the corporate seal; *Canda C. R. Co. v. Murray*, 8 Can. S. C. 313, holding an action might be maintained on an agreement for the fencing of the right of way of defendant corporation although such agreement was not under seal; *Wright v. Sun Mut. L. Ins. Co.* 5 Ont. App. Rep. 218, holding defendant company was bound on a policy issued by it

although without a corporate seal; *Garland Mig. Co. v. Northumberland Paper & Electric Co.* 31 Ont. Rep. 40, holding that corporation cannot be held liable as tenant from year unless there is lease under its corporate seal; *Hill v. Ingersoll & P. B. Gravel Road Co.* 32 Ont. Rep. 194, holding that agreement to bind corporation by executory contract to purchase gravel required for road, during indefinite period, must be under seal; *Albert Cheese Co. v. Leeming.* 31 U. C. C. P. 272, holding a contract entered into by defendant corporation for the sale of a quantity of cheese was binding on it although contract was not under seal; *Brown v. Belleville.* 30 U. C. Q. B. 373; *Wentworth County v. Hamilton.* 34 U. C. Q. B. 585; *Hughes v. Canada Permanent Loan & Sav. Soc.* 39 U. C. Q. B. 221; *Hunt v. Wimbledon Local Board.* L. R. 3 C. P. Div. 208, L. R. 4 C. P. Div. 48, 47 L. J. C. P. N. S. 540, 48 L. J. C. P. N. S. 207, 16 Eng. Rul. Cas. 637, 40 L. T. N. S. 115, 27 Week. Rep. 123; *Armstrong v. Portage, W. & N. W. R. Co.* 1 Manitoba L. Rep. 344,—on necessity of corporate seal to the validity of corporate acts.

Cited in note in 7 E. R. C. 368, on presumption of performance of everything necessary to make executed contract acted upon by corporation a binding one.

The decision of the Court of Common Pleas was cited in *Brandon Constr. Co. v. Saskatoon School Board.* 5 D. L. R. 754, holding that contract of trading company entered into for purpose for which company was organized need not be under seal of company; *Canada F. & M. Ins. Co. v. Western Assur. Co.* 5 Ont. App. Rep. 244, holding that trading corporation may become liable in respect of those matters of business which it is incorporated to carry on, by almost any act which will bind unincorporated partnership; *Ontario Co-Op. Stone-Cutters' Asso. v. Clarke.* 31 U. C. C. P. 280, holding corporation was liable on a contract for services partly performed although contract was not under seal; *Forrest v. Great Northwest C. R. Co.* 12 Manitoba L. Rep. 472; *O'Brien v. Credit Valley R. Co.* 25 U. C. C. P. 275; *Dominion Bank v. Knowlton.* 25 Grant, Ch. (U.C.) 125,—on necessity of corporate seal to the validity of corporate acts.

—Contracts by officers thereto authorized.

Cited in *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.* 14 Ont. L. Rep. 22, holding defendant company bound on an executory contract, entered into by its manager, without a corporate seal.

The decision of the Court of Common Pleas was cited in *Calvin v. Provincial Ins. Co.* 20 U. C. C. P. 267, holding that agreement not under seal, of insurance company through agent to arbitrate question of legal liability of company was not binding upon company.

—Municipal corporation.

Cited in *Jennett v. Sinclair.* 10 N. S. 392, holding that contract by city for purchase of land must be under corporate seal; *Bernardin v. North Dufferin.* 19 Can. S. C. 581, holding a municipal corporation was liable on an executed contract for the performance of work within the purpose for which it was created although a corporate seal was wanting; *Silsby v. Dunnville.* 31 U. C. C. P. 301, holding that contract not under seal, made by village, for purchase of fire engine cannot be enforced; *Wells v. Kingston-upon-Hull.* L. R. 10 C. P. 402, 44 L. J. C. P. N. S. 257, 32 L. T. N. S. 615, 23 Week. Rep. 562, holding it was not necessary that the contract of a municipal corporation letting the use of a dock to plaintiffs be under the seal of the corporation.

Cited in note in 16 E. R. C. 665, on requisites of contract for local improvements.

The decision of the Court of Common Pleas was cited in *Silsby v. Dunnville.*

S Ont. App. Rep. 524, holding that contract for purchase of fire engine by village is not binding unless contract is under seal.

Authority of officer of corporation to bind.

Cited in *Thompson v. Brantford, Electric & Operating Co.* 25 Ont. App. Rep. 340, holding the defendant corporation were liable for the value of a machine purchased by their manager under authority from directors, although under different terms than authorized; *Wood v. Ontario & I. R. Co.* 24 U. C. C. P. 334; *Bain v. Anderson*, 27 Ont. Rep. 369,—on extent of authority of agents or officers of, to bind corporation.

The decision of the Court of Common Pleas was cited in *Allen v. Ontario & R. River R. Co.* 29 Ont. Rep. 510, holding a corporation was liable on a contract entered into by one of its directors with plaintiff on behalf of the company in advertising and promoting its undertaking; *Brown v. Sweet*, 7 Ont. App. Rep. 725, on power of trustees of church to give mortgage on church property; *Sheppard v. Bonanza Nickel Min. Co.* 25 Ont. Rep. 305; *Sheppard v. Bonanza Nickel Mining Co.* 31 U. C. C. P. 305; *Calvin v. Provincial Ins. Co.* 20 U. C. C. P. 21; *Smith v. McLandress*, 26 Grant, Ch. (U. C.) 17,—on authority of officer of a corporation to contract on behalf of the corporation.

Authority of agent to bind principal.

The decision of the Court of Common Pleas was cited in *Howarth v. Singer, Mfg. Co.* 8 Ont. App. Rep. 264, holding defendant company was bound by the act of a general agent in appointing plaintiff a sub-agent; *Calloway v. Stobart*, 14 Manitoba L. Rep. 650 (dissenting opinion), on extent of authority of agent to bind principal by his acts.

6 E. R. C. 325, *FEATHERSTONE v. HUTCHINSON*, Cro. Eliz. 199.

Illegality of consideration as rendering a contract void.

Cited in *Stallings v. Johnson*, 27 Ga. 564, holding an indorser of a note was discharged from liability thereon by reason of an extension of time by the holder to the maker for a usurious consideration; *Cotten v. McKenzie*, 57 Miss. 418; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Perkins v. Cummings*, 2 Gray, 258,—holding a promissory note part of the consideration of which is liquors unlawfully sold, is wholly void in the hands of the promisee; *Love v. Palmer*, 7 Johns. 159, holding that bond taken by under-sheriff as indemnity for escape, then in contemplation, of prisoner held on execution for debt, was void; *Raquet v. Roll*, 7 Ohio, pt. 1, p. 76,—holding that obligation, part consideration of which is to forbear criminal prosecution, is void; *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053, holding a contract for the supplying of water to the county was void where part of the consideration therefor was a grant to the defendant of the exclusive right of way to lay piping for supplying a certain town with water; *Bank of Montreal v. McTavish*, 13 Grant, Ch. (U. C.) 395, holding the assignment of a policy of insurance by an insolvent debtor in satisfaction of a debt not due and for a further advance of money was void as a fraudulent preference; *Leggatt v. Brown*, 29 Ont. Rep. 530, holding notes executed by a wife and son of a debtor, part of the consideration for which was to stifle a criminal prosecution against the husband, was void for illegality; *Loomis v. Newhall*, 15 Pick. 159; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027; *Hynds v. Hays*, 25 Ind. 31,—on illegality of consideration as how affecting the validity of a contract; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Yundt v. Roberts*, 5 Serg. & R. 139,—on illegality of part of consideration as vitiating the whole contract.

Cited in notes in 18 Eng. Rul. Cas. 83, on invalidity of securities given for an immoral consideration; 15 E. R. C. 482, on right to recover rent for premises demised for an illegal purpose; 21 E. R. C. 701, on invalidity of contracts against public policy.

Cited in Benjamin. Sales, 5th ed. 503; 2 Beach, Contr. 1861, on validity of contract where consideration was partly illegal.

6 E. R. C. 326, PEARCE v. BROOKS, 12 Jur. N. S. 342, 35 L. J. Exch. N. S. 134, L. R. 1 Exch. 213, 14 L. T. N. S. 288, 14 Week. Rep. 614.

Invalidity of contract known to be for illegal or immoral purpose.

Cited in Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Adams v. Couillard, 102 Mass. 167; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Graves v. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383,—holding that sale of liquor here for transportation to another state, there to be sold contrary to law by purchaser, does not connect sale here with illegal consequences sufficiently to make it invalid; Hanauer v. Woodruff, 15 Wall. 439, 21 L. ed. 224, holding that bonds issued by authority of convention of Arkansas, which attempted to carry that state out of union, for purpose of supporting war of Rebellion does not constitute valid consideration for promissory note, although such bonds were used as circulating medium in Arkansas; Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128 (dissenting opinion), on immoral consideration as vitiating contract; Graves v. Johnson, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818, holding that contract for sale of liquor to nonresident with view to its being resold by him contrary to law of his own state, is void, although violation of law was not controlling inducement to sale which was made primarily for money received; C. F. Jewett Pub. Co. v. Butler, 159 Mass. 517, 22 L.R.A. 253, 34 N. E. 1087, holding that agreement by author to indemnify his publisher for any costs and damages by reason of publication is not invalid on ground that unlawful publication is intended, where it does not appear that there was any intention to publish libel; Snyder v. Willey, 33 Mich. 483, holding that note given in consideration of suppression of criminal proceedings, is void in hands of promisee who was party to illegality; Curran v. Downs, 3 Mo. App. 468, holding that fact that vendor knew, at time of making sale, that vendee intended to use thing sold for immoral purposes, is no bar to action to recover its value; Mitchell v. Branham, 104 App. 480, 79 S. W. 739, holding that party to contract for unlicensed sales of liquor, which contravene penal statutes, has no remedy for breach of it; St. Louis Fair Asso. v. Carmody, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365, holding that contract by fair association which has for its object facilitation and encouragement of gambling is void; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138, holding that it is no defense in action for work and labor done and material furnished in fitting up house, that plaintiff knew that house was to be used for gambling purposes; Lloyd v. North Carolina R. Co. 151 N. C. 536, 45 L.R.A.(N.S.) 378, 66 S. E. 604, holding that action will not lie when plaintiff must base claim on violation of criminal laws, even though plaintiff was acting under orders of defendant, his principal; Pfau v. Lorain, 1 Cin. Sup. Ct. Rep. 73, 13 Ohio Dec. 423 (dissenting opinion), on the point that there can be no recovery for liquor sold to persons known to be running a gambling house and selling liquor in violation of law; Trites-Wood Co. v. Western Assur. Co. 15 B. C. 405 (dissenting opinion), on validity of policy of insurance upon house described as "sporting house;" Alexander v. Heath, 8 B. C. 95, holding that transaction which is

evasion of statute does not give basis for right of action; *Walsh v. Trebilcock*, 23 Can. S. C. 695, holding that after election, when money has been paid to winner of bet, loser cannot recover from stakeholder amount deposited by him, parties being in *pari delicto*; *Clark v. Ilagar*, 22 Can. S. C. 510, holding that contract for transfer of property with intent by transferer, and for purpose that it shall be applied by transferee to accomplishment of illegal purpose, is void; *Ontario Bank v. McAllister*, 43 Can. S. C. 338 (dissenting opinion), on illegality of purpose on part of one party to agreement, known at time it was made as bar to enforcement of agreement; *Keast v. Elder*, 7 Luzerne Leg. Reg. 229, holding that contract is void where beer is supplied to unlicensed person to retail by him, in fraud of revenue; *Wilkins v. Wallace*, 38 N. B. 80, holding that one selling liquor which he knows is intended to be resold contrary to law cannot recover for purchase price; *Furlong v. Russell*, 24 N. B. 478; *Hooper v. Coombs*, 5 Manitoba L. Rep. 65, holding that contract to transport whisky in violation of law is invalid; *Ilager v. O'Neil*, 20 Ont. App. Rep. 198 (affirming 21 Ont. Rep. 27), holding that mere knowledge that house mentioned in contract for sale, is used for immoral purposes, does not vitiate sale; *Smith v. Benton*, 20 Ont. Rep. 344, holding that no recovery of purchase price of liquor can be had where seller knew it was to be resold in violation of statute; *Garand v. West*, Rap. Jud. Quebec, 40 C. S. 323, holding the banker of a broker whose extravagant and criminal operations in promising payment of unrealizable profits have become well known by denunciations in the papers, who receives and carries to the credit of its client a check given by one of the latter's dupes is a regular holder in good faith in absence of proof of notice; *Bruneau v. Laliberte*, Rap. Jud. Quebec, 19 C. S. 425, holding that a contract of insurance upon furniture in a house of ill-fame is illegal; *Kelly v. Earl*, 29 U. C. C. P. 477, to the point that intention on part of seller that goods sold shall be used for unlawful purpose is necessary to prevent recovery of price; *Scott v. Brown* [1892] 2 Q. B. 724, 61 L. J. Q. B. N. S. 738, 4 Reports, 42, 67 L. T. N. S. 782, 41 Week. Rep. 116, 57 J. P. 213, denying action founded on fictitious stock sales designed to create semblance of a market.

Cited in notes in 15 L.R.A. 836, on right to recover price of property sold for unlawful use; 13 E. R. C. 561, on invalidity of insurance on ship or goods for illegal voyage; 6 E. R. C. 334, 335, on invalidity of illegal or immoral contract.

Cited in 2 Mechem Sales, 881, on invalidity of sale in furtherance of social vices; 2 Mechem Sales, 872, on invalidity of contract of sale for immoral or illegal purpose; 2 Mechem Sales, 878, on invalidity of contract *malum prohibitum* or *malum in se*; 1 Page Contr. 831, on validity of contracts aiding sexual immorality; 2 Beach Contr. 1874, on right of action arising out of fraud; *Hollingsworth Contr.* 261, on validity of agreement where immediate object or consideration is not unlawful, but the intent is to further an illegal purpose; Benjamin Sales 5th ed. 505, 507, 508, on validity of sale of thing innocent in itself where seller knows it is intended for an illegal purpose.

Distinguished in *Waugh v. Morris*, L. R. 8 Q. B. 202, 42 L. J. Q. B. N. S. 57, 28 L. T. N. S. 265, 21 Week. Rep. 438, where there was no contemplation or belief by shipowner who chartered ship to carry hay whose importation was illegal that party chartering it would violate law.

6 E. R. C. 338, *BLACHFORD v. PRESTON*, 4 Revised Rep. 598, 8 T. R. 89.

Contracts in violation of law or contrary to public policy.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding where contract is expressly or by implication forbidden by statute or common law, no court will lend its assistance to give it effect; *Oxford Iron Co. v. Quinehett*, 44 Ala. 487, holding action not maintainable upon contract for hire of mules to be used in business of manufacturing iron for Confederate States for use in prosecuting rebellion against United States; *Bayne v. Suit*, 1 Md. 80, holding sale of negroes pending replevin suit for same illegal and action based thereon not maintainable; *Bliss v. Brainard*, 41 N. H. 256, holding plaintiff could not recover for casks in which liquors were illegally sold; *Sharp v. Teese*, 9 N. J. L. 352, 17 Am. Dec. 479, holding note void where given by insolvent debtor in consideration of withdrawal of opposition to his discharge under insolvent act; *Church v. Muir*, 33 N. J. L. 318, holding that note which is given for property transferred to drawer, for purpose of defrauding creditors of payee cannot be enforced in hands of payee against drawer; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 978, holding that agreement between publishers of newspapers, that they would divide money received for publication of laws of state, is void when law directed that state officers should select newspapers to publish such laws; *Wittkowsky v. Baruch*, 127 N. C. 313, 37 S. E. 449, holding it was unlawful for trustee to sell out trust and that executory contract based on such transaction was not enforceable; *Lyon v. Strong*, 6 Vt. 219, holding Sunday contract unenforceable; *Sharp v. McKeen*, 4 N. B. 524, holding contract violative of rights of Crown in property forming part of public domain invalid.

Cited in notes in 20 L.R.A. 545, on effect of preventing or checking bids upon validity of auction sales; 24 E. R. C. 257, on appointment of master of ship.

Cited in 2 Beach Contr. 1883, on invalidity as against public policy of contracts in violation of statute.

—Affecting offices or official fidelity or public service.

Cited in *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777, holding that an officer cannot recover on an implied contract with a municipality for materials supplied to it where the statutes prohibit him from being "directly or indirectly interested in any contract" with the city and make a violation thereof a misdemeanor; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415, holding contract illegal because in contravention of treaty and immoral because involving compromise of fraud, and also official infidelity; *Burger v. Rice*, 3 Ind. 125, holding agreement of person who had contract for keeping paupers whereby he assigned keeping of half of them, void as against public policy; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746, holding agreement to secure location of postoffice in certain place void as against public policy because tending to injure public service; *Johnson County v. Mullikin*, 7 Blackf. 301, holding promissory note void where given to county commissioners in consideration of appointment of collector for county; *Alvord v. Collin*, 37 Mass. 418, holding that where person was chosen collector of taxes "by bidding off the office at vendue" by which "he was to collect taxes of town for five per cent," election was valid; *Meredith v. Ladd*, 2 N. H. 517, holding note given in consideration of being chosen to office of town constable void; *Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389, holding that agreement to pay \$1000, on condition that plaintiff would forbear to propose to postmaster general to carry mail on mail route, is void as against public policy; *Cansler v.*

Penland, 125 N. C. 578, 48 L.R.A. 441, 34 S. E. 683, holding contract by which sheriff let taxes to farm out void on grounds of public policy; *White v. Cook*, 51 W. Va. 201, 57 L.R.A. 417, 90 Am. St. Rep. 775, 41 S. E. 410, holding contract between sheriff and deputy relative to collection of taxes and doing of work of sheriff's office, whereby deputy was to pay certain sum per annum was contrary to law against office farming; *Ireland v. Guess*, 3 U. C. Q. B. 220 (dissenting opinion), on invalidity of transaction or undertaking object of which is violation of public or private duty.

Cited in 1 Page, *Contr.* 641, on validity of contract to obtain public office; Benjamin Sales, 5th ed. 514, on invalidity of contracts for sale of offices.

Distinguished in *Alvord v. Collins*, 20 Pick. 418, where election to office of tax collector by bidding off the office at vendue was sustained.

Governmental nature of East India Company.

Cited in *Card v. Hope*, 24 E. R. C. 246, 2 Barn. & C. 661, 4 Dowl. & R. 164, 2 L. J. K. B. N. S. 96, 26 Revised Rep. 503, on governmental or private nature of East India Company.

6 E. R. C. 347, *LOWE v. PEERS*, 4 Burr. 2225, *Wilmot's Notes*, 364.

Illegality of provisions of contracts or wills restrictive of marriage.

Cited in *Sheppey v. Stevens*, 177 Fed. 484, holding that agreement by which plaintiff was to use his best efforts in influencing testator under whose will plaintiff and defendant expected to be beneficiaries, to break off relations with woman of questionable character whom he was about to marry, was valid; *Nichols v. Palmer*, 5 Day, 47 (dissenting opinion), on absence of right of court to go outside of record to look for consideration over and above what is herein specified to be the consideration, where agreement involved was for separation of husband and wife; *Appleby v. Appleby*, 100 Minn. 408, 10 L.R.A.(N.S.) 590, 117 Am. St. Rep. 709, 111 N. W. 305, 10 Ann. Cas. 563, holding that contracts in restraint of marriage, or which tend to induce separation of husband and wife, are on grounds of public policy, utterly void; *Overman v. Clemons*, 19 N. C. (2 Dev. & B. L.) 185, holding marriage-brochage agreement illegal; *Middleton v. Rice*, *Brightly (Pa.)* 88, 4 Clark (Pa.) 7, holding condition of devise restrictive of marriage void; *Maddox v. Maddox*, 11 Gratt. 804, holding condition of bequest restrictive of marriage void; *Crowder v. Sullivan*, 6 Ont. L. Rep. 708, holding that note given to housekeeper in consideration of her refraining from marriage during mother's life, was void; *Bradley v. Bradley*, 19 Ont. L. Rep. 525, holding agreement of widower not to marry again is void on ground of public policy; *R. v. Taylor*, 36 U. C. Q. B. 183, on illegality of contracts in restraint of marriage.

Cited in note in 6 E. R. C. 367, on invalidity of agreement in general restraint of marriage.

Cited in *Pomeroy*, *Spec. Perf.* 2d ed. 362, on refusal to specifically enforce contract opposed to public policy; *Hollingsworth*, *Contr.* 251, on validity of agreement against public policy because unduly limiting rights of individual action; 2 Page, *Contr.* 875, on enforceability of promise under seal to make a gift with or without the consideration of a promise to refrain from marriage; 1 Beach, *Contr.* 179, on want of consideration as defense in action on sealed instrument.

Distinguished in *Phillips v. Medbury*, 7 Conn. 568, holding restraints upon marriages in wills void as made in *terrorem* which doctrine is different from that relative to invalidity of contracts in restraint of marriage; *Crowder-*

Jones v. Sullivan, 9 Ont. L. Rep. 27 (reversing 6 Ont. L. 708), holding agreement of daughter with father to remain with him as long as he needed her not an unreasonable restraint under the circumstances.

Enforcement of contracts against public policy or express statute.

Cited in *Terry v. Olecott*, 4 Conn. 442, holding sale of lottery ticket contrary to statute illegal and void: *Veazey v. Allen*, 173 N. Y. 359, 62 L.R.A. 362, 66 N. E. 103, holding that enforcement of contracts clearly repugnant to sound morality and civic honesty will be denied by courts on ground of public policy; *United States Teleph. Co. v. Middlepoint Home Teleph. Co.* 32 Ohio C. C. 18, to the point that courts of equity have jurisdiction to interfere as to contracts between parties thereto where contract is opposed to public policy.

When specified sum constitutes liquidated damages and when penalty.

Cited in *Turner v. Fremont*, 95 C. C. A. 455, 170 Fed. 259, holding that agreement between city and bidder for paving, that deposit of 5 per cent of amount of his bid required to be made by bidder, "shall be considered as liquidated damages" if bidders proposal is accepted and he fails to enter into contract, will be construed as liquidated damages; *Watt v. Sheppard*, 2 Ala. 425, holding sum expressed was damages liquidated by the parties for failure to make titles in reasonable time; *Williams v. Green*, 14 Ark. 315, holding specified sum was recoverable as liquidated damages for failure to carry out exchange agreed upon; *Tingley v. Cutler*, 7 Conn. 291, holding sum named was liquidated damages where defendant agreed to purchase an estate of plaintiff and pay in particular manner; *District of Columbia v. Harlan & H. Co.* 30 App. D. C. 270, holding that parties may lawfully stipulate that certain sum shall be damages which one shall forfeit to other for failure to perform conditions of contract; *Alexander v. Troutman*, 1 Ga. 461, holding back interest recoverable as stipulated damages in suit upon note interest upon which was payable from date if not punctually paid; *Westfall v. Albert*, 212 Ill. 68, 72 N. E. 4, holding bond open to construction must be treated as penal; *Peine v. Weber*, 47 Ill. 41, holding when provision has reference only to uncertain damages, and case shows serious damage might have been incurred and no fraud has been used in procuring insertion of stipulation, it furnishes only measure of damages; *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136, holding that under agreement to procure and deliver to plaintiff, within limited time, certificate of third person to certain effect, and stipulation that if defendant failed to do so, he would pay \$500 liquidated damages, \$500 was measure of damages; *Foley v. McKeegan*, 4 Iowa. 1, 66 Am. Dec. 107, holding sum inserted in contract, to be paid on its nonfulfilment, was designed by parties as penalty and not as liquidated damages; *Applegate v. Jacoby*, 9 Dana, 206, holding amount to be paid upon setting up and carrying on of business in violation of agreement must be regarded as stipulated damages; *Hatch v. Kimball*, 14 Me. 9, holding provision for fulfilment of covenants in bond was seenred by penalty; *Gammon v. Howe*, 14 Me. 250, holding damages liquidated where sum stated was unaccompanied by any terms indicating it was regarded as penal and case afforded no other measure of damages equally satisfactory; *Smith v. Bergengren*, 153 Mass. 236, 10 L.R.A. 768, 26 N. E. 690, holding where physician sold his practice in certain town and covenanted that he should have right to engage in practice thereon payment of sum stated, that such sum was not penalty nor liquidated damages, but price fixed for what contract permitted; *Hempler v. Schneider*, 17 Mo. 258, holding maker of note for goods received payable in case certain party did not return to place named within fifty days, liable for full amount thereof, whether damage

was sustained by nonreturn of party or not; *Chamberlain v. Bagley*, 11 N. H. 234, holding that stipulation in land contract, that \$500 would be forfeited upon breach thereof should be construed as stipulation for liquidated damages; *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256, holding sum fixed by contract to be paid in case of failure to complete building contract at certain time was liquidated damages; *Westerman v. Means*, 12 Pa. 97, holding deduction per acre for failure to furnish title as agreed allowable as stipulated; *Whitfield v. Levy*, 35 N. J. L. 149, holding sum named as penalty and forfeiture for failure to comply with provisions of executory agreement for sale of realty was penalty, and only nominal damages recoverable, for breach; *Owens v. Hodges*, 1 McMull. L. 106, holding that true inquiry is, what did parties intend and holding sum named was penalty where it was evident parties could not have intended it as true estimate of damages; *Thomas v. Bennett*, Newfoundland Rep. (1864-74) 252, holding sum which was measure of work to be done and to be expended for benefit of both parties was not liquidated damages.

Cited in note in 6 Eng. Rul. Cas. 553, as to when stipulation in contract is for a penalty and when for liquidated damages.

Cited in *Parsons Partn.* 4th ed. 224, on provisions in partnership agreement for liquidating damages for misconduct of partner.

Distinguished in *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676, holding sum named was penalty and not liquidated damages, where agreement was between lessor and lessee relative to surrender of lease; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223, where agreement was to abstain from doing certain acts under a forfeiture; *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472, holding provision in building contract that certain sum per day is to be paid in case building is not completed at certain time, is penalty and not liquidated damages; *Jackson v. Baker*, 2 Edw. Ch. 471, where contract provided for number of unequally important things on both sides and specified sum was held a penalty; *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160, where sum to be "forfeited" and paid as "damages" for failure to convey was held a penalty; *Lindsay v. Anesley*, 28 N. C. (6 Ired. L.) 186, where amount asked as liquidated damages was greatly in excess of real damages sustained and sum named was not essence of agreement.

—Pleading and proof.

Cited in *People v. Central P. R. Co.* 76 Cal. 29, 18 Pac. 90, holding where amount is stipulated as liquidated damages, plaintiff should sue for that amount but where sum stated is merely penalty plaintiff must sue for actual damages sustained by breach; *Mure v. Wileys*, Pyke (Can.) 61, holding plaintiff must prove loss beyond penalty in order to recover damages in excess of penalty.

Cited in 1 Page. Contr. 794, on necessity of pleading illegality of contract as a defense.

Remedy under penal clause.

Cited in *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, holding courts of equity do not grant relief in cases of liquidated damages.

Maintenance of action of covenant upon bond with penalty.

Cited in *Meinert v. Botcher*, 60 Minn. 204, 62 N. W. 276, holding at common law where covenants and penalty securing them are in the same deed, action on covenant lies to recover damages for breach of covenant, damage may exceed penalty, and obligee may recover in covenant as often as breach arises;

New Holland Turnp. Co. v. Lancaster County, 71 Pa. 442, 29 Phila. Leg. Int 324, holding covenant to recover damages would lie upon bond with penalty and that damages recoverable might exceed penalty.

Criticized in Jackson County v. Leonard, 16 W. Va. 470, holding declaration insufficient either in covenant or debt in action upon bond to secure performance of annexed agreement where nonperformance of agreement, but not non-payment on the bond was assigned as breach.

Limitation of recovery to stated amount of obligation or penalty.

Cited in Perit v. Wallis, 2 Dall. 252, 1 L. ed. 370, holding interest recoverable upon penalty of bond by way of damages; Martin v. Taylor, 1 Wash. C. C. 1, Fed. Cas. No. 9,166, holding where there is penalty in agreement under seal, party injured may, at common law, sue for whole penalty, and must be satisfied with it, or he may bring covenant and recover in damages more or less than penalty; Ye Seng Co. v. Corbitt, 7 Sawy. 368, 9 Fed. 423, holding that in suit upon covenants in contract for damages for breach thereof, amount recovered may exceed penalty mentioned in contract; State v. Scoggin, 10 Ark. 326, as to whether action is grounded on nonpayment of instalments where damage would be measured by amount of aggregate of instalments and interest unpaid; Hughes v. Wickliffe, 11 B. Mon. 202, holding surety not liable beyond penalty of bond; Foster v. Passerieux, 37 Pa. Super. Ct. 307, holding that where bond given by married man to his wife, is in penal sum, and contains conditions that husband shall pay certain sum per month, and judgment is entered for penal sum, surety can only be held to pay that amount; New Holland Turnp. Co. v. Lancaster County, 71 Pa. 442, holding that where company entered into bond in penalty of \$4,000, to pay one-third of all reasonable expenses in building bridge, county in covenant could recover one-third of expenses although beyond penalty of bond; Henderson v. Hepburn, 2 Call. (Va.) 232, holding stipulation limits damages; Baker v. Trusts & Guarantee Co. 29 Ont. Rep. 456, holding plaintiff not limited to amount of penalty in bond for past and future maintenance; Barthelotte v. Melanson, 35 N. B. 652, on limitation of recovery to amount of penalty.

Distinguished in Covington v. Lide, 1 Bay. 158, holding plaintiff in assumpsit may recover less damages than those laid in declaration; Farrar v. Christy, 24 Mo. 453, where instrument contained no covenant and plaintiffs were limited in their recovery to the penalty.

Criticized in Clark v. Bash, 3 Cow. 151, holding weight of authority is in favor of doctrine that in debt on bond nothing more than penalty can be recovered; also that extent of liability of surety is penalty of bond; Lawrence v. United States, 2 McLean, 581, Fed. Cas. No. 8,145, holding surety's liability limited to penalty of bond.

Proof of consideration of bond.

Cited in Storm v. United States, 94 U. S. 76, 24 L. ed. 42, holding bond or other specialty is presumed to have been made upon good consideration so long as instrument remains unimpeached; Mason v. Evans, 1 N. J. L. 182, denying doctrine that consideration of bond cannot be inquired into, and that no parol evidence is admissible to prove instrument void, is not maintainable; Armstrong v. McConnell, 1 Yerg. 33, holding where illegality of consideration of bond does not appear on record, upon oyer, it cannot, at common law be averred, unless it be malum in se; Monro v. National Surety Co. 47 Wash. 488, 92 Pac. 280, holding nonsuit not sustainable for mere failure to prove consideration for indemnity bond under seal.

Proof of deed by witnesses who did not attest it.

Cited in *Ingram v. Hall*, 2 N. C. (1 Hayw.) 193, holding true meaning of rule that witness shall not be permitted to deny his own attestations is that if he does deny it upon trial, deed may be proved by others who were not attesting witnesses.

Necessity of mutuality in contract.

Cited in *Folts v. Huntley*, 7 Wend. 210, as to whether want of mutuality makes covenant void ab initio.

Conclusiveness of legal presumption.

Cited in *Summerville v. Holliday*, 1 Watts, 507, holding presumption of law, from lapse of time, that legacy has been satisfied is deduction from existence of fact to which legal effect is attached beyond its nature or operation, and is conclusive, and may be made by court, or inconclusive and to be found only by jury.

Enforcement of contracts in alternative.

Cited in *Salmon v. Jenkins*, 4 McCord, L. 288, holding where defendant undertook to build house for plaintiff, or on failure, to pay him certain sum, and breach assigned was failure to pay, without any averment that work was not performed plaintiff had no cause of action unless he showed work was not performed; *Mercier v. Campbell*, 14 Ont. L. Rep. 639, holding where one of two alternative obligations is not illegal in vicious sense, but cannot be enforced other may be.

Cited in *Benjamin*, Sales, 5th ed. 576, on liability for nonperformance of promises which are not strictly in the alternative.

Action upon debt uncertain in amount at time of agreement.

Cited in *Garred v. Macey*, 10 Mo. 161, holding appraisement not an award in sense action was maintainable thereon, where agreement was similar to those on which debt will lie to recover money, if quantity is ascertained at time of bringing action though it was uncertain at time agreement was made.

History of penalty.

Cited in 2 Page, Contr. 1795, on history of penalty in contract law.

Grounds for arrest of judgment.

Cited in *Haley v. Long, Peek* (Tenn.) 93, on grounds for arrest of judgment.

6 E. R. C. 368, *CARTWRIGHT v. CARTWRIGHT*, 3 De G. M. & G. 982, 10 Hare, 630, 17 Jur. 584, 22 L. J. Ch. N. S. 841, affirming the decision of the Vice Chancellor, reported in 1 Week Rep. 245.

Illegality of contractual or testamentary provisions tending to separate husband and wife.

Cited in *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949, holding that provision in will that testator's daughter should have whole fund instead of income therefrom, upon her procuring separation or divorce from husband, is void; *Nelson v. Nelson*, 14 B. C. 406, holding that agreement between parties to intended marriage, which provides for certain division of property between husband and wife in case they separated after having been married is void.

Cited in notes in 6 E. R. C. 375; 12 Eng. Rul. Cas. 814, §15,—on validity of separation agreement.

Cited in *Underhill*, Am. Ed. Trusts, 64, on legality of expressed object of trust.

Distinguished in *Cowley v. Twombly*, 173 Mass. 393, 46 L.R.A. 164, 53 N. E.

886, holding testator may make bounty contingent upon occurrence of divorce; *Appleby v. Appleby*, 100 Minn. 408, 10 L.R.A.(N.S.) 590, 117 Am. St. Rep. 709, 111 N. W. 305, 10 Ann. Cas. 563, where contract did not tend to induce separation of the parties; *Re Hope Johnstone* [1904] 1 Ch. 470, 73 L. J. Ch. N. S. 321, 90 L. T. N. S. 253, 20 Times L. R. 282, where gift was to wife as long as she cohabited with her husband with limitation over to husband after dissolution of marriage or judicial separation; *Marlborough v. Marlborough* [1901] 1 Ch. 165, 70 L. J. Ch. N. S. 244, 49 Week. Rep. 275, 83 L. T. N. S. 578, 17 Times L. R. 137, where under a power appointment to second wife was made during life of first wife who had been divorced.

Perpetuities.

Cited in *St. Paul's Church v. Atty. Gen.* 164 Mass. 188, 41 N. E. 231, holding condition of deed relative to disposition of fund void as creating perpetuity.

6 E. R. C. 376, *STANLEY v. JONES*, 7 Bing. 369, 5 Moore & Payne, 193, 33 Revised Rep. 513.

Maintenance and champerty.

Cited in *Poe v. Davis*, 29 Ala. 676, holding assignment of interest in decedent's estate during litigation concerning will champertous; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, holding that purchase of railroad bonds from litigant bond holders pending suit involving fate of railroad and in pursuance of plan to obtain lease of road to purchaser, and agreement by purchaser to pay all expenses of litigation, is not void for champerty because of purchaser's interest in result of suit; *Johnson v. VanWyck*, 4 App. D. C. 294, 41 L.R.A. 520, holding champerty is unlawful maintenance of suit in consideration of agreement to have part of thing in dispute; *Scobey v. Ross*, 13 Ind. 117, holding agreement to pay attorneys part of judgment for their services in collecting same champertous; *Boardman v. Thompson*, 25 Iowa, 487, as to old law and rules under it, by common law and statute; *Ackert v. Barker*, 131 Mass. 436, holding agreement by which in consideration that attorney should prosecute suits in behalf of his client, in which he had no previous interest and receive half recovered if successful and nothing if he failed champertous; *Belding v. Smythe*, 138 Mass. 530, holding assignment of one half interest in an estate to an attorney who was to prosecute claim and retain one half over expenses champertous; *Backus v. Byron*, 4 Mich. 535, holding agreement void for champerty where client was to pay expense of suit, attorney to receive part if recovery was had, nothing if he failed; *Hoyt v. Thompson*, 3 Sandf. 416, holding assignment of debt, which is transfer of lawsuit, to be prosecuted by assignee at his own expense, and sale of disputed title by party out of possession, is void for maintenance and champerty; *Martin v. Amos*, 35 N. C. (13 Fred. L.) 201, holding bond void for maintenance where executed to pay certain sum to plaintiff if they broke will and stipulating that if plaintiffs failed to break will they should pay costs of suit; *Barnes v. Strong*, 54 N. C. (1 Jones, Eq.) 100, holding agreement made between father and son during pendency of suit for slaves mentioned in the pleadings, whereby son was to receive one half of such slaves, in case of successful defense, champertous and void; *Brown v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11, holding that modern doctrine of champerty and maintenance as regards layman is confined to cases where man, for purpose of stirring up strife and litigation, encourages others to bring actions or make defenses they have no right to make or would not otherwise make; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586, holding champerty illegal and punish-

able by the ancient common law; *Nickels v. Kane*, 82 Va. 309, holding contract between attorney and client whereby attorney was to receive percentage on amount of reduction obtained upon decree not champertous; *Major v. Gibson*, 1 Patton & H. (Va.) 48, on definition of champerty; *Peck v. Heurich*, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927, holding according to common law agreement by attorney to prosecute at his own expense a suit to recover land in which he has no interest, in consideration of receiving a portion of what he may recover is void; *Robertson v. Bossuyt*, 8 B. C. 301, holding agreement as to percentage fee on collection of judgment is in nature of champerty; *Wheelock v. Morrison*, 7 N. S. 332, holding inclusion in deed of land in possession of one not party to such deed was champertous; *Craig v. Thompson*, 42 N. S. 150, holding contract to render assistance in litigation in which plaintiff had no legal or equitable interest illegal on ground of maintenance; *Dussault v. Compagnie Du Chemin De Fer du Nord*, 11 Quebec L. R. 165, holding contract illegal where conditions of same were within definition of champerty; *Le Maire v. Lemoine*, Rap. Jud. Quebec 3 B. R. 181, holding champerty confined within its proper limits does not affect the purchase of rights in litigation which is contract recognized by the code; *Muchall v. Banks*, 10 Grant. Ch. (U. C.) 25, holding court would not entertain suit by assignee where assignment was made for purpose of filing bill to have prior mortgage postponed for fraud in obtaining priority; *Carr v. Tannahill*, 30 U. C. Q. B. 217, holding agreement void for champerty and maintenance where purchase of property involved in suit for specific performance was made, purchaser agreeing to furnish means to maintain suit; *Guy v. Churchill*, L. R. 40 Ch. Div. 481, 58 L. J. Ch. N. S. 345, 60 L. T. N. S. 475, 37 W. R. 504, holding champerty is but a form of maintenance; *Ball v. Warwick*, 50 L. J. C. P. N. S. 382, 44 L. T. N. S. 218, 29 Week. Rep. 468, holding stipulation to carry on suit not necessary to render agreement champertous.

Cited in notes in 14 L.R.A. 746, on champertous contracts of laymen: 6 E. R. C. 391, on invalidity of champertous agreement or one for compounding a felony.

Cited in Benjamin, Sales, 5th ed. 527, 528, on invalidity of champertous contract; Reinhard, Ag. 243, on what constitutes champerty.

Distinguished in *Lytle v. State*, 17 Ark. 608, holding attorney may purchase interest in subject matter of suit; *Dorwin v. Smith*, 35 Vt. 69, where there was no adventure by the parties for a speculation and they were mutually interested in reference to supposed legal right; *Hilton v. Woods*, L. R. 4 Eq. 432, 36 L. J. Ch. N. S. 941, 16 L. T. N. S. 736, 15 Week. Rep. 1105, holding where a plaintiff has original and good title to property, he does not become disqualified to sue for it by having entered into improper bargain with his solicitor as to mode of remunerating him; *Bradlaugh v. Newdegate*, L. R. 11 Q. B. Div. 1, 52 L. J. Q. B. N. S. 454, 31 Week. Rep. 792, where conduct complained of consisted in procuring suit for penalty for sitting and voting as member of Parliament without having made and subscribed required oath, and in furnishing indemnity for costs of prosecution.

— Agreements to produce evidence or furnish information.

Cited in *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077, holding contract to procure testimony in law suit for commission on amount recovered void; *Pollak v. Gregory*, 9 Bosw. 116, holding agreement by which person is to be paid stipulated sum for giving testimony, on condition that it leads to termination of suit favorable or satisfactory to other contracting

party, who is party to such suit, is illegal and void; *Meloche v. Deguire*, Rap. Jud. Quebec, 12 B. R. 298, on trafficking in the production or withholding of evidence, and stipulating a direct interest in the result of such traffic by a person who had no interest whatever in the subject of the suit as being like the ancient offense of champerty and illegal as against public morals; *Kerr v. Brunton*, 24 U. C. Q. B. 390, holding agreement that party should have part of amount realized upon judgment out of property pointed out by him, he to pay costs if unsuccessful, was contrary to public policy; *Rees v. De Bernardy* [1896] 2 Ch. 437, 65 L. J. Ch. N. S. 656, 74 L. T. N. S. 585, holding arrangement not merely that information shall be given, but also that person who gives it, and who is to share in what may be recovered, shall himself recover or actively assist in recovery by procuring evidence or similar means, is contrary to policy of law, and void; *Hutley v. Hutley*, L. R. 8 Q. B. 112, 42 L. J. Q. B. 52, 28 L. T. N. S. 63, 21 Week. Rep. 479, holding agreement to procure evidence and advance money for prosecution of suit in consideration of share in property to be recovered by it, is champerty.

Cited in note in 19 L. R. A. 372, on validity of contracts to procure testimony.

Cited in 1 Page, Contr. 663, on contract for obtaining or suppressing evidence.

Distinguished in *Wellington v. Kelly*, 84 N. Y. 543, where party agreeing to furnish evidence was not stranger in interest to subject of litigation.

Criticized in *Mott v. Small*, 20 Wend. 212, holding contract guaranteeing payment of note in order to secure release of former holder that he might become competent witness in suit to recover on the note enforceable.

Illegality in object of contract.

Cited in *Harris v. Roof's Exr's*, 10 Barb. 489, holding action not maintainable to recover for services as lobbyist.

Assignability of cause of action in tort.

Cited in *McCormack v. Toronto R. Co.* 13 Ont. L. Rep. 656, on assignability of cause of action in tort.

6 E. R. C. 382, *KEIR v. LEE MAN*, 9 Q. B. 371, 10 Jur. 742, 15 L. J. Q. B. N. S.

360, affirming the decision of the Court of Queen's Bench, reported in 8 Jur.

824, 13 L. J. Q. B. N. S. 359, 6 Q. B. 308.

Illegality of compromise of prosecution for public offense.

Referred to as leading case in *Hungerford v. Lattimer*, 13 Ont. App. Rep. 315, holding agreement for purpose of stopping indictment in addition to purpose of determining title to road not enforceable; *Morgan v. McFee*, 18 Ont. L. Rep. 30, holding agreement to withdraw prosecution for obtaining money by false pretense void; *Windhill Local Bd. v. Vint*, L. R. 45 Ch. Div. 351, 59 L. J. Ch. N. S. 608, 63 L. T. N. S. 366, 38 Week. Rep. 738, holding stifling of offense of public nature is invalid consideration for an agreement.

Cited in *Dodson v. McCauley*, 62 Ga. 130, holding wrongdoer in case of homicide may lawfully contract to pay given amount by way of compensation of private injury to wife of deceased; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24, holding that damages resulting to person from crime, and for which he may maintain action, may lawfully be adjusted by him with offender; *Swope v. Jefferson F. Ins. Co.* 37 Phila. Leg. Int. 308, holding that a mortgage executed to suppress a prosecution for forgery is void; *Peoples' Bank v. Johnson*, 20 Can. S. C. 541, holding consideration of forbearance to prosecute felony is void as

against public policy; *R. v. Mason*, 17 U. C. C. P. 534, annulling conviction for compounding prosecution for illegal sale of liquors; *Kneeshaw v. Collier*, 30 U. C. C. P. 265, sustaining validity of note given for damages suffered by assault committed by maker; *Major v. McCraney*, 5 B. C. 571, on invalidity of security given in pursuance of agreement for stifling prosecution; *Laferriere v. Cadieux*, 11 Manitoba L. Rep. 175, holding submission to arbitration entered into under threat of criminal prosecution void; *Leggatt v. Brown*, 29 Ont. Rep. 530, holding notes not enforceable where given on illegal agreement to stifle prosecution; *Couture v. Marois*, 5 Quebec L. Rep. 96, holding that as respects illegality of agreement stifling prosecution there is no difference between felonies and misdemeanors of public nature; *Rawlings v. Coal Consumers' Asso.* 43 L. J. Mag. Cas. N. S. 111, 30 L. T. N. S. 469, 22 Week. Rep. 704, holding offense of embezzlement is of public nature, and agreement to stifle prosecution for it is against public policy, and utterly void; *Whitmore v. Farley*, 43 L. T. N. S. 192, 28 Week. Rep. 908, 45 L. T. N. S. 99, 29 Week. Rep. 825, 14 Cox, C. C. 617, holding fact magistrate sanctions compromise of prosecution for felony does not render it legal; *Flower v. Sadler*, L. R. 10 Q. B. Div. 572, holding indorsement of bills under threat of prosecution of indorser for failure to account for rents collected was valid.

Cited in note in 6 E. R. C. 389, 391, on invalidity of champertous agreement or one for compounding a felony.

The decision of the Court of Queen's Bench was cited with special approval in *Partridge v. Hood*, 120 Mass. 403, 21 Am. Rep. 524, holding agreement not enforceable under statute where entered into by defendant for purpose of compounding complaint against her son for misdemeanor.

The decision of the Court of Queen's Bench was cited in *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346, holding that mortgage to secure mortgagee for money due, but executed upon consideration that he would obtain, without improper means, *nolle prosequi* from governor on pending indictment against parties who obtained money from him by fraud is void; *State v. Carver*, 69 N. H. 216, 39 Atl. 973, holding taking of money, or other reward, or promise of reward, to forbear or stifle criminal prosecution for misdemeanor is indictable offense at common law; *Conderman v. Trenchard*, 40 How. Pr. 71, 58 Barb. 165, 3 Lans. 108, holding that agreement in consideration of suppressing evidence or compounding felony, is void; *State v. Davis*, 65 N. C. 298, holding when misdemeanor is one for which damages may be recovered in private action, it is permissible to inquire whether offender has made satisfaction to party injured in weighing punishment for the offence; *Swope v. Jefferson F. Ins. Co.* 37 Phila. Leg. Int. 308, holding that mortgage executed in consideration of agreement to compound felony is void; *Bowen v. Buck*, 28 Vt. 308, holding note invalid where obtained by representation that prosecution for obtaining goods by false pretenses was pending in another state and by agreeing to settle and stop same; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684, holding services whose purpose and natural tendency is to obstruct administration of justice do not constitute legal consideration for contract; *Mason v. Scott*, 20 Grant, Ch. (U. C.) 84, holding compromise of threatened prosecution of husband by wife for non-support was valid; *Union Bank v. Hutton*, Newfoundl. Rep. (1884-96) 290, holding agreement to stifle prosecution for making false entries in books void; *Hungerford v. Lattimer*, 13 Ont. App. Rep. 320, 321, holding that agreement for submission to arbitration entered into for purpose of putting end to prosecution on indictment of one of parties is void; *Bell v. Riddell*, 10 Ont. App. 544

(affirming 2 Ont. Rep. 25), holding note illegal where given in consideration of stifling prosecution for felony; *Mason v. Scott*, 20 Grant, Ch. (U. C.) 84, on invalidity of security given in pursuance of agreement for stifling prosecution; *Cross v. Wilcox*, 39 U. C. Q. B. 187, holding person who lays information against another for common assault is not bound to prosecute before magistrate on peril of having warrant issued for his or her arrest.

The decision of the Court of Queen's Bench was distinguished in *Paseo v. Wegg*, 6 U. C. C. P. 375, holding money paid by plaintiff under threat of prosecution for his conduct in obtaining possession of a note from defendant recoverable by plaintiff; *Carr v. Tannahill*, 31 U. C. Q. B. 201, where promise was based upon premises which included illegal agreement.

6 E. R. C. 393. *MALLAN v. MAY*, 7 Jur. 536, 12 L. J. Exch. N. S. 376, 11 Mees & W. 653.

Validity of contracts in restraint of trade.

Cited in *Re Greene*, 52 Fed. 104, holding promise of rebâte for purchasing distillery products of one concern exclusively not unlawful; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 130, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, holding that contract, sole object of which is to restrain competition and enhance prices is void as in restraint of trade; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595, holding pool to control fire insurance rates illegal; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 81 Am. Rep. 159, 3 Legal Gaz. 154, 28 Phila. Leg. Int. 156, holding agreement whereby coal regions controlled by a number of corporations were divided and prices and freight rates adjusted among them illegal; *Gompers v. Rochester*, 56 Pa. 194, holding consideration must appear on face of agreement in restraint of trade; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527, holding covenant limiting right to transport oil through two thousand acre tract of land to one company void; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 3 Chand. (Wis.) 133, 56 Am. Dec. 164, holding that contract in partial restraint of trade is void unless there is some good ground or reason to support it independent of mere pecuniary consideration; *Western U. Teleg. Co. v. New Brunswick R. Co.* N. B. Eq. Cas. 338, holding grant of exclusive privilege to put up poles and wires on railroad land valid; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663, holding he who seeks to put restraint upon freedom of contract must show it is plainly necessary for purposes of freedom of trade.

Cited in notes in 33 L. ed. U. S. 68, 71; 41 L. ed. U. S. 1008,—on validity of contracts in restraint of trade.

Cited in 2 Beach, Contr. 2043, 2044, on limit of time as not essential to validity of contract in restraint of trade; 2 Beach, Contr. 2026, 2030, on validity of contracts in restraint of trade; *Hollingsworth*, Contr. 254, on invalidity of agreement in restraint of trade because unduly limiting rights of individual action.

Distinguished in *Grasselli v. Lowden*, 2 Disney (Ohio) 323, where restraint of trade contracted for was in use and occupation of real estate and disconnected from any interest in carrying on the trade.

—Questions of law and fact.

Cited in *Dowden v. Pook* [1904] 1 K. B. 45, 73 L. J. K. B. N. S. 38, 52 Week.

Rep. 97, 89 L. T. N. S. 688, 20 Times L. R. 39, holding question whether agreement is bad as being in restraint of trade is one of law for the court.

— Reasonableness of restraint.

Cited in *Walker v. Lawrence*, 101 C. C. A. 417, 177 Fed. 363, holding that agreement of seller, on sale of liquor business, stock and good will, that he will not engage in like business in that or adjoining court, for period of six years and that he will remove from such territory for five years, is valid in absence of proof that it was not reasonable provision for protection of purchaser; *United States v. Trans-Missouri Freight Assn.* 24 L.R.A. 73, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, holding that it is not existence of restriction of competition, but reasonableness of that restriction, that is test of validity of contracts that are claimed to be in restraint of trade; *Rosenbaum v. United States Credit System Co.* 65 N. J. L. 255, 53 L.R.A. 449, 48 Atl. 237, holding reasonableness of agreed restraint is court question, and should be deducible from facts and circumstances recited in contract or averred in pleadings; *French v. Parker*, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; *Threlkeld v. Steward*, 24 Okla. 403, 138 Am. St. Rep. 888, 103 Pac. 630.—holding that contract restraining practice of medicine and surgery in particular locality, within reasonable area, is valid; *Collins v. Locke*, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 48 L. T. N. S. 292, 28 Week. Rep. 189, holding provision of agreement whereby stevedores divided up business of port among themselves that if one of the parties stevedored ship which should have been stevedored by another, party who did it should pay one who should have done it, was not unreasonable, but that provision whose effect was to deprive merchants of power to employ any stevedore they wished was unreasonable; *Haynes v. Doman* [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354, holding where man of sufficient age and business capacity knowingly enters into contract of service which is only in partial restraint of trade, onus lies upon him of proving it goes beyond what is reasonably necessary.

Cited in note in 15 E. R. C. 279, on what is unreasonable restraint of trade.

Cited in *Benjamin, Sales*, 5th ed. 520, on fair protection of promisee as test of reasonableness of contract in restraint of trade; *Benjamin, Sales*, 5th ed. 526, on invalidity as to excess if severable, of restraint larger than is necessary for protection of buyer.

— Areal extent of lawful restraint.

Cited in *Goodman v. Henderson*, 58 Ga. 567, holding that contract in restraint of trade must be limited in territory, limitation in time not affecting its validity; *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317, holding that agreement to relinquish business and not carry it on thereafter, limited as to place but unlimited as to time, is not void as being in restraint of trade; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923, holding rule is that when covenant is given against competition with existing business, area of exclusion, in its relation to territorial extent of the business, is what courts regard in testing reasonableness of the covenant; *Richards v. American Desk & Seating Co.* 87 Wis. 503, 58 N. W. 787, holding restraint preventing sale of furniture of particular kind in a number of states unreasonable, also that pleading will be had on demurrer if it does not appear from contract or averments of extrinsic facts that restraint was reasonable.

Cited in note in 24 L.R.A.(N.S.) 925, 926, on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope.

Distinguished in *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513, on ground restriction in cited case was local.

Criticized in *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274, holding that in determining reasonableness of restraint effect upon interest of public is better test than that of territory.

—Against competition in trade or occupation.

Cited in *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186, holding contract not to use boat in waters of state void; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735 (affirming 59 Ill. App. 66), holding contract not to engage in livery and undertaking business in Chicago for five years valid; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380, holding contract not to engage in sale of agricultural implements in city not unreasonable; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427, holding contract not to engage in dry goods business for five years invalid, where not limited as to space; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048, holding that contract by which one engaged in selling oil in one city binds himself to refrain from carrying on his business in whole state with exception of one other city, is void, as unreasonable; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946, holding agreement not to engage in undertaking business in certain city so long as another remained in said business not unreasonable; *Guerand v. Dandele*, 32 Md. 561, 3 Am. Rep. 164, holding condition restraining covenantor indefinitely as to time from exercising his trade at any place in city of Baltimore not too comprehensive; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, on contracts in restraint of trade; *Beal v. Chase*, 31 Mich. 490, holding agreement not to engage in business of printing and publishing with a state not unreasonable; *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233, holding agreement not to engage in drug business in certain city for five years valid; *Parsons v. Cotterell*, 56 L. T. N. S. 839, 51 J. P. 679, holding agreement binding clerk and traveller not to engage in same business as his employer valid, where necessary for employer's protection; *Davies v. Davies*, L. R. 36 Ch. Div. 359, on illegality of absolute covenant to retire from trade or business; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604, holding covenant not to engage in gun and ammunition business, unrestricted as to space valid where contract was severable.

—Against professional activity or competition.

Cited in *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537, holding contract of physician to retire permanently from practice in city and vicinity not unreasonable; *Freudenthal v. Espey*, 45 Colo. 488, 26 L.R.A.(N.S.) 961, 102 Pac. 280, holding that restraint upon physician to practice his profession within certain city for period of five years is valid where restraint is in consideration of receiving monthly salary from another physician; *Rakestraw v. Lanier*, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735, holding contract not to practise medicine in city or within radius of 15 miles, unlimited as to time, not enforceable; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590, holding contract not to practise profession in certain town enforceable by injunction; *Gilman v. Dwight*, 13 Gray, 356, 74 Am. Dec. 634, holding it competent to show what was usually known and called as village of certain name in action upon contract guaranteeing no other physician than purchaser of guarantor's practice would establish himself there; *Mott v. Mott*, 11 Barb. 127, holding extent of territory and length of time to which restraint was limited not unreasonable where agreement was

not to practise medicine in village for five years: *Turner v. Abbott*, 116 Tenn. 718, 6 L.R.A.(N.S.) 892, 94 S. W. 64, 8 Ann. Cas. 150, holding agreement by dentist's assistant not to engage in practice of dentistry in town where his employer was located, valid.

Cited in note in 26 L.R.A.(N.S.) 961, 962, on validity of contract restraining practice of profession after term of service with another.

Separation of contract into legal and illegal parts.

Cited in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, 31 Phila. Leg. Int. 270, 6 Legal Gaz. 260, holding agreement in restraint of trade divisible and legal part thereof enforceable; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380, holding where stipulations in contract are divisible, and part impose reasonable and part unreasonable restraint upon trade, courts will give effect to former and not to latter; *Dean v. Emerson*, 102 Mass. 480, holding it unnecessary to consider validity of second of two covenants where they were divisible and injury arose from direct violation of first; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299, conceding arguendo that action might be maintained upon all parts of contract except single covenant; *Piper v. Boston & M. R. Co.* 75 N. H. 435, 75 Atl. 1041, holding that joining upon single valid consideration of agreement enforceable at law with one which is unenforceable, does not prevent enforcement of former, after acceptance of consideration, provided the two are separable; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 240, holding fact one promise is illegal will not render another disconnected promise void; *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606, holding whole agreement not vitiated or avoided by presence therein of inhibited stipulation which is not immoral; *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 27 L.R.A. 33, 40 Am. St. Rep. 607, 37 N. E. 519, holding covenant severable into legal and illegal parts where there was composition with creditors of debtor, which was lawful, and agreement for giving additional security which was void; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251, 44 Phila. Leg. Int. 113; *North Carolina Endowment Fund v. Satchwell*, 71 N. C. 111 (dissenting opinion).—on division of contract into legal and illegal parts and allowing legal part to stand; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604, holding covenant in restraint of trade too wide in its application to any business which might be carried on, was nevertheless valid as regards guns and ammunition business.

Cited in 2 Beach, Contr. 1860, on validity of contract where consideration was partly illegal; 1 Beach, Contr. 301, on effect of impossibility of performance of one part of alternative promises.

Jurisdiction of court of equity to restrain violation of contract not to engage in competition.

Cited in *Casey v. Holmes*, 10 Ala. 776, holding that chancery has jurisdiction to restrain violation of contract not to engage in certain kind of business, where danger of violation is imminent, and actually impending.

6 E. R. C. 406, *PRICE v. GREEN*, 16 L. J. Exch. N. S. 108, 16 Mees. & W. 346, affirming the decision of the Court of Exchequer reported in 13 M. & W. 695, 9 Jur. 880, 14 L. J. Exch. N. S. 105, 67 Revised Rep. 791.

Illegality of restraints upon trade.

Cited in *Wakefield v. Van Tassell*, 202 Ill. 41, 65 L.R.A. 511, 95 Am. St. Rep. 207, 66 N. E. 830, holding it is not interest of parties alone which is true test, but in each particular case, under the facts, judicial inquiry is, will enforce-

ment of the condition be inimical to the public interests: *Central New York Teleph. & Teleg. Co. v. Averill*, 199 N. Y. 128, 32 L.R.A.(N.S.) 494, 139 Am. St. Rep. 878, 92 N. E. 206, holding that contract giving telephone company exclusive right to furnish connections with hotel for term of years, is against public policy and void; *Farrer v. Close*, L. R. 4 Q. B. 602, 38 L. J. Mag. Cas. N. S. 132, 10 Best. & S. 533, 20 L. T. N. S. 802, 17 Week. Rep. 1129, on invalidity, as distinguished from illegality, of unreasonable provisions in restraint of trade; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 58 L. J. Q. B. N. S. 465, 37 Week. Rep. 756, 53 J. P. 709, holding word "illegal," as used in proposition that agreement in restraint of trade is illegal, means agreement is one upon which no action can be sustained, and no relief obtained at law or equity; not that entering into the agreement is indictable, or actionable; *Swaine v. Wilson*, L. R. 24 Q. B. Div. 252, 59 L. J. Q. B. N. S. 76, 62 L. T. N. S. 309, 38 Week. Rep. 261, 54 J. P. 484, holding not every society which has rules in restraint of trade is unlawful, i. e. criminal, and its members punishable at common law; *Collins v. Locke*, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 48 L. T. N. S. 292, 28 Week. Rep. 189, holding where stevedores by agreement divided business of port among themselves, provision that party who did stevedoring of ship which should have been stevedored by another under the agreement should pay party who should have done it, was not unreasonable, but covenant depriving merchants of power to employ any one of the stevedores they wished was unreasonable.

Cited in note in 33 L. ed. U. S. 71, on validity of contracts in restraint of trade.

Cited in 2 Beach, Contr. 2047, on validity of contract in restraint of trade by protecting purchaser of good will.

The decision of the Court of Exchequer was cited in *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380, holding that mere purchase of stock in trade of party, is sufficient consideration for agreement of latter to abstain from carrying on particular trade in place where purchaser is to engage in it; *Nicholson v. Ellis*, 110 Md. 322, 24 L.R.A.(N.S.) 942, 132 Am. St. Rep. 445, 73 Atl. 17, holding that purchaser of business including secret formulas, cannot defeat foreclosure of mortgage given to secure purchase money, merely because vendor agreed not to re-engage in business anywhere in United States; *Grasselli v. Lowden*, 2 Disney (Ohio) 323, holding only question as to reasonableness of the restraint is one of public policy; *Lange v. Werk*, 2 Ohio St. 519, holding that contract in partial restraint of trade is void unless there is some good ground or reason to support it, independent of mere pecuniary consideration; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159, 28 Phila. Leg. Int. 156, holding that presumption is that restraints of trade are illegal, unless made upon adequate consideration, and on circumstances both reasonable and useful.

— Limitations in time and place.

Cited in *Kinney v. Scarbrough Co.* 138 Ga. 77, 40 L.R.A.(N.S.) 473, 74 S. E. 772, to the point that contracts in restraint of trade without territorial limitation is void; *Hursen v. Gavin*, 59 Ill. App. 66, holding that contract in restraint of trade in city of Chicago for five years, is not unreasonable or opposed to public policy, because of extent of territory or period of time; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735 (affirming 59 Ill. App. 66), holding agreement not to engage in livery and undertaking business in city for five years valid; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048, holding contract not to engage in selling of oil anywhere in state outside of certain city therein, void; *Guerand v. Dandele*, 32 Md. 561, 3 Am. Rep. 164,

holding covenant restraining covenantor indefinitely as to time from exercising his trade, within certain city not too comprehensive; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, holding contract not to engage in business of manufacturing of shoe cutters within a state, void; *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317, holding agreement not to engage in teaming business limited as to place, but unlimited as to time, valid; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527, holding grant to one company of exclusive right to transport oil through two thousand acre tract of land illegal; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604, holding covenant not to engage in guns and ammunition business valid, though unrestricted as to space.

Cited in note in 24 L.R.A.(N.S.) 918, 928, on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope.

Cited in 2 Beach, Contr. 2044, on limit of time as not essential to validity of contract in restraint of trade.

The decision of the Court of Exchequer was cited in *Lawrence v. Kidder*, 10 Barb. 641, holding that contract in restraint of trade which imposes restrictions upon it only in particular town or district may be valid.

Liquidated damages for breach of contract.

Cited in *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, holding where chartered yacht was wrecked and libel filed for failure to return it that valuation of yacht fixed by charter party was binding; *United States v. Alcorn*, 145 Fed. 995, holding amount fixed by proposal bond to be paid in case of failure to enter into contract for carrying mail as proposed was liquidated damages; *Williams v. Green*, 14 Ark. 315, holding that where there is executory contract to exchange property, worth \$1,600, and party agrees to forfeit \$500, for failure to comply with agreement, partly in default, is liable for specified sum as liquidated damages; *McCullough v. Moore*, 111 Ill. App. 545, holding that where bond conditioned for erection of five first-class buildings, three stories high, and constructed of brick and stone, is broken, penalty of \$5,000 may be recovered as liquidated damages; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107, holding sum denominated as penalty for failure to comply with terms of agreement for sale of land was penalty; *Chase v. Allen*, 13 Gray, 42, holding where contract consists of several stipulations, damages for breach of which cannot be well ascertained and valued, parties are deemed to have agreed that sum shall be treated as liquidated damages; *Davis v. Gillett*, 52 N. H. 126, holding where parties have omitted to make their intentions certain by use of unequivocal expressions which would bind them, damages will not be considered as liquidated; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713, holding case was one of liquidated damages where damages were wholly uncertain and depending entirely on proof aliunde the instrument declared on; *Esmond v. Van Benschoten*, 12 Barb. 366 (dissenting opinion), as to when sum certain and depending entirely on proof aliunde the instrument declared on named to be paid in case of breach is deemed penalty; *Knox Rock Blasting Co. v. Grafton Stone Co.* 64 Ohio St. 361, 60 N. E. 563, holding agreement that licensee using process after license expired and without renewing same should then pay double rates was liquidated damages; *Brussels v. Ronald*, 11 Ont. App. Rep. 605, holding question whether damages have been liquidated is one which depends upon intention of the parties to be gathered from the in-

strument; *McManus v. Rothschild*, 25 Ont. L. Rep. 138, holding that even though parties state in contract sum therein mentioned is liquidated damages and not penalty, this will not prevent court holding that it is in fact penalty.

Cited in *Parsons*, Partn. 4th ed. 224, on provision in partnership agreement for liquidating damages for misconduct of partner.

The decision of the Court of Exchequer was cited in *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 776, holding that under agreement that if tenant would give up his lease lessor would build brick building in place of frame one and would give possession within 3 weeks, or pay \$500 damages, amount named was penalty; *Miller v. Elliott, Smith (Ind.)* 267, holding that amount fixed in agreement not to re-engage in business may be considered, because of difficulty in establishing amount by evidence, as stipulated damages; *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475, holding that amount of \$1000 stipulated in contract not to practice medicine in certain place was liquidated damages and not penalty; *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774, holding that where in contract for sale of land parties agree that sum deposited by purchaser, in part payment shall be forfeited if he fails to carry out contract, no part of such deposit can be recovered in event of breach of contract by vendee as forfeiture is in nature of penalty; *Mott v. Mott*, 11 Barb. 127, holding that sum mentioned in contract not to practice medicine in certain town as liquidated damages was not penalty; *Thoroughgood v. Walker*, 47 N. C. (2 Jones, L.) 15, holding that stipulation was held to be penalty, where agreement was to do things of different degrees of importance and value or to pay \$2,500 as stipulated damages, and breach assigned is not doing of things which was readily ascertainable in value, and less than sum specified; *Grasselli v. Lowden*, 2 Disney (Ohio) 323, holding that agreement between owners of adjoining premises that one should discontinue action for abatement of nuisance, and bring no action for 5 years, and at end of that other party should discontinue business of chemical laboratory on premises or pay \$3,000, was valid; *Bearden v. Smith*, 11 Rich. L. 554, holding that stipulation in written contract that owner would forfeit one hundred dollars, if he did not put another in possession of certain house by certain day, will be construed as stipulating penalty and not liquidated damages.

— For breach of contract affecting a business.

Cited with special approval in *Barry v. Harris*, 49 Vt. 392, holding sum was one for stipulated damages because of form of contract, of sale of business practical impossibility of ascertaining damages consequent upon its violation, reasonableness of sum named, and object and purposes of the contract.

Cited in *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581, holding where party binds himself in sum certain not to carry on, or allow to be carried on, any particular kind of business, within certain territory, or within certain time named, sum mentioned will, in general, be regarded as liquidated damages; *Leary v. Laflin*, 101 Mass. 334, holding sum fixed by contract for failure of lessee to carry on livery business during term of lease so as not to impair its good repute was liquidated damages; *Whitfield v. Levy*, 35 N. J. L. 149, holding sum named to be paid in case of failure to carry out provisions of contract of sale of realty and grocery business in connection was penalty.

Divisibility of contract partly illegal.

Cited in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, 31 Phila. Leg. Int. 270, 6 Legal Gaz. 261, holding contract divisible so that it might stand for number of years for which it was binding though void as to other years; *Montgomery v. Montgomery & W. Pl. Road Co.* 31 Ala. 76, holding contract

partly within and partly beyond powers of city, valid in part and invalid in part; *Dean v. Emerson*, 102 Mass. 480, holding where two covenants were distinct and divisible and injury for which damages were assessed arose from breach of the first, it was not necessary for court to consider validity of second; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299, on right to maintain action upon all parts of contract except such parts as are unlawful; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 240, holding when defendant has agreed to do two things, which are entirely distinct, one legal and the other illegal, illegality of one stipulation cannot be set up as bar to suit for breach of the valid one; *Security Life & Annuity Co. v. Costner*, 149 N. C. 293, 63 S. E. 304, holding fact collateral contract was violative of statute would not invalidate policy of insurance issued or note given for premium; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251, 44 Phila. Leg. Int. 113, on division of contract into legal and illegal parts and allowing legal part to stand; *Osgood v. Central Vermont R. Co.* 77 Vt. 334, 70 L.R.A. 930, 60 Atl. 137, holding contract divisible where plaintiff leased part of defendant railway company's roadway for site for coal and lumber shed, for specified rent, and agreed to save defendant harmless from negligence of itself or servants; *Baines v. Gary*, L. R. 35 Ch. Div. 154, 56 L. J. Ch. N. S. 935, 56 L. T. N. S. 567, 51 J. P. 628, 36 Week. Rep. 98, holding covenant divisible where one employed as milk carrier agreed not to serve at any time to customers of his master for his own benefit; *Nicholls v. Stretton*, 10 Q. B. 346, 11 Jur. 1008, holding contract of attorney's clerk to abstain from interference with his employer's clients divisible.

Cited in note in 24 L.R.A.(N.S.) 943, on divisibility in respect of time or territorial extent of contracts in restraint of trade.

Cited in 1 Beach, Contr. 301, on effect of impossibility of performance of one part of alternative promises; 2 Beach, Contr. 1860, on validity of contract where consideration was partly illegal; 1 Page, Contr. 780, on effect of contract containing two covenants only one of which is void.

The decision of the Court of Exchequer was cited in *Piper v. Boston & M. R. Co.* 75 N. H. 435, 75 Atl. 1041, holding that joining upon single valid consideration of agreement enforceable at law with one which is unenforceable does not prevent enforcement of former after acceptance of consideration, provided the two are separable; *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606, holding that where there are several considerations and one of them is illegal promise to refrain from particular business, presence of such illegal stipulation will not illegalize entire contract; *North Carolina Endowment Fund v. Satchwell*, 71 N. C. 111 (dissenting opinion), on validity of part of contract separable from part void by statute.

—Enforceability of contract in excessive restraint of trade.

Cited in *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, holding mere fact covenant in restraint of trade embraces larger territory than that authorized by statute does not render stipulation as to damages for breach void; *Rosenbaum v. United States Credit System Co.* 65 N. J. L. 255, 53 L.R.A. 449, 48 Atl. 237, holding valid covenants not avoided by covenant invalid because in restraint of trade; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604, holding covenant in restraint of trade though too wide in its application to any business which might be carried on, was valid as regards guns and ammunition business.

Distinguished in *Central New York Teleph. & Teleg. Co. v. Averill*, 58 Misc. 59, 110 N. Y. Supp. 273, where vice of contract was that it tended to create monopoly and agreements on both sides could not be apportioned; *Baker v.*

Hedgecock, L. R. 39 Ch. Div. 520, 57 L. J. Ch. N. S. 889, 59 L. T. N. S. 361, 36 Week. Rep. 840, holding agreement of tailor's servant not to enter employ of any other person or engage in any other business whatsoever not divisible.

When equity will relieve from penalty.

Cited in *Robert v. New England Mut. L. Ins. Co.* 1 Disney (Ohio) 355, holding it is intention of parties which is to be looked at to ascertain whether, in particular case, there be proper ground of relief and this intention is to be ascertained from nature of agreement rather than from language of contract.

6 E. R. C. 413, *NORDENFELT v. MAXIM-NORDENFELT GUNS & AMMUNITION CO.* [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 71 L. T. N. S. 489, 11 Reports, 1, affirming the decision of the Court of Appeal, reported in [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604.

Validity of contracts in restraint of trade or competition.

Cited in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, holding that contracts between a manufacturer and all dealers whom he permits to sell his products, comprising most of the dealers in similar articles throughout the country, which fix the price for all sales are in restraint of trade, although the products may be proprietary medicines made under secret formulæ; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, holding conventional restraint of trade not enforceable unless covenant embodying it is merely ancillary to main purpose of lawful contract; *Gilbert v. American Surety Co.* 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 499, holding one who sells property to another and afterwards holds it as trustee, is estopped to deny title of his principal on ground contract by which he sold was in restraint of trade; *John D. Park & Sons Co. v. Hartman.* 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24 (reversing 145 Fed. 358), holding test is: "What is reasonable restraint with reference to particular case?" *Wakefield v. VanTassell.* 202 Ill. 41, 65 L.R.A. 511, 95 Am. St. Rep. 207, 66 N. E. 830, holding that in each particular case, judicial inquiry is, will enforcement of the condition be inimical to public interests; *Garden City Sand Co. v. Southern Fire Brick & Clay Co.* 124 Ill. App. 599, holding contract to manufacture and sell article to one party exclusively not in restraint of trade; *State v. Duluth Bd. of Trade.* 107 Minn. 506, 23 L.R.A.(N.S.) 1260, 121 N. W. 395, holding that a combination, the main purposes and effects of which are to foster the trade and increase the business of those who make and operate it, and which only indirectly and remotely restricts competition in trade or business, is not a combination and conspiracy in restraint of trade; *Edgerly v. Barker.* 66 N. H. 434, 28 L.R.A. 328, 31 Atl. 900, on questions of public policy presented by contracts in restraint of trade; *Weidman v. Shragge.* 2 D. L. R. 734 (reversing 20 Manitoba L. Rep. 189), (dissenting opinion), on agreement between two junk dealers in junk aimed to destroy all competition in certain territory as void at common law as in restraint of trade; *Rex v. Beckett.* 20 Ont. L. Rep. 401, on taking into consideration commercial changes in determining whether a contract is in restraint of trade; *Re Hollis's Hospital* [1899] 2 Ch. 540, 68 L. J. Ch. N. S. 673, 47 Week. Rep. 691, 81 L. T. N. S. 90, on changes in application of principle that restraints of trade are contrary to public policy.

Cited in notes in 6 Eng. Rul. Cas. 455, on invalidity of contracts in restraint of trade; 5 L.R.A.(N.S.) 1180, on rights of employer and employee with respect to things produced by labor of employee.

Cited in 1 Page, Contr. 588, on what is a reasonable restraint of trade; Ben-

jamin, Sales, 5th ed. 513, on invalidity as against public policy, of forestalling, regrating, and engrossing; Benjamin, Sales, 5th ed. 526, on contract capable of severance being valid as regards any restraint which is necessary to the reasonable protection of the promisee or covenantee, but void as regard the excess: Freund, Police P. 343, on covenants by vendor of business: Benjamin, Sales, 5th ed. 521, on test of reasonableness of contract in restraint of trade: 2 Beach, Contr. 2033; Benjamin, Sales, 5th ed. 518,—on validity of contracts in restraint of trade.

Distinguished in *United Shoe Mach. Co. v. Brunet*, C. R. [1909] A. C. 148, holding that contract to lease machinery for making shoes instead of selling such machinery, which owners refused to do, is not in restraint of trade; *Wampole & Co. v. F. E. Karn Co.* 11 Ont. L. Rep. 619, holding under criminal statutes an agreement between wholesalers' and retailers' associations to keep up prices was unlawful: *United Shoe Machinery Co. v. Brunet*, Rap. Jud. Quebec 18 B. R. 511, holding that leases of shoe manufacturing machinery providing that the machines shall not be used for manufacture of shoes on which work has been done by machines other than those of lessor hired by lessee are not in restraint of trade.

The decision of the Court of Appeal was cited in *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.* 177 Mo. 559, 76 S. W. 1008, holding that where in consideration of exclusive right to use certain patent process, defendant covenanted not to use or sell "similar" article for purpose of evading contract, such contract is not in restraint of trade.

—Trade processes, knowledge or secrets.

Cited in note in 46 L. ed. U. S. 1059, on restraint of trade in patented articles.

The decision of Court of Appeals was cited in *Hulse v. Bonsack Mach. Co.* 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864, holding contract by which employe's improvements upon cigarette machines were to be for exclusive use of his employer engaged in the manufacture of such machines not contrary to public policy.

—Limitations as to time and place.

Cited in *Harrison v. Glucose Sugar Ref. Co.* 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304, holding reasonableness of restraint has respect to the territory occupied by the business; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415, upholding restrictive covenants made by one capable of contracting, which is unlimited as to time which in area covers whole United States, which is ancillary to main lawful contract being in part consideration of good will sold and reasonable, and no broader than necessary to save to covenantee his rights: *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008, holding restriction may extend to limits wherein particular trade would be likely to go: *United States v. Trans-Missouri Freight Asso.* 163 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540 (dissenting opinion), on incorrectness of criterion based on distinction between partial and general restraint: *Walker v. Lawrence*, 101 C. C. A. 417, 177 Fed. 363, holding that agreement by seller, on sale of liquor business, stock and good will that he will not engage in like business in that or adjoining county for six years and that he will maintain his residence elsewhere for five years is valid, in absence of proof that it was not reasonable provision: *Underwood v. Barker* [1899] 1 Ch. 300, 68 L. J. Ch. N. S. 201, 80 L. T. N. S. 306, 47 Week. Rep. 347, 15 Times L. R. 177, holding agreement not to engage in business of hay and straw merchant in a number of countries for specified time not unreasonable: *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119, holding circumstance that restraint

is indefinite in point of time does not invalidate contract; *Swigert v. Tilden*, 121 Iowa, 650, 63 L.R.A. 608, 100 Am. St. Rep. 374, 97 N. W. 82, sustaining an agreement not to prosecute a trade in two states for ten years, it having drawn orders from a large territory, and rejecting the geographical test of validity; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509, holding stipulation to do no business for five years which would interfere with or compete with that of another valid; *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 79 N. E. 790, holding covenant not to engage in particular business for fifteen years, unrestricted as to place, enforceable; *Marshall Engine Co. v. New Marshall Engine Co.* 203 Mass. 410, 89 N. E. 548, holding that agreement never to engage in business of manufacturing certain kinds of machinery, even though unlimited in time and space, is valid if it is coupled with sale of business necessary to give purchaser what he has bought; *Southworth v. Davison*, 106 Minn. 119, 19 L.R.A.(N.S.) 769, 118 N. W. 363, 16 Ann. Cas. 253, holding stipulation not to engage in laundry business within radius of five miles from certain city valid, though not limited as to time; *Bancroft v. Union Embossing Co.* 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97, holding contract unlimited as to territory, though limited as to time, valid; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723, on reasonableness of general restraint of trade; *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 24 L.R.A.(N.S.) 913, 71 Atl. 265, holding that contract not to engage in competing business of curing and selling meat within 500 miles of city where business is located, may be enforced so far as city is concerned; *Cowan v. Fairbrother*, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212, holding contract of editor and owner of newspaper not to be connected with any other paper within state for limited time, valid; *Ryan v. McNichol*, 1 N. B. Eq. Rep. 487, holding covenant not to practice as physician and surgeon in certain town or within ten miles thereof for three years enforceable; *McCausland v. Hill*, 23 Ont. App. Rep. 738, holding agreement not to deal in clear plate glass in Canada for twenty-years valid; *Allen Mfg. Co. v. Murphy*, 23 Ont. L. Rep. 467, 475 (reversing 22 Ont. L. Rep. 539, 20 Ann. Cas. 657), holding that agreement not to engage in business of manufacturing white-wear and laundering same within Dominion of Canada was void because area covered was too great; *Tivoli Manchester Line v. Colley*, 52 Week. Rep. 632, holding agreement of actress not to perform at any place within twenty miles of city prior to commencement of agreement, during its continuance, and for six months afterwards, was reasonable; *Dubowski v. Goldstein* [1896] 1 Q. B. 478, 65 L. J. Q. B. N. S. 397, 74 L. T. N. S. 180, 44 Week. Rep. 436, holding agreement of employee of dairyman not to serve any of his employer's customers for his own or another's benefit valid; *Haynes v. Doman* [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354, holding employee's agreement not to engage in hardware business within radius of 25 miles of employer's works without written consent of employee valid.

Cited in notes in 24 L.R.A.(N.S.) 916, 918, 919, 922, on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope; 24 L.R.A.(N.S.) 935, 936, on validity of agreement by employee not to engage in competing business, as affected by scope in time and territorial extent; 24 L.R.A.(N.S.) 943, 944, on divisibility in respect of time or territorial extent of contracts in restraint of trade; 22 L.R.A. 675, on validity of contracts of sale in restraint of trade without limitation of place.

Cited in 1 Page, Contr. 595, on effect of duration of restraint on legality of

contract in restraint of trade; Benjamin, Sales, 5th ed. 525, on validity of restraint general as to space but limited as to time; 1 Beach, Contr. 106, on effect of uncertainty in contract as to place and time.

Distinguished in *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048, holding contract not to sell oil within a state excepting one city void.

The decision of the Court of Appeal was cited in *Ru Ton v. Everitt*, 35 App. Div. 412, 54 N. Y. Supp. 896, holding covenant by vendor of particular business not to engage therein or in similar business to prejudice of vendee is valid when incident to sale of good will of business sold, and is not in restraint of trade so long as it is coextensive with interest to be protected, and but adequate to secure to vendee the full, and, as against vendor exclusive enjoyment of thing purchased; *Central Fireworks Co. v. Charlton*, 42 App. Div. 104, 58 N. Y. Supp. 900, holding if contract is reasonable, not oppressive, and supported by valuable consideration, mere fact that it operates to restrain one of parties to it from engaging in particular business for considerable time and within great extent of territory will not induce court to refuse specific performance of it; *Kelly v. McLaughlin*, 21 Manitoba L. Rep. 789, holding that covenant in contract transferring to plaintiff defendant's share in company dealing in automobiles, prohibiting defendant from engaging in similar business in certain described districts is valid; *Virgo v. Toronto*, 22 Can. S. C. 447 (affirming 20 Ont. App. Rep. 435, in dissenting opinion), on contracts in restraint of trade; *Cook v. Shaw*, 25 Ont. Rep. 124, holding agreement not to engage in manufacture and sale of bamboo ware and fancy furniture at any place in Canada for ten years not against public policy.

Agreements contrary to public policy.

Cited in *Kay v. Moneton*, 36 N. B. 377, holding agreement of appointed officer with city council to accept reduction in salary not void on ground of public policy.

Cited in *Hollingsworth*, Contr. 254, 255, on validity of agreement against public policy because unduly limiting rights of individual action.

The decision of the Court of Appeal was cited in *Clark v. Needham*, 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027, holding that agreement to close one part of business is as much against policy of law as agreement to close whole business; *Wilson v. Carnley* [1908] 1 K. B. 729, 1 B. R. C. 901, 77 L. J. K. B. N. S. 594, 98 L. T. N. S. 265, 24 Times L. R. 277, 52 Sol. Jo. 239, holding that promise of marriage made by man who, to knowledge of promise, was at time married, is void as against public policy.

6 E. R. C. 455, *WILLIAMS v. BAYLEY*, 12 Jur. N. S. 875, 35 L. J. Ch. N. S. 717, L. R. 1 H. L. 200, 14 L. T. N. S. 802, affirming the decision of the Vice Chancellor reported in 4 Giff. 638, 11 Jur. N. S. 236, 11 L. T. N. S. 110, 13 W. R. 533.

Invalidity of contract obtained by duress, undue influence or coercion.

Cited in *Turley v. Edwards*, 18 Mo. App. 676, holding any contract produced by actual intimidation ought to be held void, whether as arising from result of merely personal infirmity or from circumstances which might produce like effect upon persons of ordinary firmness; *Jordan v. Elliott*, 13 Pittsb. L. J. N. S. 68, holding that where threat whether of mischief to person or property, is such as to destroy freedom of will, law will not enforce contract executed under such

contract; *Jordan v. Elliott*, 39 Phila. Leg. Int. 320, holding that any contract produced by actual intimidation may be held void; *Calusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495, holding true doctrine of duress is that contract obtained by so oppressing person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of free exercise of his will is voidable for duress; *Niagara Dist. Fruit Growers Stock Co. v. Stewart*, 26 Can. S. C. 629, on the point that a contract of suretyship should be based upon the free and voluntary agency of the individual who enters into it; *Armstrong v. Gage*, 25 Grant, Ch. (U. C.) 1, holding evil threatened must be serious, death, wounds, or loss of liberty, and in these cases it is indifferent whether threat be directed against selves or children; *Jordan v. Elliott*, 12 W. N. C. 56, holding that test of right to have conveyance set aside because of undue influence is, whether party's freedom of will was destroyed; *Allen v. Flood* [1898] A. C. 1, 17 Eng. Rul. Cas. 285, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, as to what constitutes coercion in civil case.

Cited in note in 6 Eng. Rul. Cas. 489, on right to recover back money paid under illegal contract.

Cited in 2 Cooley Torts, 3d ed. 968, on invalidity of notes, etc., obtained by duress; 2 Beach, Contr. 1828, on validity of notes or receipts obtained by duress; 1 Beach, Trusts, 295, on trust resulting to grantor from undue influence; *Hollingsworth*, Contr. 202, as to when undue influence will be presumed; *Hollingsworth*, Contr. 189, on duress by lawful imprisonment.

Distinguished in *Jones v. Merionethshire Permanent Benefit Bldg. Soc.* [1892] 1 Ch. 173, 61 L. J. Ch. N. S. 138, 65 L. T. N. S. 685, 40 Week. Rep. 273, 17 Cox, C. C. 389, where there was no proof of pressure or undue influence.

—Threats of prosecution.

Cited in *Kiventsky v. Sirovy*, 142 Iowa, 385, 121 N. W. 27, holding that threat of husband to prosecute his wife and her paramour for criminal intimacy, whereby stipulation upon which decree of court was entered setting aside deed from himself to wife, was duress; *Major v. McCraney*, 5 B. C. 571, on invalidity of security given in pursuance of agreement for settling prosecution; *Laferriere v. Cadieux*, 11 Manitoba L. Rep. 175, holding agreement of arbitration entered into under threat of criminal prosecution void; *Smith v. Halifax Bkg. Co.* 1 N. B. Eq. 17, to the point that threat to prosecute for crime may make void agreement entered into because of threat; *Campbell v. Glasgow & L. Ins. Co.* 30 N. B. 332, on invalidity of contract obtained by threat of criminal prosecution; *People's Bank v. Johnson*, 23 N. S. 392, holding that threat to prosecute criminally is not alone sufficient to avoid contract, it must be shown that contract was entered into because of threat; *Burris v. Rhind*, 30 N. S. 405, holding that threat by creditor to have arrested debtor who had transferred property to sister, in order to compel sister to reconvey property constituted duress and made reconveyance void; *Fulton v. Kingston Vehicle Co.* 30 N. S. 455, holding that confession of judgment will not be set aside on ground that it was made under threat of arrest where party had reason for making arrest and did not agree to recall warrant that was issued.

Cited in 1 Page, Contr. 374, on effect of legality of threatened arrest on question of duress; 2 Beach, Contr. 1832, on threat to prosecute third person as duress.

—Agreement to pay or assure debt of another.

Cited in *Western Bank v. McGill*, 32 Can. S. C. 581, holding one terrorized

into giving note for debt of party for which he was not responsible, not liable thereon; *Cox v. Cox*, 35 Can. S. C. 393, holding where person giving security for debt of another is wife of debtor, same guarantee of freedom and voluntary action should be given as in case of child and parent; *Gananogue v. Stunden*, 1 Ont. Rep. T, on necessity that contract of suretyship be entered into freely and voluntarily.

— **Obligations to compound or make good embezzlement or defalcation.**

Cited in *Yowell v. Walker*, 118 La. 28, 42 So. 635, holding that surety on note cannot set up, as discharging his liability upon notes, that plaintiff after binding himself not to prosecute certain person, had violated his promise and caused him to be indicted; *Partridge v. Hood*, 120 Mass. 403, 21 Am. Rep. 524, holding that action will not lie on agreement entered into for purpose of compounding misdemeanor, unless agreement is approved by court in which prosecution is pending; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525, holding notes given by person under pressure of threats of imprisonment for defalcation voidable for duress; *Ball v. Ward*, 76 N. J. Eq. 8, 74 Atl. 158, holding that agreement between debtor and creditor to compound crime committed by debtor, makes transaction for payment of debt illegal; *Jourdan v. Burstow*, 76 N. J. Eq. 55, 139 Am. St. Rep. 741, 74 Atl. 124, holding that agreement to convey property in satisfaction of embezzlement in consideration of promise not to prosecute for crime, is illegal.

Explained in *Flower v. Sadler*, L. R. 9 Q. B. Div. 83, L. R. 10 Q. B. 572, 46 J. Prob. N. S. 503, holding indorsees of bills of exchange might recover thereon where indorsed by person whom indorsees had threatened to prosecute for embezzlement; *McClatchie v. Haslam*, 63 L. T. N. S. 376, 17 Cox, C. C. 402, 65 L. T. N. S. 691, (1891) Week. Notes, 191, holding wife cannot necessarily impeach security which she makes to get her husband out of a difficulty even though result is to stifle prosecution.

— **Shielding relative from prosecution or punishment.**

Referred to as leading case in *Jaeger v. Koenig*, 30 Misc. 580, 62 N. Y. Supp. 803, holding wife may recover back money paid because of fear of her husband's arrest.

Cited in *Sharon v. Gager*, 46 Conn. 189, holding contract of suretyship entered into by elderly woman through fear of prosecution of her nephew for crime not enforceable; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67, holding that mortgage given by wife on her land to settle criminal proceeding against husband for obtaining goods on false pretenses is not enforceable in equity; *Williamson, H. F. Co. v. Aekerman*, 77 Kan. 502, 20 L.R.A.(N.S.) 484, 94 Pac. 807, holding father subject to duress because of threats of prosecution directed against his son; *Rau v. Von Zedlitz*, 132 Mass. 164, holding young woman, on eve of her marriage, pressed to pay debts of her intended husband, prosecution of whom is threatened if she does not comply, is object of undue and improper influence; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383, holding mortgages given by mother to save her son from criminal prosecution voidable; *Hargreaves v. Korieck*, 44 Neb. 660, 62 N. W. 1086, holding mortgage avoided by duress where executed by husband and wife in fear of criminal prosecution of husband; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8, holding mortgage joined in by wife under fear of her husband's being prosecuted for embezzlement not enforceable against her real estate; *Nebraska Cent.-Bldg. & L. Asso. v. McCandless*, 83 Neb. 536, 120 N. W. 134; *Gorringe v. Reed*, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902,—holding that contract obtained by threats of imprison-

ment of near relative is void; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7, holding wife might recover back money paid for debt due from her husband, where she was induced to pay it by threat of her husband's arrest; *Strang v. Peterson*, 56 Hun. 418, 10 N. Y. Supp. 139, holding fear of prosecution of near relative is such duress that security obtained by means thereof cannot stand; *Sulzner v. Cappeau-Lemley & M. Co.* 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103, holding that transfer of stock cannot be set aside for duress because of threat to imprison son of transferrer, who made contract for transfer, if it was not carried out; *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1105, holding deed of trust given blind negro, seventy years of age in order to save his son from prosecution for crime not enforceable; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 26 L.R.A. 48, 43 Am. St. Rep. 880, 59 N. W. 564, holding wife might avoid her note given under pressure of threats to prosecute her husband for forgery; *Burris v. Rhind*, 29 Can. S. C. 498, holding rule applicable to father entering into contract to relieve son from prosecution applies in case of sister doing the like for a brother; *Jones v. Johns*, 20 N. S. 378, holding that assignment of claim by father to creditors of son upon threats of arrest of son is void; *Peoples' Bank v. Johnson*, 23 N. S. 302, holding defendant not liable upon bond entered into to prevent prosecution of husband of his adopted daughter; *Sheard v. Laird*, 15 Ont. Rep. 533, holding that deed procured from wife by threats of criminal prosecution of husband may be set aside; *St. Thomas v. Yearsley*, 22 Ont. App. Rep. 34, holding bond given by father to pay industrial school charges for his son's maintenance not binding where given to prevent his being sent to another school; *Doyle v. Carroll*, 28 U. C. C. P. 218, holding notes given by father to shield his son from consequences of forgery not enforceable; *Secar v. Cohen*, 45 L. T. N. S. 589, holding father and uncle of bankrupt not liable upon promissory notes, where representations were made to them that bankrupt would be prosecuted criminally.

Cited in note in 26 L.R.A. 49, on contracts procured by threats to prosecute a relative.

Distinguished in *Sheard v. Laird*, 15 Ont. App. Rep. 339 (allowing appeal from 15 Ont. Rep. 533), where threats to prosecute husband of daughter or grantor of deed were made to her daughter but apparently not directly to grantor.

—Equitable relief by cancellation.

Referred to as leading case in *Burton v. McMillan*, 52 Fla. 469, 8 L.R.A. (N.S.) 991, 120 Am. St. Rep. 220, 42 So. 849, 11 Ann. Cas. 380, holding maxim in *pari delicto* inapplicable to case of wife suing to set aside deed executed by her because of threats to prosecute her husband criminally.

Cited in *Colby v. Title Ins. & T. Co.* 160 Cal. 632, 35 L.R.A.(N.S.) 813, 117 Pac. 913, Ann. Cas. 1913A, 515, holding that where an instrument given to compound a felony was procured by duress, menace, or undue influence it may be set aside in equity; *Mills v. Swords Lumber Co.* 63 Conn. 103, 26 Atl. 689, holding where contract of suretyship is obtained from one who is under pressure to such extent as to be deprived of free agency, equity will not only refuse to aid party in whose favor such contract is made, but will declare the contract void; *Merchant v. Cook*, 21 D. C. 145, holding deed executed by wife by reason of threats to prosecute her husband criminally voidable; *Bryant v. Peck & W. Co.* 154 Mass. 460, 28 N. E. 678, holding although both parties are chargeable with knowledge their agreement is contrary to some rule of law, yet if one acts under duress or undue influence, weaker one may be granted affirmative relief;

Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555, holding if contract is extorted by brutal and wicked means which though not directly actionable owes its immunity solely to law's imperfect powers, contract may be avoided by party to whom undue influence has been applied; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741, cancelling mortgage given by mother under coercion of threats to prosecute her son for larceny and embezzlement; *Fisher v. Bishop*, 36 Hun, 112, canceling bond and mortgage given by husband and wife because of threats that conveyances to the husband by their son who was a defaulter, would be set aside; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419, annulling note and mortgage given by mother to protect son from prosecution; *Perkins v. Adams*, 17 Tex. Civ. App. 331, 43 S. W. 529, holding law will relieve aged man, mentally infirm, from contract entered into to save his sons from prosecution for felony; *Davies v. London & P. M. Ins. Co.* L. R. 8 Ch. Div. 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794, holding contract of suretyship is one which should be based upon free and voluntary agency of individual who enters into it, also that illegality from pressure and illegality resulting from attempt to stifle prosecution are of class in which court may actively give assistance in favor of oppressed party; *Whitmore v. Farley*, 45 L. T. N. S. 99, 29 Week. Rep. 825, 14 Cox, C. C. 617, holding court may order return of title deeds deposited by wife in pursuance of agreement to stifle prosecution against her husband in consideration that she charge her separate estate to settle claim against her husband out of which prosecution arose.

Composition of crimes.

Referred to as leading case in *Union Bank v. Hulton*, Newfoundland Rep. (1884-96) p. 290, holding agreement to stifle prosecution for making false entries in books void.

Cited in *Partridge v. Hood*, 120 Mass. 403, 21 Am. Rep. 524, holding agreement entered into by defendant for purpose of compounding complaint against her son for misdemeanor not enforceable; *Major v. McCraney*, 5 B. C. 571, on invalidity of security given in pursuance of agreement to stifle prosecution; *Bell v. Riddell*, 10 Ont. App. Rep. 544, on invalidity of note given by husband and wife to stifle criminal prosecution against husband; *Merchant's Bank v. Lucas*, 15 Ont. App. Rep. 573 (dissenting opinion), on invalidity of promise made or securities given, or contracted to be given in consideration that criminal proceeding be stifled; *Leggatt v. Brown*, 29 Ont. Rep. 530, holding notes not enforceable where given upon illegal agreement to stifle prosecution; *Morgan v. McFee*, 18 Ont. L. Rep. 30, holding agreement to withdraw prosecution for obtaining money by false pretense void; *Taylor v. Ainslie*, 19 C. C. P. 78, on invalidity of mortgage given to prevent criminal proceedings; *Kneeshaw v. Collier*, 30 U. C. C. P. 265, on validity of note given by defendant when in prison by due course of law on charge of assaulting plaintiff, to secure damage sustained by plaintiff because of the assault; *Toponce v. Martin*, 38 U. C. Q. B. 44, holding no recovery could be had upon notes given in consideration that maker should not be prosecuted for felony; *Fisher v. Apollinaris Co.* L. R. 10 Ch. 297 note, 44 L. J. Ch. N. S. 500, 32 L. T. N. S. 628, 23 Week. Rep. 460, on illegality of composition of misdemeanor and use thereof to harass accused.

Cited in notes in 48 L.R.A. 849, on injunction, in favor of party in *pari delicto*, against enforcing contract for compounding crime; 36 L.R.A.(N.S.) 1011, on invalidity of agreement to compound felony; 6 Eng. Rul. Cas. 389, 390, on invalidity of champertous agreement or one for compounding a felony.

Cited in *Hollingsworth*, Contr. 246, on validity of agreements for purpose of stifling a criminal prosecution.

Distinguished in *Paige v. Hieronymous*, 192 Ill. 546, 61 N. E. 832, where it did not appear complainant was not equally guilty with defendants in compromise of criminal offense; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287, on ground cited case did not present precise point whether parties stood in *pari delicto* when compounding of felony entered into and constituted part of consideration of contract; *Commercial Bank v. Rolsey*, 10 Manitoba L. Rep. 281, where it did not appear by the pleas that defendant had committed criminal offense; *Fulton v. Kingston Vehicle Co.* 30 N. S. 455, where jury negatived any agreement to abandon criminal proceedings; *Henry v. Dickie*, 27 Ont. Rep. 416, where there was not sufficient evidence of agreement to stifle prosecution.

Illegality of contract involving violation of public duty.

Cited in *Fearnley v. DeMainville*, 5 Colo. App. 441, 39 Pac. 73, holding contract involving moral turpitude and conspiracy with public officer to misapply public funds not enforceable; *Henry v. Dickie*, 27 Ont. Rep. 416 (dissenting opinion), on invalidity of agreement having tendency to affect administration of justice; *La Compagnie Montreal-Canada Contre Le Feu v. Therrien*, Rap. Jud. Quebec, 18 B. R. 490, holding a contract of a third person having as its object the purchase of the interest of a victim of embezzlement, and the preventing of the conviction of the guilty party, void.

Ratification of forgery.

Cited in *La Banque Nationale v. Lemaire*, Rap. Jud. Quebec, 41 C. S. 37, holding that a forged signature to a note cannot be ratified.

Cited in note in 36 L.R.A. 544, on ratifying a forged signature being against public policy.

Application of maxim "in pari delicto."

Cited in *St. Louis, U. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953, holding where parties are in *pari delicto*, and contract has been fully executed on part of plaintiff, by conveyance of property, or by payment of money, and has not been repudiated by defendant, neither court of law nor court of equity will assist plaintiff to recover back such money paid or property conveyed.

Cited in 2 Beach, Contr. 1873, on enforcement of performance of illegal contract where parties are in *pari delicto*.

6 E. R. C. 477, *TAYLOR v. CHESTER*, 10 Best & S. 237, 38 L. J. Q. B. N. S. 225, L. R. 4 Q. B. 309, 21 L. T. N. S. 359.

Failure of action or defense based on illegal transaction.

Cited in *Guernsey v. Cook*, 120 Mass. 501, holding action not maintainable on contract to buy stock in corporation provided purchaser was made treasurer; *Kitchen v. Greenbaum*, 61 Mo. 110, holding action not maintainable where based on illegal sale of lottery ticket; *Guilbault v. Brothier*, 10 B. C. 449, on non-maintenance of action where evidence discloses illegal contract; *Boucher v. Capital Brewing Co.* 9 Ont. L. Rep. 266, on failure of plaintiff's action when he cannot make out his case otherwise than by aid of illegal transaction to which he was party; *Hagar v. O'Neill*, 21 Ont. Rep. 27, on non-forfeiture of estate in land remaining after limited estate has been made over for illegal purpose; *Ontario Bank v. McAllister*, 43 Can. S. C. 338 (dissenting opinion),

on right to recover on contract concerning illegal transaction, where illegal transaction need not be shown to make out case.

Cited in note in 12 E. R. C. 405, on enforceability of wagering contracts.

Distinguished in *Clark v. Hagar*, 22 Can. S. C. 510, holding illegality of consideration of instrument, whether under seal or not to enforce which action is brought, not only may be pleaded, but if it does not appear from plaintiff's own pleading must be pleaded.

— Parties in equal wrong.

Referred to as leading case in *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, holding party could not recover collateral notes indorsed by him to another with whom he was dealing in cotton futures.

Cited in *Stewart v. Wright*, 77 C. C. A. 499, 147 Fed. 321 (dissenting opinion), on absence of right to maintain action in tort or contract, where arising out of moral turpitude of plaintiff or from his violation of general law of public policy; also on test to determine whether party is in *pari delicto*; *Monahan v. Monahan*, 77 Vt. 133, 70 L.R.A. 935, 59 Atl. 169, holding of a case not arising upon contract that where party is not required to disclose his fraud in making out his case, he can have relief, if entitled to it upon grounds alleged and proved; *Gallagher v. McQueen*, 35 N. B. 198, sustaining action of replevin to recover goods distrained for rent under lease of hotel where liquor was to be sold illegally; *Hager v. O'Neil*, 20 Ont. App. Rep. 198, holding defendant excluded from proving turpitude of person under whom he claimed; *Re Cronmire* [1898] 2 Q. B. 383, 67 L. J. Q. B. N. S. 620, 78 L. T. N. S. 483, 5 Manson, 30, 14 Times L. R. 377, 46 Week. Rep. 679, on application of rule "*Potior est conditio defendentis*:" *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561, 54 L. J. Q. B. N. S. 340, 53 L. T. N. S. 94, 33 Week. Rep. 606, 49 J. P. 502, holding true test for determining whether or not plaintiff and defendant were in *pari delicto*, is by considering whether plaintiff could make out his case otherwise than through medium and by aid of illegal transaction to which he was party; *Scott v. Brown* [1892] 2 Q. B. 724, 61 L. J. Q. B. N. S. 738, 4 Reports, 42, 67 L. T. N. S. 782, 41 Week. Rep. 116, 57 J. P. 213, holding plaintiff could not recover money handed defendant for purpose of creating fictitious premium by keeping up price of shares; *Wilson v. Strugnell*, L. R. 7 Q. B. Div. 548, 50 L. J. Mag. Cas. N. S. 145, 45 L. T. N. S. 218, 14 Cox, C. C. 624, 45 J. P. 831, holding where money has been paid to person in order to effect an illegal purpose with it, person making payment may recover money back before purpose is effected.

Cited in note in 6 E. R. C. 488, on right to recover back money paid under illegal contract.

Cited in *Keener, Quasi-Contr.* 274, as to when parties are in *pari delicto*; *Underhill*, Am. Ed. Trusts, 154, on non-recovery by settlor where he has vested property in trustee for an illegal purpose.

Distinguished in *Brophy v. North American Life Assur. Co.* 32 Can. B. C. 261, where there was no delictum on part of plaintiff.

Invalidity of contract entered into with illegal purpose.

Cited in *Keast v. Elder*, 7 Lauzerne Leg. Rep. 239, holding that contract is void where beer is supplied to unlicensed person to retail by him, in fraud of revenue; *Graves v. Johnson*, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818, on invalidity of sale of goods sold with knowledge of purchaser's intent to break the domestic law; *Hooper v. Coombs*, 5 Manitoba L. Rep. 65, holding contract lawful in itself is illegal, if it be entered into with object that

law shall be violated; *Smith v. Benton*, 20 Ont. Rep. 344, holding price of liquors sold for use where temperance law was in force not recoverable.

Cited in notes in 40 L.R.A.(N.S.) 968, on right of conditional vendor to recover property as affected by knowledge of intended unlawful use; 15 E. R. C. 482, on right to recover rent for premises demised for an illegal purpose.

Cited in *Benjamin, Sales*, 5th ed. 507, on validity of sale of thing innocent in itself where seller knows it is intended for an illegal purpose; *Benjamin, Sales*, 5th ed. 501, on invalidity of contract at common law.

6 E. R. C. 482, *DIGGLE v. HIGGS*, L. R. 2 Exch. Div. 422, 46 L. J. Exch. N. S. 721, 37 L. T. N. S. 27, 25 Week. Rep. 777.

Recovery back of stakes before their payment over by stakeholder.

Cited in *Davis v. Hewitt*, 9 Ont. Rep. 435, holding plaintiff entitled to demand and recover stake deposited at any time before it was paid over to other party to horse race by defendant stakeholder; *Marcotte v. Perras*, Rap. Jud. Quebec, 6 B. R. 401 (dissenting opinion), on right to recover money from stakeholder when not paid over; *Shoolbred v. Roberts* [1899] 2 Q. B. 560, 69 L. J. Q. B. N. S. 800, 83 L. T. N. S. 37, 16 Times L. R. 486, 68 L. J. Q. B. 998, 81 L. T. N. S. 522, 6 Manson. 397, [1900] 2 Q. B. 497, holding there is nothing in amending Gaming Act of 1892 to take away common law right of gamester to recover back deposit; *Trimble v. Hill*, L. R. 5 App. Cas. 342, 49 L. J. P. C. N. S. 49, 42 L. T. N. S. 103, 28 Week Rep. 479, holding plaintiff entitled to recover from defendant money deposited with latter to abide event of horse race, when plaintiff revoked authority to pay it over before day set for race.

Distinguished in *Walsh v. Treblecock*, 23 Can. S. C. 695, where deposit of stake in election list was itself illegal by statute; *Read v. Anderson*, L. R. 10 Q. B. Div. 100, where agent's authority to pay bets was coupled with an interest.

—Reclaiming stake after event decided.

Cited in *Barelay v. Pearson* [1893] 2 Ch. 154, 62 L. J. Ch. N. S. 636, 68 L. T. N. S. 709, 3 Reports, 388, 42 Week. Rep. 74, holding that notwithstanding illegality of contract, action is maintainable against stakeholder by contributor who has, before money is paid over, given him notice not to part with his contribution, although notice is not given until after event has happened on which stakes were to be paid over; *Re Cronmire* [1898] 2 Q. B. 383, 67 L. J. Q. B. N. S. 620, 78 L. T. N. S. 483, 14 Times L. R. 376, 46 Week. Rep. 679, on necessity of repudiation of wager before event of it has been determined in order to recover money deposited with another and on construction of statute.

Invalidity of wager.

Cited in *Swift v. Angers*, 16 Quebec L. R. 163, on invalidity of bets upon games under statute.

Cited in note in 12 Eng. Rul. Cas. 406, on enforceability of wagering contracts.

Defense of *pari delicto*.

Cited in *Monahan v. Monahan*, 77 Vt. 133, 70 L.R.A. 935, 59 Atl. 169, holding it proper to enforce a trust where the holder held by an illegal transfer, it being possible to prove rights of parties without resting on the wrong doing.

Decision of English Court of Appeal as rule of decision.

Cited in *Hunt v. Fripp* [1898] 1 Ch. 675, 67 L. J. Ch. N. S. 377, 77 L. T.

N. S. 516, 5 Manson, 105, 46 Week. Rep. 125; Robinson v. Detroit & C. Steam Nav. Co. 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883,—on decision of English Court of Appeal as binding rule of decision unless overcome by one from the House of Lords.

6 E. R. C. 492, BEHN v. BURNES, 3 Best & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. N. S. 204, 8 L. T. N. S. 207, 11 Week. Rep. 496, reversing the decision of the Court of Queen's Bench, reported in 1 Best & S. 877, 31 L. J. Q. B. N. S. 73.

Statements or representations as conditions of the contract.

Cited in Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438, holding representations by defendant that the seeds sold were the kind desired by the plaintiff for a particular known purpose amounted to a warranty that they were of that particular kind; Wyld v. London & L. & G. Ins. Co. 33 U. C. Q. B. 284, holding statements in policy of insurance as to where the goods are located are material ones: Wilfred v. Myers, 40 Fed. 170; McKenzie v. McMullen. 16 Manitoba L. Rep. 11; McGregor v. Harris, 30 N. B. 456; Stewart v. Souththorp, 25 Ont. L. Rep. 544; Johnston v. Barker, 20 U. C. C. P. 228; Benson v. Ottawa Agri. Ins. Co. 42 U. C. Q. B. 282 (dissenting opinion); Irish Land Commission v. Maquay, Ir. L. R. 28 C. L. 342; Lodwick v. Perth, 1 Times L. R. 76; Isaac Joseph Iron Co. v. Richardson, 38 W. N. C. 487, 2 Pa. Super. Ct. 208, 27 Pittsb. L. J. N. S. 138,—on when representations or statements may amount to a warranty; Johnston v. Barker, 20 U. C. C. P. 228, holding that if representation or statement was intended to be substantial part of contract, it is to be regarded as warranty.

Cited in Hollingsworth, Contr. 164, as to when a representation by one party to a contract amounts to a condition; Benjamin. Sales, 5th ed. 437, representations being of two kinds, those that are part of, and those that are external to a contract; 2 Mechem, Sales, 993, on default in delivery of installment as authorizing repudiation of contract; Hollingsworth, Contr. 157, on effect of misrepresentation on validity of contract.

—In charter party of ship.

Cited in Simonetti v. Foster, 2 Fed. 415, holding a representation in the charter part that the vessel would be able to stow one thousand tons dead weight, was a warranty.

—Warranties or conditions in charter party of vessel "at" a certain port or place or to sail therefrom.

Cited in Bentsen v. Taylor [1893] 2 Q. B. 274, 63 L. J. Q. B. N. S. 15, 4 Reports, 510, 69 L. T. N. S. 487, 42 Week. Rep. 8, 7 Asp. Mar. L. Cas. 385; Davison v. Von Lingren, 113 U. S. 40, 28 L. ed. 885, 5 Sup. Ct. Rep. 346,—holding a stipulation in a charter party of a steamer that she is "now sailed or about to sail" was a warranty and not a mere representation; Deshon v. Fosdick, 1 Woods, 286, Fed. Cas. No. 3,819, holding same where representation made that the ship would sail on a certain day; Watters v. Milligan, 22 N. B. 622, holding same where there was a statement in the charter party that the vessel was there on a particular voyage; Corking v. Massey, L. R. 8 C. P. 395, 42 L. J. C. P. N. S. 153, 28 L. T. N. S. 636, 21 Week. Rep. 680, 1 Asp. Mar. L. Cas. 18, holding same as to representation in charter party as to the time of arrival of the vessel at a certain port; Lowber v. Bangs, 2 Wall, 728, 17 L. ed. 768, holding a stipulation in a charter party that the vessel will proceed "with all possible dispatch" is a warranty that she will so proceed; Oppenheim v.

Fraser, 34 L. T. N. S. 524, 3 Asp. Mar. L. Cas. 146, holding representation in contract for carriage that ship was now at a certain place amounted to a warranty.

Cited in Benjamin, Sales, 5th ed. 560, on delay as would frustrate object of voyage as breach of condition that vessel should sail or receive cargo at a certain time.

Conditions precedent and warranties.

Cited in *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12, 42 Phila. Leg. Int. 466, holding the provisions of a contract of sale of steel rails that they were to be shipped at the rate of one thousand tons a month amounted to a warranty; *Adams v. Guyandotte Valley R. Co.* 64 W. Va. 181, 61 S. E. 341, holding that parties may make performance of covenant in contract condition precedent, and in such case, contract will be enforced as made; *McLean v. Brown*, 15 Ont. Rep. 313, holding an order that a shipment of lambs be consigned in the name of the firm in order to help the business was a material condition that required compliance therewith; *McBride v. Gore Dist. Mut. F. Ins. Co.* 30 U. C. Q. B. 458, holding a statement in a policy of insurance that the company must be given notice of other insurance was a condition precedent.

Cited in notes in 9 E. R. C. 452, on implied obligation of landlord to repair, and implied warranty of fitness of premises for purposes for which they are let; 23 E. R. C. 458, on implied warranty on sale of goods by description.

Cited in Benjamin, Sales, 5th ed. 1003, 1004, on common law rules as to warranty and conditions in sale of goods; Benjamin, Sales, 5th ed. 562, on sale of specific goods with a warranty; 1 Beach, Contr. 135, on necessity for performance of conditions precedent; 2 Mechem, Sales, 925, on performance of contract as condition precedent.

Sufficiency of performance of conditions precedent.

Cited in *Bonanno v. Tweedie Trading Co.* 117 Fed. 991; *Wiley v. Athol*, 150 Mass. 426, 6 L.R.A. 342, 23 N. E. 311,—on performance of conditions precedent necessary to maintain an action on a contract; *Gerli v. Poidebard Silk Mfg. Co.* 57 N. J. L. 432, 30 L.R.A. 61, 51 Am. St. Rep. 612, 31 Atl. 401 (dissenting opinion) on necessity that a tender of goods be made at the time specified in the contract; *Leggatt v. Clarry*, 13 Ont. Rep. 105, holding that damages for breach of warranty on sale of goods could not be awarded in absence of proof of law, in action brought upon bills given for purchase price.

Cited in Benjamin, Sales, 5th ed. 998, on buyer's duty to accept goods which are not equal to those required by the contract.

Failure to comply with conditions precedent as giving right to avoid contract.

Cited in *Smith v. York Mfg. Co.* 58 N. J. L. 242, 33 Atl. 244, holding a contract by which a boiler maker agrees to set up a boiler of a certain capacity to be determined by test may be rescinded when the test fails to comply with contract; *Ross-Meehan Foundry Co. v. Royer Wheel Co.* 113 Tenn. 370, 68 L.R.A. 829, 83 S. W. 167, 3 Ann. Cas. 898, holding a contract to make and deliver castings may be terminated as an entirety for failure to make payments of instalments within the time stipulated; *Hailbutt v. Hickson*, L. R. 7 C. P. 438, 41 L. J. C. P. N. S. 228, 27 L. T. N. S. 336, 20 Week. Rep. 1035, on failure to comply with conditions of contract as giving right to rescind.

Cited in *Hollingsworth*, Contr. 510, on breach of warranty by one party as discharge of other party.

Breach of conditions of contract remediable only by actions for damages.

Cited in *New Hamburg Mfg. Co. v. Webb*, 23 Ont. L. Rep. 44, 20 Ann. Cas. 817, holding that if party has received substantial part of consideration for promise, warranty consisting of descriptive statement, loses its character of a condition, and is available only as basis for damages; *Briggs v. Grand Trunk R. Co.* 24 U. C. Q. B. 510, holding there being part performance of a contract of carriage, the breach would only entitle him to compensation for damages; *Miller v. Thompson*, 16 U. C. C. P. 513, on when failure to comply with terms of contract will only give rise to an action for damages.

Construction of contracts.

Cited in *Browne v. Paterson*, 36 App. Div. 167, 55 N. Y. Supp. 404, holding that in construing contracts it may be necessary to consider circumstances under which contract was made; *Browne v. Paterson*, 165 N. Y. 460, 59 N. E. 296 (reversing 36 App. Div. 167, 55 N. Y. Supp. 404), on how a mercantile contract was to be construed.

Cited in *Benjamin*, Sales, 5th ed. 561, on rules of construction for discovery of intention of parties in making warranties.

— Charter party.

Cited in *The Alert*, 61 Fed. 504, holding a provision in a charter party that the vessel should be delivered about a certain date meant that only such time would be given after a seasonable start as might be made necessary by accidents of navigation.

Warranty as question of law or of fact.

Cited in *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, holding that it is question of fact whether representation, descriptive of article sold by name by which it is known in market is expression of judgment only, or was intended as warranty; *Berg v. Rapid Motor Vehicle Co.* 78 N. J. L. 724, 75 Atl. 933, holding that purchaser of machine is entitled to have jury decide whether seller has supplied machine capable of performing work for which it was purchased, and for which seller knew it was purchased; *Baker v. Fawkes*, 35 U. C. Q. B. 302, on it being for the court to construe whether representations amount to a warranty.

Right to rescind a contract.

Cited in *Hunter v. Richards*, 5 D. L. R. 116, 26 Ont. L. Rep. 458 (dissenting opinion), on right of party to repudiate contract where other party fails to perform essential conditions; *McRory v. Henderson*, 14 Grant, Ch. (U. C.) 271, holding a vendee was entitled to have a rescission of a contract of sale of land where the true state of the title was not disclosed, but was alleged to be good although no fraudulent intention existed; *Heffernan v. Berry*, 32 U. C. Q. B. 518, on nonpayment by vendee as not entitling vendor to rescind the sale where title has passed but not possession.

Cited in note in 27 L.R.A.(N.S.) 914, 918, on right to reject goods for breach of warranty.

Cited in 1 Beach, Contr. 956, on right to abandon contract for nonperformance within time fixed.

Conditional contract when ceases to be such.

Cited in *Smith v. Commercial Union Ins. Co.* 33 U. C. Q. B. 69, holding that forfeiture in insurance policy may be waived and when it is waived contract is to be construed as if that part of it for particular purpose was struck out.

and the rest of the contract whether condition precedent or not, will remain: *Sheffield Nickel & Silver Plating Co. v. Unwin*, L. R. 2 Q. B. Div. 214, 46 L. J. Q. B. N. S. 299, 36 L. T. N. S. 246, 25 Week. Rep. 493, on a conditional contract as ceasing to be such when a substantial part of the consideration is received.

6 E. R. C. 503, *PARKIN v. THOROLD*, 16 Beav. 59, 16 Jur. 959, 22 L. J. Ch. N. S. 170, reversing the decision of the Vice Chancellor, reported in 2 Sim. N. S. 1.

Time as of the essence of a contract.

Cited in *Augusta Factory v. Mente & Co.* 132 Ga. 503, 64 S. E. 553, holding that time may become essence of contract by express stipulation or by reasonable construction; *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222; *Davis v. Read*, 37 Fed. 418; *Labelle v. O'Connor*, 15 Ont. L. Rep. 519 (dissenting opinion); *Secombe v. Steele*, 20 How. 94, 15 L. ed. 835,—on time as an essential element of a contract; *Mercantile Nat. Bank v. Heinze*, 75 Misc. 551, 135 N. Y. Supp. 962, holding that where on proper construction of contract intention of parties to make time of the essence of the contract is established, it will be enforced in equity as fully as at law in absence of recognized grounds for equitable intervention; *Mitchell v. Wilson*, 2 D. L. R. 714, holding that time is not of essence of contract unless it so appears by express terms, or from nature of contract and surrounding circumstances; *Hicks v. Laidlaw*, 2 D. L. R. 460, holding that where it is condition of contract for sale of land, that time is to be considered as of essence of agreement, mere extension of time is waiver of condition only to extent of substituting extended time for original time; *Patrick v. Milner*, L. R. 2 C. P. Div. 342, 46 L. J. C. P. N. S. 537, 36 L. T. N. S. 738, 25 Week. Rep. 790, holding time was not an essential element of a contract for sale of stocks where no express stipulation to that effect.

Cited in note in 6 E. R. C. 536, 537, 539, on time as of the essence of a contract.

Cited in 1 Beach Contr. 749, on time of performance as of the essence of a contract.

The decision of the Vice Chancellor was cited in *Wallace v. Ridge*, 4 Mich. 570; *Benson v. Tilton*, 24 How. Pr. 494,—holding that decree for specific performance to convey land will be made after day fixed by agreement for delivery of deed, where time fixed appears to have been disregarded by parties as essence of contract; *Hubbell v. Von Schoening*, 58 Barb. 498, on right to specifically enforce contract after appointed day for performance by person in default; *Paul v. Blackwood*, 3 Grant. Ch. (U. C.) 394 (dissenting opinion), on time as of the essence of a contract.

Right to make time of the essence of a contract by demand or notice.

Cited in *Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 275, holding time might by stipulation be made of the essence of a contract for the sale of real estate; *Fuller v. Hovey*, 2 Allen. 324, 79 Am. Dec. 782, holding a person could have no performance of a contract for the conveyance of land where he delayed in paying the instalments after the same were due and after the owner had refused to give further time; *Ketchum v. Owen*, 55 N. J. Eq. 344, 36 Atl. 1095, holding a vendee could not maintain an action for the specific performance of a contract to convey land where there was a delay of three years after the vendor had given notice of an intention not to perform; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Mathews v. Cragg*, 38 U. C. Q. B. 319; *Ewins v. Gordon*, 49 N. H. 444,—on right to make time of the essence of a contract; *Barclay v. Messenger*, 43 L. J. Ch. N. S. 449, 30 L. T. N. S. 350, 22 Week. Rep. 522, holding

time might be made of the essence of a contract by a notice that it must be performed within a specified time.

Cited in note in 15 L.R.A. 737, on making time of the essence of a contract by demand or notice.

The decision of the Vice Chancellor was cited in *King v. Ruckman*, 20 N. J. Eq. 316, on right to make time of the essence of a contract.

Sufficiency of notice making time an essential element of a contract.

Cited in *St. Regis Paper Co. v. Santa Clara Lumber Co.* 186 N. Y. 89, 78 N. E. 701, holding a notice by a person that he would rescind a contract unless payments were more promptly made was not sufficient to destroy the right of the other party to specific performance of the contract; *McMurray v. Spicer*, L. R. 5 Eq. 527, 37 L. J. Ch. N. S. 505, 16 Week. Rep. 332, 18 L. T. N. S. 116; *Chadwell v. Winston*, 3 Tenn. Ch. 110,—holding a notice did not give such a reasonable time for the performance of a contract as would give the party a right to rescind because of a failure to perform within such time; *Manson v. Howison*, 4 B. C. 404 (dissenting opinion); *Myres v. DeMier*, 4 Daly, 343,—on sufficiency of notice making time as of the essence of a contract.

6 E. R. C. 516, *HOULDSWORTH v. EVANS*, 37 L. J. Ch. N. S. 800, L. R. 3 H. L. 263, 19 L. T. N. S. 211.

Time as of the essence of a cause of action.

Cited in *Alexander v. Searey*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630, holding the stockholders of a corporation estopped to say that another corporation had no power to purchase the stock of the corporation where they had acquiesced in such acts for a number of years; *Ho Tung v. Man On Ins. Co.* [1902] A. C. 232, 71 L. J. P. C. N. S. 46, 85 L. T. N. S. 617, 18 Times L. R. 118, 9 Manson, 171, holding the unsigned articles of a corporation must be treated as valid and operative where acted on for nineteen years without objection.

Cited in note in 27 L.R.A. 318, on forfeiture of corporate stock.

Presumption of assent of stockholders to acts of directors.

Cited in *Re Thunder Hill Min. Co.* 4 B. C. 61, holding stockholders to have actually assented to unauthorized act of directors in issuing new stock where they accepted such new issue; dissenting opinions in *Riche v. Ashbury Railway Carriage & Iron Co.* L. R. 9 Exch. 224, L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 2 Eng. Rul. Cas. 304; *Shickel v. Berryville Land & Improv. Co.* 99 Va. 88, 37 S. E. 813,—on right of stockholders of a corporation to assume that directors have not exceeded their authority.

Distinguished in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, L. R. 9 Exch. 224, 44 L. J. Exch. N. S. 185, 2 Eng. Rul. Cas. 304, holding the subsequent ratification by stockholders of unauthorized acts of defendants would not validate such acts being without the powers of the corporation.

6 E. R. C. 540, *PEACHY v. SOMERSET*, 1 Strange, 447.

Right to relief against penalties and forfeitures.

Cited in *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878, holding that equity will not interfere in cases of forfeiture for breach of covenants, where there cannot be any just compensation decreed for breach; *Morris v. McCoy*, 7 Nev. 399; *United States v. Oregon & C. R. Co.* 186 Fed. 861,—holding that equity will enforce forfeiture where forfeiture is for breach of condition of public grant to private person or corporation; *Wheeler v. Con-*

necticut Mut. L. Ins. Co. 16 Hun, 317, holding the insanity of assured did not excuse the non-payment of premiums though such non-payment worked a forfeiture of the policy; *Taylor v. Carondelet*, 22 Mo. 105 (dissenting opinion); *Small v. Herkimer Mfg. & Hydraulic Co.*, 2 N. Y. 330; *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44; *Hukill v. Gaffey*, 37 W. Va. 425, 16 S. E. 544; *Gorman v. Low*, 2 Edw. Ch. 324; *Laurence v. Savannah*, 71 Ga. 392.—on right to relief against penalties and forfeitures; *Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73; *Messersmith v. Messersmith*, 22 Mo. 369.—on equity as not lending its aid to the enforcement of a forfeiture; *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222, on a penalty or forfeiture as not being enforceable when the party insisting on it has been paid his money or damages; *Kunkel v. Wherry*, 189 Pa. 198, 69 Am. St. Rep. 802, 42 Atl. 112, holding that equity will regard penalty as intended to secure fulfilment of contract, and it may preclude other party from recovering more than just compensation; *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44, holding that court of chancery will not relieve against forfeiture of estate, declared at law, where conditions for breach of which forfeiture has been declared, consists in performance of services for personal comfort of party claiming forfeiture.

Cited in note in 69 L.R.A. 858, on equitable relief against forfeiture of estate.

Cited in *Dillon, Mun. Corp.*, 5th ed. 961, on non-relief in equity against valid forfeitures imposed by municipal corporation: 1 *Brandt, Suretyship*, 3d ed. 229, on non-relief from penalty.

Distinguished in *Baltimore & N. Y. R. Co. v. Bouvier*, 70 N. J. Eq. 158, 62 Atl. 868, holding that railroad company was entitled to be relieved in equity of a forfeiture of land because of failure to build passenger station and double track its road when vendor could be amply compensated by damages and his land would not have been benefited.

— Forfeiture of estate by breach of condition.

Cited in *Goidon v. Richardson*, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027, holding a lessee of real estate bound to pay taxes is not entitled to relief in equity from a forfeiture of his lease for nonpayment of taxes where he allows premises to be sold by the collector for nonpayment.

Liquidated damages and penalties distinguished.

Cited in *Chicago, B. & Q. R. Co. v. Dockery*, 115 C. C. A. 173, 195 Fed. 221, holding that where contract leaves intention of parties in doubt as to amount to be paid for breach, and amount specified is beyond all reasonable proportion to possible damages, contract will be construed to provide for penalty only; *Tilley v. American Bldg. & L. Asso.*, 52 Fed. 618, on whether a sum named in a contract is to be construed as a penalty or liquidated damages; *State v. Larson*, 83 Minn. 124, 54 L.R.A. 487, 86 N. W. 3 (dissenting opinion), on whether a bond was intended as a penalty or as liquidated damages; *Ferris v. Ferris*, 28 Barb. 29, holding that condition in mortgage that whole amount will become due is neither penalty nor forfeiture that equity may relieve against; *Adams v. Rutherford*, 13 Or. 78, 8 Pac. 896 (dissenting opinion), on construction of contract in which upon certain contingency payment of debt must be made on earlier day as providing for penalty; *Schofield v. Preston*, 16 Phila. 100, 40 Phila. Leg. Int. 140, holding that stipulation for certain amount of damages, for breach of contract will generally be treated as penalty; *Whitla v. Riverview Realty Co.*, 19 Manitoba L. Rep. 746, holding that clause in contract for forfeiture upon failure to pay instalments will be treated as penalty.

Waiver of conditions providing for penalties and forfeitures.

Cited in *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. 259, holding a clause in a policy of insurance providing for a forfeiture in case of nonpayment of assessment was waived where the agent accepted such payment and reported it to the company after the time for the payment had expired; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 24 Am. Rep. 172, 4 W. N. C. 313, on waiver of forfeiture of policy because of failure to pay assessments.

6 E. R. C. 543, *SLOMAN v. WALTER*, 1 Bro. Ch. 418.

Forfeiture as penalty or liquidated damages.

Cited in *Williams v. Green*, 14 Ark. 315, holding where the parties to an executory contract mutually bind themselves in a specific sum on forfeiture of complying with the contract, such sum is on such forfeiture by either recoverable as liquidated damages; *Alexander v. Troutman*, 1 Ga. 469, holding in a suit upon a rate payable upon time with interest from date if not punctually paid, the back interest is recoverable as stipulated damages; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223, holding an agreement between joint inventors that neither should use the machines in the district of the other under a forfeiture of a certain sum constituted such forfeiture a penalty; *Nobles v. Bates*, 7 Cow. 307, holding a covenant in contract of sale that the seller was not to set up the same business in a certain territory under penalty of a forfeiture of an instalment of the purchase price was a stipulation in the nature of stipulated damages; *Law v. House*, 3 Hill, L. 268, holding a mutual agreement of persons to bind themselves in a specific sum for the performance of a certain contract was in the nature of a penalty.

Cited in note in 6 Eng. Rul. Cas. 552, 553, as to when stipulation in contract is for a penalty and when for liquidated damages.

Relief in equity against the enforcement of a penalty or forfeiture.

Cited in *McCaull v. Braham*, 16 Fed. 37, holding an injunction would lie against a threatened violation of a contract providing for the right to forfeit salary without loss of right to enforce the contract; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662, 38 Phila. Leg. Int. 432, holding equity could not relieve against a forfeiture caused by a failure to pay the stipulated premiums on a policy of life insurance; *Lieberman v. First Nat. Bank*, 8 Del. Ch. 229, 40 Atl. 382; *Laurence v. Savannah*, 71 Ga. 392; *Ferris v. Ferris*, 16 How. Pr. 102; *Jackson v. Baker*, 2 Edw. Ch. 471; *Johnson v. Coffee*, 1 Ashm. (Pa.) 96; *Henry v. Tupper*, 29 Vt. 358; *Wheeling & E. G. R. Co. v. Triadelphia*, 53 W. Va. 487, 4 L.R.A.(N.S.) 321, 52 S. E. 499; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; *Brussels v. Ronald*, 4 Ont. Rep. 1; *Staats v. Herbert*, 4 Del. Ch. 508,—on when equity will relieve against the collection of a penalty.

Agreements in restraint of trade.

Cited in *Holmes v. Martin*, 10 Ga. 503, on validity of contracts in restraint of trade.

6 E. R. C. 545, *BIRD v. LAKE*, 1 Hem. & M. 111, 8 L. T. N. S. 632, later application for injunction in 1 Hem. & M. 338.

Construction of agreement not to do specified things.

Cited in *McCaull v. Braham*, 21 Blatchf. 278, 16 Fed. 37, holding that mere penalty designated solely to secure observance of contract will not be construed as liquidated damages nor prevent injunction; *Ropes v. Upton*, 125 Mass. 258,

holding that stipulation in agreement dissolving partnership that retiring partner would not engage in business under penalty of \$1,000, did not prevent other partner from obtaining injunction against such partner engaging in business: *Wills v. Forester*, 140 Mo. App. 321, 124 S. W. 1090, holding that agreement for liquidated damages to be paid in case of breach of contract not to engage in rival business, does not prevent injunction to enforce contract: *Phenix Ins. Co. v. Continental Ins. Co.* 14 Abb. Pr. N. S. 266, holding that fact that deed, in addition to covenant restricting kind of building that might be erected on land retained provides that grantor will pay \$1500 for violation of restrictive clause, does not give grantor right to pay \$1500 and annul restriction: *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *Gallup Electric Light Co. v. Pacific Improv. Co.* 16 N. M. 86, 113 Pac. 848.—holding that contract not to engage in business is personal and can only bind parties to it.

Cited in note in 10 L.R.A.(N.S.) 206, on jurisdiction to enjoin breach of contract not to engage in business, containing stipulation for liquidated damages.

The decision in later application was cited in *Salzman v. Siegelman*, 102 App. Div. 406, 92 N. Y. Supp. 844, holding an agreement by a retiring partner not to engage in a similar business is not violated by his lending money to one engaged in a similar business: *Harkinson's Appeal*, 78 Pa. 196, 21 Am. Rep. 9, 1 W. N. C. 591, 32 Phila. Leg. Int. 313, holding an agreement by a mother withdrawing from business not to engage in the same business in the same district for a certain period was not violated because of fact that she advance money to son to be used in a similar business; *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654, holding the purchasers of a business could not maintain an action for breach of an agreement to refrain from engaging in the same business where in the meantime they had disposed of the business; *Anderson v. Ross*, 14 Ont. L. Rep. 682, holding an agreement by a wife that on her withdrawal from a firm her husband would not engage in a similar business was violated where the husband took a position as manager of the business of complainant's competitor: *Smith v. Hancock* [1894] 2 Ch. 377, 63 L. J. Ch. N. S. 477, 7 Reports, 200, 70 L. T. N. S. 587, 42 Week. Rep. 456, 58 J. P. 638, on what may constitute a breach of an agreement not to engage in the same business.

Right to injunctive relief against the breach of an agreement.

Cited in *Harkinson's Appeal*, 7 Legal Gaz. 198, holding that in action to enjoin carrying on trade it must appear clearly that agreement has been violated; *Toronto Dairy Co. v. Gowans*, 26 Grant. Ch. (U. C.) 290, on right to relief in equity to prevent the breach of an agreement.

Submission of affidavits on belief at hearing of interlocutory motion.

Cited in *Detroit v. Detroit City R. Co.* 54 Fed. 1, to the point that affidavits on belief may be submitted at hearing of interlocutory motion, provided facts were stated upon which belief was founded.

6 E. R. C. 563, *NOBLE v. WARD*, 36 L. J. Exch. N. S. 91, L. R. 2 Exch. 135, 15 L. T. N. S. 672, 15 Week. Rep. 520, affirming the decision of the Court of Exchequer, reported in 4 Hurlst. & C. 149, 12 Jur. N. S. 167, 35 L. J. Exch. N. S. 81, L. R. 1 Exch. 117, 13 L. T. N. S. 639, 14 Week. Rep. 397.

Termination or change of liability under written contract by subsequent parol agreement.

Cited in *Carskaddon v. Kennedy*, 40 N. J. Eq. 259, holding oral evidence was not competent to establish an agreement to change the description of land previously bargained for by a written contract signed by the vendor; *McMockin v.*

Furray, 13 B. C. 20, holding a valid agreement for the conveyance of mineral rights in land was not affected by a subsequent written agreement varying the terms thereof which was invalid as within statute of frauds.

Cited in 2 Mechem, Sales, 678, on new contract within statute of frauds not rescinding old written contract.

Distinguished in *Proctor v. Thompson*, 13 Abb. N. C. 340, holding a contract for the sale of land might be rescinded by a subsequent parol agreement; *Hickman v. Haynes*, L. R. 10 C. P. 598, 44 L. J. C. P. N. S. 358, 32 L. T. N. S. 873, 23 Week. Rep. 871, holding a right of action on a written contract was not lost because of an oral agreement of one of parties at request of another to extend the time of payment.

The decision of the Court of Exchequer was cited in *Marie v. Garrison*, 13 Abb. N. C. 210, holding an oral agreement varying the terms of a written contract was void and did not affect the enforcement thereof; *Williston v. Lawson*, 22 N. S. 521 (dissenting opinion), on terms of a written contract not waived by a subsequent parol agreement; *Molson v. Bradburn*, 25 U. C. Q. B. 457, on the evidence required at a trial to support a plea of waiver of terms of a contract; *Smith v. Commercial Union Ins. Co.* 33 U. C. Q. B. 69, on right to waive terms of a written contract by parol.

—Parol extension of time.

Cited in *Maloughney v. Crowe*, 26 Ont. L. Rep. 579, 6 Dom. L. R. 471,—to the point that parol agreement to extend contract required to be in writing does not effect implied rescission of former contract; *Fair v. Pengelly*, 34 U. C. Q. B. 611, holding a parol variation of a written contract, to extend the time of the performance thereof was not competent; *Mara v. Fitzgerald*, 19 Grant, Ch. (U. C.) 52, holding a written agreement for sale of possession and of option for a lease was not affected by a parol extension thereof.

Written contracts at common law and under statute of frauds distinguished.

Cited in *Peters v. Hamilton*, 19 N. B. 284, distinguishing between written contracts at common law and under the statute of frauds.

Discharge or release of contract.

Cited in *Hussey v. Horne-Payne*, L. R. 8 Ch. Div. 670, 47 L. J. Ch. N. S. 751, 38 L. T. N. S. 341, 543, 26 Week. Rep. 532, 703, on how a contract may be abandoned.

Cited in note in 6 E. R. C. 573, on what will discharge a contract.

Sufficiency of plea of satisfaction of debt.

Cited in *Frith v. Alliance Invest. Co.* 5 D. L. R. 491, to the point that plea that debt had been satisfied by oral promise of third party to pay sum, was not good plea.

Review on points not made below.

The decision of the Court of Exchequer was cited in *McIntyre v. McCracken*, 1 Ont. App. Rep. 1, holding a verdict could not be supported on grounds not raised at the trial.

6 E. R. C. 566, *HEAD v. TATTERSALL*, 41 L. J. Exch. N. S. 4, L. R. 7 Exch. 7, 25 L. T. N. S. 631, 20 Week. Rep. 115.

Right to rescind contract.

Cited in *O'Shea v. Vaughn*, 201 Mass. 412, 87 N. E. 616, to the point that party cannot rescind void contract unless he returns consideration received.

Right to rescind contract of sale after depreciation or loss of chattel.

Cited in *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485, 33 N. E. 493, holding that in order to rescind a contract for breach of warranty it was not necessary that he return the property in as good condition as he received it where it was due to such breach of condition that it was damaged; *Campbell v. Tinker*, 137 Mo. App. 436, 118 S. W. 660, holding that where horses were sold and delivered to purchaser for trial, with option to return them if unsatisfactory, and were injured while in purchaser's possession without his fault he was not thereby deprived of his right to return; *Castleman v. Waghorn, G. & Co.* 41 Can. S. C. 88, to the point that right to rescind sale is not defeated by loss of chattel alone, so long as right to return remains in force; *Moore v. Scott*, 16 Manitoba L. Rep. 492, holding defendants had a right to rescind a contract for the sale of a horse because of breach of warranty of pedigree although the horse died in the hands of the defendant without his fault; *May v. Conn*, 22 Ont. L. Rep. 102, holding that title to horse sold subject to condition that it might be returned if not as warranted, within a specified time passed to vendee where horse was as warranted but died before the expiration of such period.

Cited in note in 3 L.R.A.(N.S.) 679, on effect of change of condition of chattel upon right to return for breach of warranty.

Cited in *Benjamin, Sales*, 5th ed. 442, on right of buyer to return chattel because of depreciation or under term of contract; *Benjamin, Sales*, 5th ed. 332, on necessity that retention of goods by buyer shall be voluntary in case of conditional sale; *Benjamin, Sales*, 5th ed. 414, on risk of loss or depreciation of chattel attaching to the person who is eventually entitled to the property where buyer without fault; *Benjamin, Sales*, 5th ed. 472, on right of defrauded buyer to avoid sale; *Benjamin, Sales*, 5th ed. 1012, on remedy of buyer on accident to or destruction of thing sold; *Benjamin, Sales*, 5th ed. 443, on misrepresentation as ground for avoiding contract of sale although chattel is injured or lost; 1 *Beach, Contr.* 294, on impossibility of performance as excusing bailee who has bought chattel with option of return; 1 *Mechem, Sales*, 559, on nature of title acquired by vendee under sale with option to pay or return; 1 *Mechem, Sales*, 564, 565, on sale becoming absolute where purchaser with option to return puts it out of his power to return; 1 *Hollingsworth, Contr.* 438, on discharge of contract by provision in contract itself.

Breach of contract as ground for rescission.

Cited in *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584,—on right of part to rescind contract because of breach thereof.

Cited in 2 *Mechem, Sales*, 686, on right to rescind executed sale for mere breach of warranty.

Right to recover back purchase price on conditional sale of chattel.

Cited in *Elphick v. Barnes*, L. R. 5 C. P. Div. 321, 49 L. J. C. P. N. S. 698, 29 Week. Rep. 139, 14 J. P. 651, holding a person selling a horse on condition that the purchaser might try it for a certain time and then return if not suitable could not recover for the horse where it died within such time without fault on the part of the purchaser.

Election between return of chattel and action for damages.

Cited in *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558, holding that person injured by breach of warranty of such nature as would justify return of property cannot be compelled to elect between return and damage.

Defense of wrong doing.

Cited in *Toms v. Whitby*, 35 U. C. Q. B. 195, on participation in wrong doing as affecting right of action.

Waiver of notice of breach of warranty.

Cited in *Lennox v. Goold, S. & M. Co.* 5 D. L. R. 836, holding that under contract for purchase of engine warranting that it would develop certain horse power and that buyer would notify seller if it did not do so, latter provision is waived by seller sending out experts to test engine.

6 E. R. C. 576, *HOCHSTER v. DE LA TOUR*, 2 El. & Bl. 678, 17 Jur. 972, 22 L. J. Q. B. N. S. 455, 1 Week. Rep. 469.

Accrual of causes of action.

Cited in *Patterson v. Great Western R. Co.* 8 U. C. C. P. 89, on accrual of cause of action for damages to land by flooding.

Right of action for breach of contract when accrues.

Cited in *National Acci. Soc. v. Spiro*, 47 U. S. App. 293, 24 C. C. A. 334, 78 Fed. 774, holding suit might be maintained upon a policy of insurance immediately upon the refusal of the company to pay although commenced within time that company had to make payment; *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L.R.A.(N.S.) 922, 96 N. E. 99, holding that person agreeing to support another during lifetime of latter, is not bound to sue for breach of contract because such person leaves former's place and repudiates agreement, but may wait until death of such person; *Grant v. Cornock*, 16 Ont. App. Rep. 532, holding the statute of limitations did not begin to run against a cause of action for breach of promise to marry until the time had elapsed which was fixed by the agreement though the cause of action accrued before; *Ward v. American Health Food Co.* 119 Wis. 12, 96 N. W. 388; *Re Swift*, 105 Fed. 493; *Re Stern*, 54 C. C. A. 60, 116 Fed. 604; *Wilkinson v. Verity*, L. R. 6 C. P. 206, 40 L. J. C. P. N. S. 141, 24 L. T. N. S. 32, 19 Week. Rep. 604, 16 Eng. Rul. Cas. 208; *Davis v. Dodge*, 126 App. Div. 469, 110 N. Y. Supp. 787,—on when right of action accrues for breach of contract; *Connelly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350, holding that renunciation of contract of marriage alters status of parties, and right of action accrues at once.

Cited in note in 14 E. R. C. 679, 680, on time of doing of act by obligee under instrument as condition precedent of obligation.

—Immediate right of action for breach of contract on refusal or disability to proceed to performance.

Cited in *Pennsylvania Steel Co. v. New York City R. Co.* 117 C. C. A. 503, 198 Fed. 721, holding that appointment of receiver for insolvent corporation who refuses to perform contract, is such disablement to perform contract as gives rise to cause of action for breach; *Holt v. United Secur. L. Ins. & T. Co.* 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301; *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L.R.A. 302, 79 S. W. 1069; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938,—on the option to treat a premature refusal as a breach of the agreement or to treat the contract as still in force; *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524; *Maltby v. Eisenhauer*, 17 Kan. 308; *James v. Adams*, 16 W. Va. 245; *Horst v. Roelm*, 84 Fed. 565; *Marks v. Van Eeghen*, 57 U. S. App. 149, 30 C. C. A. 208, 85 Fed. 853; *Northrop v. Mercantile Trust & D. Co.* 119

Fed. 969; *Re Neff*, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780 (affirming 91 Fed. 345, 33 C. C. A. 550, 62 U. S. App. 520); *Dullea v. Taylor*, 34 U. C. Q. B. 12; *Rhymney R. Co. v. Brecon & M. T. J. R. Co.* 69 L. J. Ch. N. S. 813, 49 Week. Rep. 116; *Mountjoy v. Metzger*, 9 Phila. 10, 29 Phila. Leg. Int. 300,—holding the unqualified refusal to perform contract when the time arrives, announced before such period is a breach thereof and gives an immediate right of action; *Lyon v. Culbertson*, 83 Ill. 22, 25 Am. Rep. 349, (dissenting opinion), on right of party to sue for breach of contract where other party refuses to perform prior to time when performance is required by terms of contract; *Supreme Council, A. L. H. v. Lippincott*, 67 C. C. A. 630, 69 L.R.A. 803, 134 Fed. 824; *Supreme Council, C. L. H. v. Black*, 59 C. C. A. 414, 123 Fed. 650,—holding member of a fraternal benefit association may treat his contract with the association as rescinded and maintain an action for its breach where it passes a by-law, arbitrarily reducing the amount payable on his contract of life insurance; *Allen v. D. T. Ranck Pub. Co.* 98 Ill. App. 44; *Crabtree v. Messersmith*, 19 Iowa, 179; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 459; *Lewis v. Tapman*, 90 Md. 294, 47 L.R.A. 385, 45 Atl. 459; *Lyman v. Becannon*, 29 Mich. 466; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124; *O'Neill v. Supreme Council, A. L. H.* 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; *Freer v. Denton*, 61 N. Y. 492; *Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661 (dissenting opinion); *Napier v. Spielmann*, 54 Misc. 96, 103 N. Y. Supp. 982; *McEachron v. Randles*, 34 Barb. 301; *McCrary v. Lindenborn*, 63 App. Div. 106; *Houghton v. Rowley*, 9 Phila. 288, 30 Phila. Leg. Int. 60; *Lee v. Mutual Reserve Fund Life Asso.* 97 Va. 160, 33 S. E. 556; *Mutual Reserve Fund Life Asso. v. Taylor*, 99 Va. 208, 37 S. E. 854; *Allen v. Field*, 65 C. C. A. 19, 130 Fed. 641; *Cornwall v. Moore*, 132 Fed. 868; *Barker & S. Lumber Co. v. Edward Hines Lumber Co.* 137 Fed. 300; *J. J. Moore & Co. v. Cornwall*, 75 C. C. A. 180, 144 Fed. 22; *Joline v. Metropolitan Securities Co.* 164 Fed. 144; *Connolly v. Coon*, 23 Ont. App. Rep. 37; *Harper v. Paterson*, 14 U. C. C. P. 538; *Mitchell v. Great Western R. Co.* 35 U. C. Q. B. 148; *Mersey Steel & Iron Co. v. Naylor*, L. R. 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 32 Week. Rep. 989, 51 L. T. N. S. 637, 23 Eng. Rul. Cas. 504; *Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450,—on when a part to may treat a contract as broken and sue for its breach; *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625; *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69; *Ex parte Pollard*, 2 Low. Dec. 1411, Fed. Cas. No. 11,252; *Re Wheeler*, 2 Low. Dec. 252, Fed. Cas. No. 17,488; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.* 51 C. C. A. 213, 113 Fed. 256; *Weber v. Grand Lodge, F. & A. M.* 95 C. O. A. 20, 169 Fed. 522; *Smoot's Case (United States v. Smoot)*, 15 Wall. 36, 21 L. ed. 107; *Phelps v. McLachlin*, 35 Can. S. C. 482 (dissenting opinion); *Dalrymple v. Scott*, 19 Ont. App. Rep. 477; *Lockhart v. Pannell*, 22 U. C. C. P. 597; *McEwan v. McLeod*, 46 U. C. Q. B. 235; *Ellis v. Pond* [1898] 1 Q. B. 426, 67 L. J. Q. B. N. S. 345, 78 L. T. N. S. 125, 14 Times L. R. 152; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, 55 L. J. Q. B. N. S. 162, 50 J. P. 694, 34 Week. Rep. 238, 54 L. T. N. S. 629; *Roper v. Johnson*, L. R. 8 C. P. 167, 42 L. J. C. P. N. S. 65, 28 L. T. N. S. 296, 21 Week. Rep. 384, 23 Eng. Rul. Cas. 532; *Smith v. Georgia Loan, Sav. & Bkg. Co.* 113 Ga. 975, 39 S. E. 410,—on renunciation of executory contract as giving right of action for breach thereof; *Inwaack v. Cruse, Wilson Super. Ct. (Ind.)* 320; *Nelson v. Plimpton Fireproof Elevating Co.* 55 N. Y. 480; *Oppenheimer v. Brackman & K. Mill Co.*, 32 Can. S. C. 699; *Mt. Hope Cemetery Asso. v. Weidenmann*, 139 Ill. 67,

28 N. E. 834,—on right to maintain an action for breach of contract; *Lee v. Penn-ington*, 7 Ill. App. 247, holding bond by trustee for remaindermen was actionable by them when he became insolvent though remaindermen's rights had not yet fallen in; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253, on remedy of party on the rescission of an executory agreement; *Clark v. National Ben. & Casualty Co.* 67 Fed. 222; *Gilbert v. Campbell*, 12 N. B. 474; *Parent v. Bourbonnière*, 13 Manitoba L. Rep. 172; *Union Ins. Co. v. Central Trust Co.* 157 N. Y. 633, 44 L.R.A. 227, 52 N. E. 671, 29 N. Y. Civ. Proc. Rep. 1,—on right of action for breach of contract as accruing where one party puts it out of his power to perform; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850, on refusal to complete performance of contract as giving rise to a cause of action for breach of contract; *Wells v. Hartford Manilla Co.* 76 Conn. 27, 55 Atl. 599, holding there was not such a breach of a contract to receive a quantity of pulp as would give a cause of action for breach of contract where the defendant told plaintiff not to ship more until so ordered; *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197, 5 Ann. Cas. 103, holding an action for a breach of a promise to marry upon the happening of a certain event might be maintained where such refusal to marry took place before such event occurred; *Eugesette v. McGilvray*, 63 Ill. App. 461, holding that where contractor before day of performance declared that he will not fulfill, other party may sue at once for breach of contract; *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. 419, holding where a railroad company refused to pay according to tenor of contract, such act may be treated as a rescission and an action may be maintained at once for the breach; *Lafayette v. Bloom*, 17 Ind. App. 461, 46 N. E. 1016, holding an action might be maintained for a breach of a contract to teach school which the school board revoked before the commencement of the term; *Holt v. United Secur. L. Ins. & T. Co.* 74 N. J. L. 795, 11 L.R.A. (N.S.) 100, 67 Atl. 118, 12 Ann. Cas. 1105, holding action for the breach of a contract to make a loan of money might be maintained at once upon the refusal to make the loan after the vendor had fulfilled the conditions of it; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773, holding where party to a contract for the erection of a house abandons the contract before its completion, the other party is thereby released from his undertaking and may maintain an action for its breach; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516, holding that action for breach of promise to marry will lie at once upon positive refusal to perform contract to marriage, although time specified for performance has not arrived; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227, on denial of liability under contract as giving rise to right of action prior to time fixed for performance of contract; *Miller v. Jones*, 68 W. Va. 526, 36 L.R.A. (N.S.) 408, 71 S. E. 248, holding that vendee may enforce performance at once where purchase money is all paid prior to time fixed by contract, if vendor wholly repudiates contract; *Kehlor v. Magor*, 7 Mont. L. Rep. 387, on option to injured party either to sue immediately for breach of contract or wait until the time when the act was to be done; *Frost v. Knight*, L. R. 5 Exch. 322, L. R. 7 Exch. 111, 39 L. J. Exch. N. S. 227, 23 L. T. N. S. 714, 19 Week. Rep. 77, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471, holding same where defendant promised to marry plaintiff when father died and then during the life time of the father absolutely refused to do so; *Synge v. Synge* [1894] 1 Q. B. 466, holding an action for breach of contract might be maintained where a man as an inducement to a woman to marry him agreed

to leave her certain property at his death and after the marriage conveyed such property to a third person.

Cited in note in 6 L.R.A.(N.S.) 1121, on assertion of action for damages where at time of suit defendant has repudiated contract or is unable to carry it out.

Cited in 3 Page, Contr. 2222, on right of action for breach of contract before performance is due; 1 Beach, Contr. 492, 494, on effect of refusal to perform before arrival of time for performance; Hollingsworth, Contr. 471, 472, 475, on right to sue at once on announcement by other party that services will not be needed; Benjamin, Sales, 5th ed. 565, on effect of one party to sale of goods rendering himself incapable of performing; 2 Mechem, Sales, 936, 938, 939, on right to regard renunciation of contract as present breach and sue at once; Benjamin, Sales, 5th ed. 569, on prospective refusal amounting to an immediate breach of which promisee can at once take advantage, if he chooses.

Distinguished in *Day v. Connecticut General L. Ins. Co.* 45 Conn. 480, 29 Am. Rep. 693, holding that action cannot be maintained by policy holder, without rescinding contract because company refused to receive premium on ground that policy had become forfeited by breach of condition by person insured.

Disapproved in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, holding action for the breach of contract to purchase land brought before the expiration of the time to purchase cannot be maintained by proof of an absolute refusal on the part of defendant ever to purchase.

What necessary to constitute breach of an executory contract.

Cited in *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5708, holding that declaration that party will not perform act, may be treated as breach of promise to perform such act; *Greenway v. Gaither*, Taney, 227, Fed. Cas. No. 5788; *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384,—holding that action for breach of written agreement to purchase land, brought before expiration of time given for purchase, cannot be maintained by proof of absolute refusal on defendant's part ever to purchase; *Dingley v. Oler*, 11 Fed. 372; *Roehm v. Horst*, 33 C. C. A. 550, 62 U. S. App. 520, 91 Fed. 345,—holding that where one party to contract gives notice of his intention not to perform, other party is justified in treating such action as anticipatory breach; *El Paso Cattle Co. v. Stafford*, 99 C. C. A. 515, 176 Fed. 41, holding that insistence by vendee on return of deposit made to secure performance of contract for sale of land made in anticipation of time of performance, while contract is executory, was inconsistent with further performance, and tantamount to refusal to perform; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 59 L.R.A. 122, 91 Am. St. Rep. 112, 42 S. E. 378, holding a countermand of an order for a shipment of goods is not effectual to constitute a rescission of the contract where the seller has not assented to; *Ford & Co. v. Lawson*, 133 Ga. 237, 65 S. E. 444, holding that party to continuing contract renounces it prior to date fixed for performance other party is at liberty to treat such renunciation as breach of contract and sue for damages; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, holding there is a breach of a contract for future employment when the time arrives for its performance and one of the parties absolutely repudiates it although the other party stands ready to perform; *Gray v. Green*, 9 Hun, 334, holding that in order to entitle one to sue for breach of contract before time of performance, there must be positive refusal to perform or party in default must have disabled himself from performing; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436, 1 Silv. Ct. App. 550, holding where the

purchaser before the delivery of the goods gives notice that he will not receive or pay for them the seller may treat the contract as broken without attempting to make a delivery of the goods; *Wills v. Simmonds*, 8 Hun, 189; *Wills v. Simmonds*, 51 How. Pr. 48,—holding the declaration of an intention not to perform a contract amounts to a breach thereof; *Metcalfe v. Britannia Iron-works Co.* L. R. 2 Q. B. D. 423, 46 L. J. Q. B. N. S. 443, 36 L. T. N. S. 451, 25 Week. Rep. 720, 3 Asp. Mar. L. Cas. 407, holding there was a breach of a contract to carry goods where they were landed before they reached their proper destination; *Gibbons v. Bentle*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, on how the renunciation of an executory contract becomes effective; *Roberts v. Brett*, 5 Jur. N. S. 146, 6 C. B. N. S. 611, 28 L. J. C. P. N. S. 323, on right of person to break his contract before the time of its performance had arrived.

Cited in 2 Beach, Contr. 2221, on non-creation of a breach of an executory contract by merely giving notice of refusal to perform; Benjamin, Sales, 5th ed. §11, on effect of repudiation by buyer of goods to be manufactured.

Distinguished in *Moore v. Security T. & L. Ins. Co.* 93 C. C. A. 652, 168 Fed. 496, holding contracts with agents for commissions on future renewals of premiums are not broken by reinsurance and abandonment of business; *Churchward v. R. L. R.* 1 Q. B. 173, 14 L. T. N. S. 57, holding on facts there was no breach of an executory contract with plaintiff to carry the mails; *Société Générale de Paris v. Milders*, 49 L. T. N. S. 55, holding a mere intimation of an intention not to perform a contract, not acted upon did not amount to a breach thereof; *Ex parte Tendeur*, L. R. 5 Eq. 160, 37 L. J. Ch. N. S. 160, 16 Week. Rep. 270, holding a suspension of payment by a bank which has issued a letter of credit is not a breach of such contract.

Right to treat contract as broken.

Cited in *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884, holding that repudiation of contract by owner of land made with agent to sell such land gives agent right to sue as for breach of contract; *McPherson v. Walker*, 40 Ill. 371, holding that declaration of party to contract that he will not perform contract, not withdrawn at time when act is to be performed is sufficient excuse for default of other party; *Beardsley v. Smith*, 61 Ill. App. 340, holding that seller may maintain action against buyer for damages upon his failure or refusal to take or select goods described in contract; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773, holding that breach of contract which will justify party not in default in abandoning performance and suing for damages need not be of such character as to render further execution of contract by him impossible; *Olmstead v. Bach*, 78 Md. 132, 22 L.R.A. 74, 44 Am. St. Rep. 273, 27 Atl. 501, holding that employee wrongfully dismissed cannot sue for unaccrued wages, but for breach of contract; *Wayland v. Western Life Indemnity Co.* 166 Mo. App. 221, 148 S. W. 626, holding that policy issued to member by assessment company cannot be declared forfeited by reason of failure of member to pay assessments illegally levied; *Kingsley v. Brooklyn*, 7 Abb. N. C. 28, holding that where under contract for public work, portion of money was reserved until completion of contract, contractor may recover for work actually done without producing certificate of completion, where public agents stopped work; *Henry v. Rowell*, 31 Misc. 384, 64 N. Y. Supp. 488, holding a breach of an oral contract of sister to leave her brother all the property she has at her death if he will support her for life occurs when she definitely abandons his household; *Empie v. Empie*, 35 App. Div. 51, 54 N. Y. Supp. 402,

holding a grantor may treat a contract of grantee to support grantor as broken where the grantee conveys the farm to another and announces that he can no longer support grantor; *Re Pettingill*, 137 Fed. 143; *Re Neff*, 84 C. C. A. 561, 157 Fed. 57; *Phoenix Nat. Bank v. Waterbury*, 123 App. Div. 153, 108 N. Y. Supp. 391,—holding the vendor in a contract of sale at a future date may treat such contract as broken by anticipation where the vendee before such date files a petition in bankruptcy; *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, Ann. Cas. 1913C, 758 (dissenting opinion), on right to sue for damages for breach of contract upon repudiation of contract by opposite party; *Brooke v. Laurens Mill. Co.* 78 S. C. 200, 125 Am. St. Rep. 780, 58 S. E. 806, holding a seller of corn might treat a contract as broken where the purchaser announced his intention of receiving no more of the corn bargained for; *Sydney Boat & Motor Mfg. Co. v. Gillis*, 43 N. S. 259; *Fitzgerald v. Mandas*, 21 Ont. L. Rep. 312,—holding that where one party repudiates contract, other party may treat contract at end and sue for damages for breach; *Greenwood v. Estevan School Dist.* 3 Sask. L. R. 433, to the point that if one party to contract refuses distinctly to be bound thereby other party may treat contract at end.

Cited in note in 6 E. R. C. 586, on refusal or inability of one party to perform contract as discharge of other party.

Cited in 2 Elliott, Railr. 2d ed. 861, on right to abandon contract and sue for work already done where prevented by other party, without good cause, from completing contract; *Benjamin, Sales*, 5th ed. 814, on right of seller to treat contract as rescinded because of buyer's conduct and to recover value of goods delivered.

Necessity of averring or proving performance or readiness or offer to perform.

Cited in *Holt v. United Security L. Ins. & T. Co.* 76 N. J. L. 585, 21 L.R.A. (N.S.) 691, 72 Atl. 301; *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286; *Crist v. Armour*, 34 Barb. 378,—holding that where party to contract refuses to perform his part other party is relieved from averring or proving performance or a readiness or offer to perform the contract; *Grandy v. Small*, 50 N. C. (5 Jones, L.) 50, holding that in action for breach of contract to deliver article on certain day upon payment of purchase price, plaintiff must allege and prove readiness and ability to pay at time and place specified.

Damages recoverable for breach of contract.

Cited in *Delaware & H. Canal Co. v. Mitchell*, 92 Ill. App. 577, holding that in action by vendee of personalty for refusal to deliver measure of damages is difference between contract price and market price at time and place where property should have been delivered; *Cummins v. Hanson*, 10 Daly, 493, holding that damages for breach of contract by hirer of room and board for definite period may be recovered up to time of trial not merely to time of commencement of action; *Cummings v. Hansen*, 63 How. Pr. 351, holding that damages for breach of contract may be recovered up to time of trial of action, where contract has not been terminated by flux of time; *Brady v. Oliver*, 125 Tenn. 595, 41 L.R.A.(N.S.) 60, 147 S. W. 1135, Ann. Cas. 1913C, 376, holding that building contractor is entitled to recover on quantum meruit for services performed to time of rescission by owner of building; *Hart v. Dubrule*, 20 Manitoba L. Rep. 234, holding that upon breach of contract by defendant action is for damages for breach and not for moneys that would have become payable had contract been carried out.

Cited in note in 23 Eng. Rul. Cas. 550, on measure of damages for non-performance of contract for sale of goods to be delivered at different times.

Cited in Benjamin, Sales, 5th ed. 990, on measure of damages for seller's breach of contract for future deliveries in instalments.

—Contract of employment.

Cited in American China Development Co. v. Boyd, 148 Fed. 258, holding in an action for damages for a breach of a contract of employment a servant might recover the contract price remaining unpaid on absence of evidence by defendant that he might obtain other employment; Moody v. Leverich, 4 Daly, 401, holding that servant wrongfully discharged can only recover damages for breach of contract or for any amount due for services; Toles v. Hazen, 57 How. Pr. 516, holding that employee discharged wrongfully can only recover amount due at commencement of action, if suit is brought before expiration of term; Everson v. Power, 60 How. Pr. 166, holding damages in an action for a wrongful discharge from employment are recoverable up to the time of trial; Jay v. Macdonnell, 17 Grant, Ch. (U. C.) 436; Broughton v. Brantford, 19 U. C. C. P. 434; Moody v. Leverich, 14 Abb. Pr. N. S. 145,—on damages recoverable for a wrongful discharge from employment; Knutson v. Knapp, 35 Wis. 86, holding that servant wrongfully discharged before end of his term of service may sue immediately upon contract, and recover thereon for services to time of discharge; Richardson v. McClary, 16 Manitoba L. Rep. 74, holding that land owner cannot revoke agency conferred upon broker before time fixed for expiration of contract and is liable in damages for refusing to sell.

Cited in note in 6 L.R.A.(N.S.) 113, on remedy of wrongfully discharged servant by action for breach of contract.

Contract not performable within year within statute of frauds.

Cited in Booth v. Prittie, 6 Ont. App. Rep. 680, holding a contract of hiring for a year or more defeasible within the year was within the statute of frauds.

Refusal to receive performance as dispensing with necessity for a tender.

Cited in Smith v. Canadian Exp. Co. 12 Ont. L. Rep. 874, holding the refusal of a consignee to accept a shipment of trees absolved the carrier from making a further tender of them.

Excuse for non-performance of contract.

Cited in Kingsley v. Brooklyn, 78 N. Y. 200, holding that where performance by one party to contract is prevented by acts of other party, non-performance is excused.

Action on contract before performance.

Cited in Boyde v. Snarr, 6 U. C. C. P. 94, on right of agent to commission where he failed to procure the contract he was employed to get.

Right to rescind executory contract.

Cited in 2 Beach. Contr. 2213, on right of party to rescind executory contract and be liable only for damages.

6 E. R. C. 589. DOUGLAS v. PATRICK, 1 Revised Rep. 793. 3 T. R. 683.

Sufficiency of tender of payment.

Cited in Wing v. Davis, 7 Me. 31, holding a tender of money in a bag made at a window of a house in payment of a debt the creditor being at the window but not admitting debtor into the house was sufficient; Hubbard v. Bank of Chenango, 8 Cow. 88, on the sufficiency of a tender of payment; Niagara Bridge

Co. v. Great Western R. Co. 22 U. C. Q. B. 592, holding a tender of payment in American currency equivalent to the amount due was not a valid tender.

Cited in 1 *Beach, Contr.* 398, on sufficiency of tender on severable debts; 1 *Beach, Contr.* 395, on amount of tender; Benjamin, *Sales*, 5th ed. 776, on validity of payment or tender by one of several joint debtors; Benjamin, *Sales*, 5th ed. 773, on effectiveness of tender of more than is due; Benjamin, *Sales*, 5th ed. 772, on waiver of actual production of money by creditor; 2 *Meechem, Sales*, 1272, on validity of seller's lien against subpurchaser unless seller is estopped.

Necessity of pleading tender.

Distinguished in *Griffin v. Tyson*, 17 Vt. 35, holding where tender is made and refused and action commenced, the tender must be placed specially at the trial.

Sufficiency of plea of tender.

Cited in *Reed v. Woodman*, 17 Me. 463, on the sufficiency of a plea of tender; *Thetford v. Hubbard*, 22 Vt. 440, holding tender pleaded generally applies to each of distinct counts.

Evidence necessary to support a plea of tender.

Cited in *Holmes v. Holmes*, 9 N. Y. 525 (affirming 12 Barb. 137), holding evidence of a waiver of tender by the opposite party was sufficient to support an averment of tender; *Bakeman v. Pooler*, 15 Wend. 637, holding evidence that the debtor had the money in his pocket and told creditor that he was ready to pay it was not sufficient to support a plea of tender; *Slingerland v. Morse*, 8 Johns. 474, on waiver of tender as sufficient to support a plea of tender; *Thomson v. Hamilton*, 5 U. C. Q. B. O. S. 111, holding evidence that sheriff sent his clerk to say that certain monies he had collected were ready to be paid without sending the money with clerk would not support plea of tender.

6 E. R. C. 591, *FINCH v. BROOK*, 1 Bing. N. C. 253, 4 L. J. C. P. N. S. 1, 1 Scott, 70.

Sufficiency of tender of payment.

Cited in *Cothran v. Scanlan*, 34 Ga. 555, holding an offer to pay what the amount of principal and interest on a note in Confederate money would have been worth in species was not a sufficient tender; *McGehee v. Jones*, 10 Ga. 127, on the sufficiency of a tender of payment; *Dunlevie v. Spangenberg*, 66 Misc. 354, 121 N. Y. Supp. 299, holding that tender is waived by refusal of creditor to receive less than amount which is larger than that to which he is entitled; *Wagenblast v. McKean*, 2 Grant, Cas. 393, on circumstances dispensing with need for actual manual production of money in making tender.

Cited in note in 6 Eng. Rul. Cas. 638, on sufficiency of tender of payment.

Cited in Benjamin, *Sales*, 5th ed. 771, 772, on waiver of actual production of money by creditor; 1 *Beach, Contr.* 389, on production of money as essential to valid tender.

6 E. R. C. 597, *BROWN v. ROYAL INS. CO.* 1 El. & El. 853, 5 Jur. N. S. 1255, 28 L. J. Q. B. N. S. 275, 7 Week. Rep. 479.

Impossibility excusing the performance of a contract.

Cited in *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. 176, holding a city having elected under the terms of a water company franchise to purchase the plant by serving notice of such intention could not rescind its election because of fact that source of supply became temporarily dry subsequent to

such notice; *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692, holding water company was not excused from liability for loss of the plaintiff's building by fire due to defendant's failure to furnish water, where their failure was due to a break in the pipes without fault on their part; *Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741 (dissenting opinion), on impossibility of performance as excusing the nonperformance of a contract; *Laine v. Reg.* 5 Can. Exch. 103, holding that where contract creates duty, party is bound thereby notwithstanding any accident preventing performance.

Cited in note in 6 Eng. Rul. Cas. 638, on perishing or destruction of subject matter of contract as excusing performance of contract.

Cited in *Hollingsworth*, Contr. 559, on discharge of contracts by impossibility of performance; Benjamin, Sales, 5th ed. 575, on effect of impossibility of performance of one of two alternative promises.

— **Where impossibility imposed by law or lawful regulation.**

Cited in *Webb Granite & Constr. Co. v. Worcester*, 187 Mass. 385, 73 N. E. 639, holding it was no defense in an action by a contractor against a city for refusing to proceed with the work contracted for that the plaintiff did not complete the work within the stipulated time where the cause of the delay was an injunction served on both parties.

— **Where restoration of building by insurer is prevented by building regulations.**

Cited in *Fire Asso. of Philadelphia v. Rosenthal*, 108 Pa. 474, 1 Atl. 303, 42 Phila. Leg. Int. 436, holding defendant company after an election to repair a building were not excused from making such repairs because the building inspector refused to allow the construction of a frame building; *Pennsylvania Co. v. Philadelphia Contributionship*, 201 Pa. 497, 57 L.R.A. 510, 51 Atl. 351, 10 Pa. Dist. R. 181, holding the increased cost of rebuilding a burned building due to new requirements of the building laws must be borne by the insurance company to the extent of the amount designated by the policy; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337; *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 81 Am. St. Rep. 286, 83 N. W. 409,—holding a recovery may be had as for a total loss where the repair of the building damaged is prevented by reason of a municipal ordinance.

Cited in note in 56 L.R.A. 792, on constructive total loss of insured building where insurer, having elected to rebuild, was unable to do so because of action of public authorities.

Remedy for failure of insurer to perform after making election under contract.

Cited in *Stone v. Mutual F. Ins. Co.* 74 Md. 579, 14 L.R.A. 684, 22 Atl. 1051, on remedy of insured where insurance company fails to rebuild premises after an election to do so.

Conclusiveness of election under contract.

Cited in *Castle Creek Water Co. v. Aspen*, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 660, holding that option to purchase is continuing offer by vendor to sell and its acceptance by vendee completes contract and estops vendee from revoking it; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534, on the conclusiveness of an election under a contract; *Cruso v. Bond*, 9 Ont. Pr. 111, holding that mortgagee is not obliged to accept payment of whole principal of mortgage, on which, only interest is due, though bill filed prays for both; *Butters v. Glass*, 31 U. C. Q. B. 379, holding a seller of grain having exercised the option under the

contract of naming the carrying vessel could not substitute another one for it.

Cited in note in 26 L.R.A. 855, on insurer's option to rebuild being final although impossible to perform because of action of public commissioners.

6 E. R. C. 603, *TAYLOR v. CALDWELL*, 3 Best. & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726.

Impossibility excusing the non-performance of a contract.

Cited in *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 6 N. E. 742; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *McCreery v. Green*, 38 Mich. 172; *Hall v. School Dist.* 24 Mo. App. 213; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 489, *Lorillard v. Clyde*, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62, 33 Phila. Leg. Int. 184; *Richmond Ice Co. v. Crystal Ice Co.* 99 Va. 285, 38 S. E. 141; *Griffith v. Blackwater Boom & Lumber Co.* 55 W. Va. 604, 69 L.R.A. 124, 48 S. E. 442; *Vancouver Nat. Bank v. Law Union & Crown Ins. Co.* 151 Fed. 440; *McKenna v. McNamee*, 15 Can. S. C. 311; *Laine v. R.* 5 Can. Exch. 103; *Morris v. Armit*, 4 Manitoba L. Rep. 152; *Anglo-Newfoundland Fish, etc., Co. v. Smith*, 35 N. S. 267 (dissenting opinion); *Sawyer v. Pfingle*, 18 Ont. App. Rep. 218; *Ardill v. Citizens' Ins. Co.* 20 Ont. App. Rep. 605; *York County v. Toronto*, 21 U. C. C. P. 95; *Re Hull & Meux's Arbitration* [1905] 1 K. B. 588, 74 L. J. K. B. N. S. 252, 53 Week. Rep. 289, 92 L. T. N. S. 74, 21 Times L. R. 220; *Jackson v. Union M. Ins. Co.* L. R. 10 C. P. 125, 6 Eng. Rul. Cas. 650, L. R. 8 C. P. 572, 42 L. J. C. P. N. S. 281, 22 Week. Rep. 79, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169 (dissenting opinion); *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60 (dissenting opinion),—on impossibility of performance as excusing the nonperformance of a contract; *Jaminet v. American Storage & Moving Co.* 109 Mo. App. 257, 84 S. W. 128, holding that one who undertakes to move household goods from one residence to another is private carrier and only responsible for losses occasioned by negligence, unless by agreement he assumes additional responsibility; *Delaware, L. & W. R. Co. v. Bowns*, 58 N. Y. 573, holding plaintiffs were not liable for damages to defendant by reason of failure to perform contract to deliver coal where such performance was rendered impossible by reason of a strike for which no fault could be attributed to defendants; *Dominion Iron & Steel Co. v. Dominion Coal Co.* C. R. [1909] A. C. 64, holding that breach of contract to supply certain quality of coal for specified period of time, is not excused because supply of such coal became exhausted; *Marks v. Dartmouth Ferry Commission*, 36 N. S. 158, holding that under contract for services plaintiff cannot recover unless he shows compliance although he is prevented by sickness; *Dominion Iron & Steel Co. v. Dominion Coal Co.* 43 N. S. 77, holding that contract to supply coal of certain quality, to be used for certain purposes, is broken by failure to supply such coal and it is no excuse that person so contracting is unable to procure such coal because of exhaustion of supply in its mines; *Montreal Street R. Co. v. Recorder's Ct.* Rap. Jud. Quebec, 37 C. S. 311, holding that performance of a contract is excused where contract is beyond its charter power; *Luxfer Prism Co. v. McLeod*, 1 Sask. L. R. 75, holding that in order to recover for price of goods agreed to be delivered, plaintiff must show delivery, and delivery is not excused because impossible owing to omission on defendant's part; *Elliott v. Brown*, 3 Sask. L. R. 238, to the point that where there is positive contract to do thing, contractor must perform it or pay damages, although in consequence of unforeseen accident, performance has become impossible; *Hamilton v. Moore*, 33

U. C. Q. B. 275, holding the default of owner to have works ready for contractor excused his failure to have the work completed within the specified time: *Chapman v. Withers*, 57 L. J. Q. B. N. S. 457, L. R. 20 Q. B. Div. 824, 37 Week. Rep. 29, holding the nonreturn of a horse within the stipulated period was not a bar to an action for breach of warranty where it was impossible to return the horse within such period because of accidental injury to it: *Jackson v. Union Marine Ins. Co.* 5 E. R. C. 650, L. R. 8 C. P. 572, L. R. 10 C. P. 125, 42 L. J. C. P. N. S. 284, 22 Week. Rep. 79, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169, on excuse discharging charterer of vessel.

Cited in notes in 14 L.R.A. 216, on intervening impossibility as relieving from obligation of contract: 1 Eng. Rul. Cas. 348, on inevitable accident as excuse for nonperformance of express contract.

Cited in 3 Page, Contr. 2123, on destruction of specific subject-matter as excuse for nonperformance of contract: *Hollingsworth*, Contr. 569, on destruction, without fault of other party, of thing, the continued existence of which is necessary to performance of a contract, as to its discharge: *Hollingsworth*, Contr. 559, on discharge of contracts by impossibility of performance.

Distinguished in *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, '81 Am. St. Rep. 467, 45 Atl. 692, holding a water company contracting to supply plaintiff with water is liable for a loss by fire because of the failure of the water supply due to a break in the mains without fault of water company: *Robinson v. Scurry*, 1 Manitoba L. Rep. 257, holding defendant in an action for the nondelivery of goods could not set up as a defense the impossibility of making such delivery because of fact that plaintiff had distrained them for rent.

Disapproved in *McCallum v. Russell*, 2 Sask. L. R. 442, holding that cancellation of contract with broker for commission after purchaser has been found, does not bar recovery for amount of commissions.

— Hindrances by the elements or natural conditions.

Cited in *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co.* 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. Rep. 231, 66 Pac. 28, holding that under contract for sale of crop of certain orchard, stating minimum quantity of fruit to be delivered, seller cannot be made liable in damages for failure to deliver specified quantity because of failure of crop due to climatic conditions; *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919, holding that where sale and delivery of fruit trees of a certain age to be grown to a specified size or age and in a manner prescribed by the buyer or seller was not responsible for non-delivery where failure to deliver was due to natural conditions and not to any fault of his own: *Clarksville Land Co. v. Harriman*, 68 N. H. 374, 44 Atl. 527, holding a party contracting to drive logs was excused from performance of contract where because of the sufficiency of the water of the stream its performance was rendered impossible: *Herter v. Mullen*, 159 N. Y. 28, 44 L.R.A. 703, 70 Am. St. Rep. 53 N. E. 700, holding a tenant's omission to surrender premises at the expiration of the term was excused by the impossibility of his removal on account of sickness; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N. Y. 247, 51 L.R.A. 951, 59 N. E. 5, holding a breach of vendor's agreement to operate street cars on the property at specific times was excused where the operation of the cars was rendered impossible for a time by reason of the severity of snow storms; *Re Jamieson & N. S. S. Freight Ins. Asso.* [1895] 1 Q. B. 510, holding the delay of a vessel chartered to carry a cargo of freight caused by the severe storms encountered by the vessel on her way to port of loading, excused the performance

of the contract; *Nickoll v. Ashton* [1901] 2 K. B. 126, 70 L. J. K. B. N. S. 600, 49 Week. Rep. 513, 84 L. T. N. S. 804, 17 Times L. R. 467, 6 Com. Cas. 151, 9 Asp. Mar. L. Cas. 209 (affirming [1900] 2 Q. B. 298, 69 L. J. Q. B. N. S. 640, 82 L. T. N. S. 761, 16 Times L. R. 370, 5 Com. Cas. 252, 9 Asp. Mar. L. Cas. 94), holding there could be no action for a breach of a contract to carry a cargo of grain by a certain vessel where the vessel was delayed by storms from arriving in time to take the cargo; *Robinson v. Davison*, L. R. 6 Exch. 269, 40 L. J. Exch. N. S. 172, 24 L. T. N. S. 755, 19 Week. Rep. 1036, holding plaintiff could maintain no action for defendant's breach of contract to play the piano at a concert where she was detained by illness from so doing; *Boast v. Firth*, L. R. 4 C. P. 1, 38 L. J. C. P. N. S. 1, 19 L. T. N. S. 264, 17 Week. Rep. 29, holding defendant might plead the permanent illness of his son as an excuse to an action for the breach of an apprenticeship deed.

Distinguished in *McCuaig v. Independent Order of Foresters*, 19 Ont. L. Rep. 613, holding the mental incapacity of an insured did not excuse the non-compliance with conditions of policy as to payment of assessments; *Re Arthur*, L. R. 14 Ch. Div. 603, 49 L. J. Ch. N. S. 556, 43 L. T. N. S. 46, 28 Week. Rep. 972, holding where by terms of a marriage settlement husband agrees to keep life insured for a certain amount for the benefit of his wife and children, the fact that when policy expired his health was so bad that he could not reinsure did not relieve him from liability.

— Destruction of subject matter by fires or the like agencies.

Cited in *Levy v. Caledonia Ins. Co.* 156 Cal. 527, 105 Pac. 598, holding that insurance company, which contracts with broker to pay certain sum per month for definite period, in consideration of his promise to place with it all fire insurance business which he might be able to secure is not relieved from contract by total destruction of insurable property in district referred to; *Edison Co. v. Huyett & S. Mfg. Co.* 66 Ill. App. 222, holding the destruction of a building in which defendant had contracted to put a ventilating system excused him from carrying out his contract for materials for such house; *Martin Emerich Outfitting Co. v. Siegel C. & Co.* 141 Ill. App. 147, holding that owner of building is relieved from contract to provide space for furniture business, where building is destroyed by fire without his fault; *Hottellet v. American Corn Mill Co.* 160 Ill. App. 58, holding that in absence of saving clause, destruction of plant by fire does not excuse nonperformance of contract providing for delivery of merchandise; *Martin Emerich Outfitting Co. v. Siegel C. & Co.* 237 Ill. 610, 20 L.R.A.(N.S.) 1114, 86 N. E. 1104 (affirming 141 Ill. App. 147), holding the destruction of a particular thing necessary to the performance of a contract excuses its performance; *Krause v. Crothersville*, 162 Ind. 278, 65 L.R.A. 111, 102 Am. St. Rep. 203, 70 N. E. 264, 1 Ann. Cas. 460, holding a contractor was not liable for the non-performance of a contract to construct an addition to a building where the old building was struck by lightning and that and the inflammable parts of the new building were burned; *Butterfield v. Byron*, 153 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667, holding neither party to a contract for the erection of a building could recover for the non-performance of the contract where the building was destroyed by lightning shortly before its completion; *Hawkes v. Kehoe*, 193 Mass. 419, 10 L.R.A.(N.S.) 125, 79 N. E. 766, 9 Ann. Cas. 1053, holding no action could be maintained for breach of a contract to convey land with buildings where before the time for such conveyance the buildings were destroyed by fire; *Nicol v. Fitch*, 115 Mich. 15, 69 Am. St. Rep. 542, 72 N. W. 988, holding the destruction of a steamboat did not absolve the

owners from liability for the salary of a person employed to solicit freight for her; *Stewart v. Stone*, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595, holding defendant was relieved from his contract to manufacture cheese and butter from milk delivered by plaintiff by reason of the accidental destruction of defendant's factory by fire; *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607, holding party to a charter party to deliver a vessel on the termination of a voyage was excused from its performance by the destruction of the vessel without fault of party before such time; *Dixon v. Breon*, 22 Pa. Super. Ct. 340, holding performance of a contract to cut and deliver timber was excused by the destruction of the timber in a forest fire; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052, holding same where lumber after being prepared for delivery was destroyed by an accidental fire; *Ellis v. Midland R. Co.* 7 Ont. App. Rep. 464, holding a contract of employment for the "season" on a vessel was excused by the destruction of the vessel before the end of season without fault of defendant; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L.R.A.(N.S.) 609, 104 Pac. 432; *Waite v. O'Neil*, 72 Fed. 348; *The Tornado* (*Ellis v. Atlantic Mut. Ins. Co.*) 108 U. S. 342, 27 L. ed. 747, 2 Sup. Ct. Rep. 746; *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; *Boswell v. Sutherland*, 8 Ont. App. Rep. 233 (allowing appeal from 32 U. C. C. P. 131); *St. Thomas v. Credit Valley R. Co.* 12 Ont. App. Rep. 273; *McKenna v. McNamee*, 14 Ont. App. Rep. 339; *Howell v. Soupland*, L. R. 9 Q. B. 462, 46 L. J. Q. B. N. S. 147, L. R. 1 Q. B. Div. 258, 24 Week. Rep. 470, 33 L. T. N. S. 832; *Boswell v. Sutherland*, 32 U. C. C. P. 131; *Bowell v. Dayton, S. & G. R. Co.* 12 Or. 488, 8 Pac. 544,—on destruction of subject-matter of contract as excusing nonperformance; *McLellan v. North British & M. Ins. Co.* 30 N. B. 363, to the point that if title to article to be delivered passed at time contract was made, destruction of property will excuse vendor from making delivery; *Reynolds v. Roxburgh*, 10 Ont. Rep. 649, holding the defendants who had hired a portable engine and boiler were excused from making a return of same where it exploded without negligence on their part; *Grant v. Armour*, 25 Ont. Rep. 7, holding defendants who had hired a scow and pile driver were liable for injury to, because of an unusually severe storm where they assumed responsibility thereto; *Chamberlen v. Trenouth*, 23 U. C. C. P. 497, holding burning of goods excused return of them "in good condition reasonable wear and tear only excepted."

Cited in note in 40 L. ed. U. S. 516, 518, on act of God as excuse for nonperformance of obligation.

Cited in 2 Underhill, Land. & T. 1342, on non-liability of tenant of room or apartment for rent where premises destroyed by fire.

Distinguished in *Ontario Electric Light & P. Co. v. Baxter & G. Co.* 5 Ont. L. Rep. 419, holding defendants who had contracted for a certain quantity of electric current for use in their mill were not relieved from liability to pay for such power by reason of the accidental destruction of the mill; *Marshall v. Schofield*, 52 L. J. Q. B. N. S. 58, holding a recovery might be had for the rent due for the term after the destruction of the premises by fire where the devise amounted to a rental of the land; *Appleby v. Meyers*, L. R. 1 C. P. 615, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669, holding plaintiff who contracted to place machinery in defendant's shop could recover for the machinery already in place when the shop was destroyed by an accidental fire although the contract had not been completed; *Turner v. Goldsmith* [1891] 1 Q. B. 544, 60 L. J. Q. B. N. S. 247, 64 L. T. N. S. 301, 39 Week. Rep. 547, holding plaintiff who was employed by defendant as a salesman for a certain

designated time was not prevented from recovering for his services for such period by the destruction of defendant's factory before the expiration of such period and his retirement from business therefrom.

—Where rendered impossible by operation of law.

Cited in *J. H. Labarre Co. v. Crossman*, 100 App. Div. 499, 92 N. Y. Supp. 565, holding a vendor of a quantity of raw coffee was excused from a strict compliance with the terms of the contract because of the health regulations of the health board of the port of entry; *Hickey v. Scintto*, 10 B. C. 187, holding no action could be maintained by the lessor on covenants for rent and repair where the lessee was stopped by the authorities from using the premises for the purposes rented for.

Death of party to as terminating contract.

Cited in *Preston v. Smith*, 67 Ill. App. 613, holding that contract for personal services is terminated by death, or incapacity from illness of person who agrees to perform such services; *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688 (affirming 67 Ill. App. 613), holding the personal representations of a decedent are not liable for the performance of a contract of a strictly personal nature to which the decedent was a party; *Patlee v. Boynton*, 73 N. H. 525, 63 Atl. 787, holding the death of the obligor under a mortgage conditioned upon the performance of a bond by the mortgagor, "her heirs, executors and administrators" does not terminate the right of enforcing the contract; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578, holding the death of an employer excused the further performance of a contract of employment with a clerk; *Blakely v. Sousa*, 197 Pa. 305, 80 Am. St. Rep. 821, 47 Atl. 286; *Siler v. Gray*, 86 N. C. 566, on death of party to, as excusing the performance of the contract; *Chisholm v. Chisholm*, 2 D. L. R. 57, holding that contract to pay certain sum per annum so long as promisor was able to do so for support of another, is not terminated by death of promisor but continues as against his executors.

Cited in note in 21 L.R.A.(N.S.) 915, 916, on termination of contract of employment by death of party.

Rights of parties to contract upon impossibility of performance.

Cited in *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, holding upon the total destruction of buildings and personalty on premises leased for a gross rental, the tenant is entitled to an abatement of the rent equal to the proportionate rental value of the personalty; *Pinkham v. Libbey*, 93 Me. 575, 49 L.R.A. 693, 45 Atl. 823, holding a person cannot recover money paid for the service of a stallion where the stallion died and plaintiff could not therefor exercise the right of return and the service proved fruitless; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, holding a vendor of a house cannot retain any part of the purchase price thereof where the house was destroyed by an accidental fire before he had conveyed the title thereto full payment not having been made; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Hayes v. Gross*, 9 App. Div. 12, 40 N. Y. Supp. 1098,—holding a contractor could recover for work actually done under a contract to erect a building where the building before its completion was accidentally destroyed by fire; *Wolf v. Altmeyer*, 8 Pa. Dist. R. 408, 30 Pittsb. L. J. N. S. 27, holding same case in action by architect for services; *Chandler v. Webster* [1904] 1 K. B. 493, 73 L. J. K. B. N. S. 401, 52 Week. Rep. 290, 90 L. T. N. S. 217, 20 Times L. R. 222; *Blakeley v. Muller* [1903] 2 K. B. 760, note 67 J. P. 51, 88 L. T. N. S. 90, 19 Times L. R. 186,—holding plaintiff who had paid for a seat that would overlook the coronation procession of the king could not recover back his money where the procession was

not held because of the illness of the king; *Topping v. Marling*, 15 B. C. 52, holding that where contract is made dependent upon insurance of government license to cut timber, and unexpected happens, parties must stand loss which is result of failure to issue license; *Civil Service Co-op. Soc. v. General Steam Nav. Co.* [1903] 2 K. B. 756, holding same where plaintiff chartered vessel to watch the naval review which was not held because of the illness of the king; *Krell v. Henry* [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246 (affirming 18 Times L. R. 823), holding plaintiff could not recover for a balance due on the rent of a flat which defendant had hired to view the coronation procession which did not take place because of the king's illness; *Elliott v. Crutchley* [1903] 2 K. B. 476, holding plaintiff could not recover for refreshments to be served on a steamer chartered to watch the naval review in the king's coronation which was postponed because of the king's illness, the defendant having stopped payment on the check he had given.

Distinguished in *Herne Bay S. B. Co. v. Hutton*, 72 J. K. B. N. S. 879, [1903] 2 K. B. 683, 89 L. T. N. S. 422, 19 Times L. R. 680, 52 Week. Rep. 183, 9 Asp. Mar. L. Cas. 472, holding defendants could not set up as a defense to an action for the hire of a vessel for a number of days, that as the naval review which was the object of the hiring did not take place they were not liable.

Sufficiency of compliance with conditions of contract under circumstances of accident or ignorance.

Cited in *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002, holding a provision on insurance policy that notice of loss must be given immediately was sufficiently complied with where the daughter of the decedent gave the required notice as soon as she learned of his death although it was over a year afterwards; *Accident Ins. Co. v. Young*, 20 Can. S. C. 280, on sufficiency of compliance with conditions of a policy of insurance.

Agreement for use of property whether a lease or a license.

Cited in *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92, on the nature of an agreement for the use of a building for a specific number of rights; *Power v. Griffin*, 20 N. S. 52, holding that instrument is not demise, if its contents show that such was not intention of parties; *Halpin v. Fowler*, 12 B. C. 447, holding on facts an agreement for the mining of ore was not a lease of the mine; *Flynn v. Toronto Industrial Exhibition Asso.* 9 Ont. L. Rep. 582, holding an agreement for the use of a spot on fair grounds for a merry-go-round was in the nature of a license rather than a lease; *Bradley v. McClure*, 18 Ont. L. Rep. 503, holding an agreement to rent a farm for pasturing purposes was a lease thereof; *Oliver v. Newhouse*, 32 U. C. C. P. 90, holding a demise of goods by a father to a son where the father leased farm to son gave the son only a limited interest for the term of the lease.

Cited in note in 18 L.R.A. 492, on distinction between a lease and a license.

Cited in 1 Underhill, Land. & T. 251, on intention governing whether instrument is lease; 1 Washburn, Real Prop. 6th ed. 354, on how far possession is necessary to perfect lease.

Conditions implied as part of contract.

Cited in *Gordon v. Manchester & L. R. Co.* 52 N. H. 596, 13 Am. Rep. 97, 6 Phila. Legal Gaz. 29, holding that in order to make binding contract it is not necessary to express in words what law tacitly implies; *Connolly v. St. John*. 36 N. B. 411, holding that covenant would be implied that plaintiff would be paid

for time lost by reason of high tides, where contract was for dredging harbor during certain period of time: *Snyder v. Kaulbach*, 27 N. S. 251 (dissenting opinion), on when conditions implied as part of contracts; *Hamilton v. Moore*, 33 U. C. Q. B. 275, holding that party whose fault prevents performance by other party cannot take advantage of latter's default as such condition is implied in all contracts.

Distinguished in *Battle v. Willox*, 40 Can. S. C. 198, holding an undertaking by person to enter into contracts for the sale of sand, on the strength of which plaintiff loaned him funds for the undertaking was an absolute one; *McNeeley v. McWilliams*, 13 Ont. App. Rep. 324, holding it was not an implied condition of a contract for the carriage of stone that the river would remain navigable for the remainder of the season.

Destruction of building at which note is payable as affecting necessity of demand.

Cited in *McRobbie v. Torrance*, 4 Manitoba L. Rep. 426, holding that note payable at certain bank, may be sued upon without demand, where bank ceased to do business before maturity of note.

6 E. R. C. 615, *MASTER v. MILLER*, 2 H. Bl. 140, 5 T. R. 367, 1 Anstr. 225, 2 Revised Rep. 399, affirming the decision of the court of King's Bench reported in 4 T. R. 320.

See S. C. 2 E. R. C. 69.

6 E. R. C. 617, *HADLEY v. BAXENDALE*, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. N. S. 179, 2 Week. Rep. 302.

See S. C. 5 E. R. C. 502.

6 E. R. C. 617, *HARNE v. MIDLAND R. CO.* 42 L. J. C. P. N. S. 59, L. R. 8 C. P. 131, 28 L. T. N. S. 312, 21 Week. Rep. 481, affirming the decision of the court of common pleas reported in L. R. 7 C. P. 583.

See S. C. 5 E. R. C. 506.

6 E. R. C. 627, *CUTTER v. POWELL*, 3 Revised Rep. 185, 2 Smith, Lead. Cas. 1, 6 T. R. 320.

Right of recovery for part performance of entire contract.

Cited in *Brooks v. Byam*, 2 Story, 525, Fed. Cas. No. 1,948, holding in general, the contract is not apportionable where only in part performed and not by its nature and terms severable; *The Erie*, Fed. Cas. No. 4,512, holding modern judges tend to make exceptions on slight grounds to the common law rule against apportionment of contracts; *Gardenhire v. Smith*, 39 Ark. 280, holding that person employed to work land and make crop for specified portion of it may, if discharged before crop is gathered, sue and recover value of services to that time, or he may wait until crop is gathered and recover agreed portion of crop, less what he might have earned after dismissal; *Gill v. Vogler*, 52 Md. 663; *Cox v. McLaughlin*, 52 Cal. 590,—holding that mere failure to pay installment under contract, will not authorize contractor to abandon work and sue for all benefits he would have received upon full performance; *Ford v. Smith*, 25 Ga. 675, holding that if work has not been done according to contract, but is received, and of benefit to party receiving it, party so receiving it must pay sum equal to value of labor and material; *Drake v. Surget*, 36 Miss. 458, holding there can be no recovery on the common counts where there was a special

contract; *McGrath v. Cannon*, 55 Minn. 457, 57 N. W. 150, holding this rule of law is applicable only to contracts which are entire; *Elliott v. Caldwell*, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845, holding an action can only be maintained where a new contract may be implied from conduct of parties to pay what benefits received are reasonably worth; *Haslack v. Mayers*, 26 N. J. L. 284, holding that where party performs part of entire contract, and without excuse refuses to perform rest, he cannot recover for part performance; *Moody v. Leverich*, 14 Abb. Pr. N. S. 145, holding that remedy for wrongful dismissal before expiration of term, is general action for damages; *Niblett v. Herring*, 49 N. C. (4 Jones, L.) 262, holding there can be no recovery for the part performed of an entire executory contract, terminated without legal excuse by one seeking to recover; *Brewer v. Tysor*, 48 N. C. (3 Jones, L.) 180, holding in such case there can be no recovery on the special count nor on a quantum meruit; *Willis v. Jarrett Constr. Co.* 152 N. C. 100, 67 S. E. 265, holding that one who has violated his contract in such manner as to prevent its fulfillment by other party may not escape liability under his contract on ground that contract was entire and only partly performed by other party; *Witherow v. Witherow*, 16 Ohio. 238 (dissenting opinion), on right of purchaser to reduce claim for purchase price by showing that plaintiff failed to fulfil his contract; *Richardson v. Young*, 38 Pa. 169, holding the doctrine that entire contracts cannot be apportioned, applies to freight as to other things; *McIntosh v. Cullen*, 6 N. S. 268, holding that where there is substantial performance of work under special contract, though not in strict accordance with it, plaintiff is entitled to contract price less such sum as would take to complete contract.

Distinguished in *Brown v. Vinal*, 3 Met. 533, holding where it appears from the contract that parties did not contemplate an entire contract the rule has no application; *Parker v. Macomber*, 17 R. I. 674, 16 L.R.A. 858, 24 Atl. 464, holding where the special agreement is no longer binding the plaintiff may resort to a quantum meruit; *Crandall v. Grow*, 41 N. J. Eq. 482, 5 Atl. 136, holding where party comes into equity to have an instrument cancelled he has given for work imperfectly performed he is not entitled to relief and still retain the results of the work; *Malbon v. Birney*, 11 Wis. 107, holding where one after contracting to build a house complete, abandons the work after doing but a small part of it, he is not entitled to recover for the work he did.

Excuses for nonperformance as affecting rights in contract.

Cited in *Reynolds v. Manhattan Trust Co.* 27 C. C. A. 620, 55 U. S. App. 96, 83 Fed. 593, to the point that where party disables himself from performing contract, other party may bring action for damages as upon rescission of such contract; *Smith v. Hicks*, 14 N. M. 560, 19 L.R.A. (N.S.) 938, 98 Pac. 138, holding landlord who agreed to furnish water was bound notwithstanding the supply well was capped by a contractor to secure his compensation for sinking it; *Fenton v. Clark*, 11 Vt. 557 (dissenting opinion), on excuse for nonfulfillment of entire contract; *McLaughlin v. United States*, 37 Ct. Cl. 150, affirming 36 Ct. Cl. 138), holding if parties in contracting make no provision for a dispensation, the rule of law gives none, nor can equity interpose; *Manitoba Farmers' Mut. Hail Ins. Co. v. Fisher*, 14 Manitoba L. Rep. 157, holding that member of company entitled to withdrawal from membership upon certain conditions, including surrender of policy, cannot exercise such right without surrendering policy although loss of it has rendered it impossible to perform such condition.

— Accident.

Cited in *Brumby v. Smith*, 3 Ala. 123, holding although performance may be prevented by inevitable accident a pro rata compensation cannot be recovered for the services actually performed; *Nicol v. Fitch*, 115 Mich. 15, 69 Am. St. Rep. 542, 72 N. W. 988, holding that destruction of one of line of three steam-boats will not relieve owner from liability under contract whereby person was to be paid salary and expenses to act as agent in securing freight for boats; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415, holding that where contract is made for sale and delivery of specified article, under such circumstances that title does not vest in vendee, if property is destroyed by accident, vendor is not liable for non-delivery; *King v. Low*, 3 Ont. L. Rep. 231, holding where contract was to do an entire work for a specific sum and without defendants' fault the building was destroyed so work could not be completed, no recovery can be had on quantum meruit.

Cited in note in 1 Eng. Rul. Cas. 350, on inevitable accident as excuse for nonperformance of express contract.

Distinguished in *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507, holding where contract called for mason work on building by one having nothing to do with the painting or carpenter work, and building was destroyed before completion, the loss falls on owner.

Disapproved in *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388, holding though the contract be entire where one has rendered valuable services and has been disabled by sickness from completing the contract he is entitled to recover for services rendered; *Haynes v. Second Baptist Church*, 12 Mo. App. 536, holding where fire destroys the building, one under contract to do the ornamental wood work may recover on a quantum meruit for part performed.

— Death.

Cited in *Givhan v. Dailey*, 4 Ala. 336, holding where there was a contract to act as overseer for a year for a fixed amount there can be no recovery on a quantum meruit though death terminated the contract; *Womrath's Estate*, 6 Pa. Co. Ct. 262, holding that contract of hiring of servant is terminated by death of employer; *West's Appeal*, 3 Walk. (Pa.) 395, holding that death is not such accident as to be ground of relief in equity in cases of express contract. *Womrath's Estate*, 19 Phila. 123, 46 Phila. Leg. Int. 6, holding that death of master operates as dissolution of contract for personal services as general workman, for specified term; *Parker v. Macomber*, 17 R. I. 674, 16 L.R.A. 858, 24 Atl. 464, holding that death of woman whose services are contemplated in contract by which she and her husband agreed to board and care for her aunt during life, make such substantial failure of consideration that aunt may rescind contract; *Grant v. Johnson*, 5 N. S. 493, on effect of death of employer on a contract for hire.

Cited in notes in 16 L.R.A. 858, on recovery for services on contract interrupted by sickness or death; 21 L.R.A. (N.S.) 923, 925, 926, on termination of contract of employment by death of party.

Disapproved in *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618, holding where an attorney engages to defend a cause for a specific sum and dies the administrator may recover on a quantum meruit from the client amount services were reasonably forth.

— Physical disability.

Cited in *West v. O'Callaghan*, 15 Phila. 165, 38 Phila. Leg. Int. 458, holding that agreement to pay for services of plaintiff although he might be prevented by physical disability.

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vented from performing them by sickness, will not be construed to extend to case of death.

Cited in note in 28 L.R.A.(N.S.) 316, on right of servant to compensation in case of incomplete performance of contract caused by physical disability.

Cited in Reinhard, Ag. 265, on compensation of agent in case of his death, insanity, sickness, etc., before completion of service; Keener, Quasi-Contr. 244, on right of plaintiff in default under contract to recover where full performance was prevented by sickness, death or law; 1 Beach, Contr. 285, on right of recovery where completion of contract for services is rendered impossible by sickness or death.

—Superior force or act of God.

Cited in *Firrell v. Gage*, 4 Allen, 245, holding there can be no recovery under an entire contract to deliver a cargo of ice at a specified place for a fixed amount though armed forces prevented the delivery; *Stees v. Leonard*, 20 Minn. 494, Gil. 448, holding that if man bind himself, by positive, express contract, to do act in itself possible, he must perform his engagement, unless prevented by act of God, law or other party to contract; *Eisenbauer v. Ernst*, 40 N. S. 420; *Beattie v. Johansen*, 28 N. B. 26,—to the point that under written agreement to make certain voyage, party could not recover where ship was wrecked before voyage was completed.

—Unforeseen difficulties.

Cited in *Standard Constr. Co. v. Brantley Granite Co.* 90 Miss. 16, 43 So. 300; *McLaughlin v. United States*, 36 Ct. Cl. 138,—holding that equity cannot interfere to excuse performance of contract because of existence of unforeseen difficulties; *Dermott v. Jones* (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; *Smith v. Hicks*, 14 N. M. 560, 19 L.R.A.(N.S.) 938, 98 Pac. 138,—holding that where parties fix terms and conditions of contract, and make no provision as to unforeseen difficulties, law can make none; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817, holding that mere fact that work was more expensive than any one anticipated is no excuse for breach of contract to do it.

—Abandoned or terminated employment.

Cited in *Perry v. Hewlett*, 5 Port. (Ala.) 318, holding there can be no recovery as hire of a slave, under an entire contract where owner detained the slave from the hirer part of the time; *Trowick v. Trussell*, 122 Ga. 320, 50 S. E. 86, holding that where employee hired for a year left after ten months with consent of employer's wife, upon the employer becoming sick and unable to carry on his business could recover for the time he worked; *Jennings v. Camp*, 13 Johns. 94, 7 Am. Dec. 367, holding there can be no recovery for part performance where party voluntarily abandons the employment; *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128; *Haslock v. Mayers*, 26 N. J. L. 284,—holding that where party performs part of entire contract and without excuse refuses to perform rest, he cannot recover for part performance; *Chamblee v. Baker*, 95 N. C. 98, holding that where plaintiff contracted to work for year and was to be paid by month, but stopped work before year expired, he could recover for time he did work at contract price; *Hunter v. Gibson*, 3 Rich. L. 161, holding where contract was entire, to serve till the first of January, there can be no partial compensation where service is left or there is a dismissal for an agreed cause; *Swift v. Williams*, 2 Ind. 365; *McArthur v. Dewar*, 3 Manitoba L. Rep. 72; *Brown v. Kimball*, 12 Vt. 617,—holding there can be no recovery where laborer voluntarily abandons work after a part performance of an entire contract;

Rogers v. Steele, 24 Vt. 513, holding the father of a minor cannot recover on quantum meruit where minor abandons a contract providing for payment of a lump sum for services for a fixed time; *Knox v. Munro*, 13 Manitoba L. Rep. 16, holding that under agreement to work for one year for \$130, no recovery could be had where plaintiff left service at end of four months without excuse; *McHugh v. Murray*, 24 N. B. 12; *McAuley v. Geddes*, 9 N. B. 526; *Allan v. Peters*, 10 N. S. 365,—holding that where, by refusal of defendant to perform his part of contract, plaintiff is prevented from completing his part, he may sue for quantum meruit.

Cited in *Reinhard*, Ag. 267, on loss of compensation by agent abandoning undertaking without just cause.

—**Abandonment or nonperformance caused by defendant.**

Cited in *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468, to the point that clerk hired for year may recover year's salary where defendant prevents complete performance of contract; *Pettigrew v. Bishop*, 3 Ala. 440, holding it must be shown either that plaintiff performed the contract on his part or that he was prevented from doing so by the act of the opposite party; *San Francisco Bridge Co. v. Dumbarton Land & Improv. Co.* 119 Cal. 272, 51 Pac. 335, holding where failure to complete the contract as specified was due to default on part of defendant there may be a recovery for reasonable worth of the work; *Stanton v. New York & E. R. Co.* 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300, holding that in cases where plaintiff has been deprived of benefit of contract by act of defendant, he is entitled to recover what he has lost by defendant's acts; *Rogers v. Parham*, 8 Ga. 190, holding that servant wrongfully discharged, may sue immediately for damages for breach of contract, or may after time of service expires sue on contract for wages, or may treat contract as rescinded, and sue immediately on quantum meruit; *Jones v. Duntun*, 7 Ill. App. 580, holding that employee wrongfully discharged, cannot wait till expiration of term for which he was hired, and then sue for whole wages on ground of constructive services, but can only sue for damage for breach of contract; *Jacksonville v. Allen*, 25 Ill. App. 54, on right to recover damages in consequence of wrongful discharge of servant, and not wages as such; *Monarch Cycle Mfg. Co. v. Mueller*, 83 Ill. App. 359, holding that doctrine of constructive service to support action for wages not earned, is not tenable; *Rodemeyer v. Gonder*, 9 Gill, 288; *Kerstetter v. Raymond*, 10 Ind. 199,—holding that if plaintiff has been prevented by defendant from performing special contract, he may in general recover compensation for work actually performed; *Mitchell v. Scott*, 41 Mich. 108, 1 N. W. 968, holding that action will lie on common counts for wages fairly earned by past services rendered under express agreement of which defendant has prevented full performance; *Gaar, S. & Co. v. Fritz*, 60 Minn. 346, 62 N. W. 391, to the point that where defendant refuses to perform his part of contract, plaintiff may rescind special contract and sue on implied contract; *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283, holding that it was error to rule that measure of damages in contract price of services, where employee, wrongfully discharged before completion of his term of services, brings action before expiration of such term for damages for breach of contract; *Booge v. Pacific R. Co.* 33 Mo. 212, 82 Am. Dec. 160, holding that recovery by wrongfully discharged servant before expiration of period for which he was hired will be bar to subsequent action upon same contract; *Lindner v. Cape Brewery & Ice Co.* 131 Mo. App. 680, 111 S. W. 600, holding that where employee's contract provides for periodical instalments of wages, and he is discharged for cause, he

may recover salary due at time of discharge; *Colburn v. Woodworth*, 31 Barb. 381, holding that servant wrongfully discharged may sue immediately for damages for breach; *Marsh v. Blackman*, 50 Barb. 329, holding that where plaintiff and defendant entered into agreement, by which former agreed to support infirm father of latter during natural life, and defendant agreed to pay certain sum per week, defendant could not terminate contract by notice; *Brinkley v. Swieegood*, 65 N. C. 626, holding that person hired for one year, who is wrongfully discharged may treat contract as rescinded, and recover on quantum meruit; *Woodley v. Bond*, 66 N. C. 396, holding that overseer who contracts to carry on farm for owner at fixed salary for year, is entitled to recover value of services, where he quits before expiration of term, because employer sells plantation, and directs overseer to remain with grantee; *Smith v. Cashie & C. R. & Lumber Co.* 142 N. C. 26, 5 L.R.A.(N.S.) 439, 54 S. E. 788, holding that servant employed for entire term at wages payable in instalments, may upon wrongful discharge, sue at each period of payment for wages then due; *Allen v. Colliery Engineers' Co.* 196 Pa. 512, 46 Atl. 899, holding that employee, wrongfully discharged, may sue for salary as it becomes due, or may sue for breach of contract at once; *Festing v. Hunt*, 6 Manitoba L. Rep. 381, holding that where agreement was to work for 5 years in consideration of conveyance of 240 acres of land, intimation by defendant that he would only convey 160 acres, justified plaintiff in suing at once on quantum meruit; *Giles v. McEwan*, 11 Manitoba L. Rep. 150, holding that upon repudiation of verbal contract for services by employer plaintiff may sue on quantum meruit and verbal agreement may be given in evidence for purpose of showing amount agreed upon; *Womrath's Estate*, 23 W. N. C. 434, holding that one hired for year may recover where notwithstanding that he was notified before expiration of year to leave, he remained, may recover amount agreed upon for year's service.

Cited in note in 17 E. R. C. 210. on non-recovery of unearned salary by servant where he is dismissed for wrongful behavior.

Distinguished in *Mitchell v. Scott*, 41 Mich. 108, 1 N. W. 968, holding wages fairly earned may be recovered on the common counts where the defendant has prevented full performance of contract.

— Right to wages of seaman dying on voyage.

Cited in *Natterstrom v. The Hazard*, 6 McLean, 413, Fed. Cas. No. 10,055, on right of heirs of seaman dying on voyage to recover his wages; *Scott v. Greenwich*, 1 Pet. Adm. 155, Fed. Cas. No. 12,531, holding in case of death of seaman during return voyage the administrator cannot claim wages for the entire voyage but under maritime law may claim wages until time of death; *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047, holding jurisdiction exercised by the admiralty in cases, where wages are paid by the run, might be disputed upon the narrow rule of the common law.

Distinguished in *Walton v. Neptune*, 1 Pet. Adm. 142, Fed. Cas. No. 17,135, holding the heirs of a seaman, dying on the home voyage, are entitled to claim the full wages; *The Velona*, 3 Ware. 139, Fed. Cas. No. 16,912, holding, by the maritime law, when a vessel meets with a disaster and is unable to proceed without repairs an equitable apportionment is admitted.

Disapproved in *Gray v. Murray*, 3 Johns. Ch. 167, holding where party is prevented by death from rendering all the services of the voyage in person and substitutes another who renders the services, his state may claim the full compensation.

Full performance as condition precedent to recovery on contract.

Cited in *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644, holding that where an act is to be performed by plaintiff before the accruing of defendants' liability under his contract plaintiff must prove performance, offer to perform, which was rejected, or readiness to fulfill condition until defendant discharged him from doing it or prevented execution of matter which such act required him to perform; *Cincinnati, S. & C. R. Co. v. Bensley*, 19 L.R.A. 796, 2 C. C. A. 480, 6 U. S. App. 115, 51 Fed. 738, holding that breach of contract by which defendant subscribed to fund for erection of board of trade building near his property, takes place where plaintiff failed to build within specified time; *Wagner v. Edison Electric Illuminating Co.* 177 Mo. 44, 75 S. W. 966; *Coe v. Bradley*, Fed. Cas. No. 2,941; *Bangs v. Lowber*, 2 Cliff. 157, Fed. Cas. No. 840,—holding that unless nonperformance, alleged in breach of contract, goes to whole root and consideration of it, covenant broken is not to be considered as condition precedent, but as distinct covenant for breach of which party may be compensated in damages; *Crane Co. v. Columbus Constr. Co.* 20 C. C. A. 233, 46 U. S. App. 52, 73 Fed. 984, holding that vendee under contract of sale which is executory and entire cannot repudiate it in respect to part of goods, and at same time enforce it in respect to remainder; *Dermott v. Jones*, 23 How. 220, 16 L. ed. 442, holding that where something has been done under special contract, but not in strict accordance with it, party cannot recover remuneration stipulated for in contract; *Rourke v. McLoughlin*, 38 Cal. 196, holding that where money is to be paid in instalments on a land contract, deed to be given upon payment of price, the promises to pay are independent and performance by the vendor is not a condition precedent to an action for the first instalment; *Hill v. Grisby*, 35 Cal. 656; *Raudabaugh v. Hart*, 61 Ohio St. 73, 76 Am. St. Rep. 361, 55 N. E. 214,—holding that when vendor has agreed to convey interest in land upon payment of given sum,—deal to be closed on certain day, neither party can maintain action without averring performance or offer to perform; *Ernst v. Cummings*, 55 Cal. 179, holding that where mutual promises go to whole consideration on both sides, they are dependent, and their performance condition precedent to action; *Clark v. Terry*, 25 Conn. 395, holding that the performance of a contract of service is a condition precedent of the right of recovery for labor performed where employee abandons contract; *Bayard v. McLane*, 3 Harr. (Del.) 139, holding that where mutual promises go to consideration on both sides, they are mutual conditions, and conditions precedent; *Hall v. Hardaker*, 61 Fla. 267, 55 So. 977, holding that one cannot break and sue upon contract; *Solary v. Stultz*, 22 Fla. 263, holding that if a day be appointed for the payment of money, and the day is to happen or may happen before the act which is the consideration therefor is performed, an action is maintainable before performance, as the performance is not a condition precedent; *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331, holding that action, in statutory form, where only defense is that work was not finished in time, compensation for work done may be given, even though contract has not been performed strictly in accordance with its terms; *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200, holding that where contract is entire, performance by party undertaking work, is condition precedent to recovery upon contract; *Main v. Simmons*, 2 Ga. App. 821, 59 S. E. 85; *Watkins v. Hodges*, 6 Harr. & J. 38; *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638,—holding performance is a condition precedent to recovery of compensation where the contract is entire; *Forbes v. Pausinsky*, 14 Ill. App. 17, holding that where subject of sale was not in existence at time of contract, engagement that it shall,

when existing, possess certain qualities, is condition precedent to any obligation upon vendee under contract; *Dunn v. Moore*, 16 Ill. 151, holding that where day which follows performance of consideration is named for payment of money, action will not lie for the money before performance; *Stein v. Metzger*, 18 Ill. App. 251, holding that purchaser is liable only upon quantum valebant for goods received after time agreed upon for their delivery; *American Pub. House v. Wilson*, 63 Ill. App. 413, holding a substantial performance of an entire contract must be shown before there can be any recovery upon it; *Ricks v. Yates*, 5 Ind. 115, holding that a servant dismissed wrongfully before expiration of term can only recover for value of services actually rendered; *McClung v. Lyster*, 3 G. Greene, 182, holding that in compromise by which creditor agrees to take in satisfaction less than amount due if other party fails to comply with terms, creditor is entitled to full amount of his claim; *Standard Constr. Co. v. Brantley Granite Co.* 90 Miss. 16, 43 So. 300, holding where parties agree to use materials in construction of a building acceptable to the architect they must perform that part of their contract where architect exercises an honest judgment; *Consolidated Coal Co. v. Shannon*, 34 Md. 144, holding that plaintiff could only recover under special contract, freight charges as damages on special count, alleging performance and readiness to perform on his part and refusal or prevention on part of defendant; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716, holding that upon countermand of order to manufacture article party injured may sue as upon refusal to take article for damages; *Foley v. Dwyer*, 122 Mich. 587, 81 N. W. 569, to the point that where day is appointed for payment of money, and day may happen before thing which in consideration for money is performed, action may be brought for money before performance; *Wallace v. Antrim Shovel Co.* 44 N. H. 521, holding that where stipulation which plaintiff fails to perform is but part of consideration for defendant's agreement, and is of such nature that it may be compensated in damages, it will be regarded as independent, and not condition precedent; *Marshall v. Hann*, 17 N. J. L. 425, holding that in assumpsit for work and labor, it is competent to show that services have not been performed in manner agreed upon; *Evans v. Harris*, 19 Barb. 416; *Van Campen v. Knight*, 63 Barb. 205; *New Orleans v. Texas & P. R. Co.* 171 U. S. 312, 43 L. ed. 178, 18 Sup. Ct. Rep. 875,—to the point that where stipulation in contract is condition precedent it must be complied with by party upon whom it is imposed, before such party can enforce contract; *Farley v. Browning*, 15 Abb. N. C. 301, holding that where one sues without setting up special contract for services admission in answer that he had performed services, but denying value, does not excuse him from proving that he had done all work required by contract; *Farley v. Browning*, 13 Daly, 85, holding that where party who has performed work and furnished material under special contract must, in order to recover, prove performance of special contract; *Winstead v. Reid*, 44 N. C. (Busbee, L.) 76, 57 Am. Dec. 571, holding where there is no averment of performance, or a readiness to do so, there can be no recovery on the special contract or on quantum meruit; *Gove v. Island City Mercantile & Mill. Co.* 19 Or. 363, 24 Pac. 521, holding that recovery may be had for services performed, although not in entire accordance with special contract, less damages caused by such failure to comply with contract; *Richardson v. Young*, 38 Pa. 169, holding that entire contract must be fully performed, and cannot be apportioned, although new contract may be implied from acceptance of performance different from that for which contract provided; *Kille v. Reading Iron Works*, 47 Phila. Leg. Int. 464, on the point that an action does not lie for nonperformance of a contract where

other party has not performed his part of contract which is a condition precedent: *Kille v. Reading Iron Works*, 141 Pa. 440, 21 Atl. 666, on necessity of vendor in land contract tendering deed before commencement of action for purchase price; *Jones v. Dunn*, 3 Watts & S. 109, on right to recover anything before completion of an indivisible contract; *Watkins v. Hodges*, 6 Harr. & J. 38, holding that where agreement forms entire contract, plaintiff, in order to recover thereon, must prove performance, or tender to perform everything required by it; *Braswell v. Pope*, 82 N. C. 57, holding that when there are mutual dependent stipulations to be performed under contract, neither party can maintain action without averring performance or offer to perform; *Kettle v. Harvey*, 21 Vt. 301, holding that where one contracts to perform work for a specified sum, payable upon completion, the performance of the work is a condition precedent to payments, and there can be no pro rata recovery where contractor voluntarily abandons contract without fault of other party; *St. Albans S. B. Co. v. Wilkins*, 8 Vt. 54, holding where the contract for services is entire, full performance is a condition precedent to any claim for compensation.

Cited in *Benjamin, Sales*, 5th ed. 561, on necessity of performance of contract as condition precedent to maintenance of action for breach of contract of sale; *Benjamin Sales*, 5th ed. 559, on conditions and warranties in sales of goods; *Benjamin, Sales*, 5th ed. 748, on seller where he has tendered delivery not being required to do more than be ready to deliver on payment of purchase price in absence of special agreement; *Tiffany, Ag.* 453, on agent's right to remuneration except on full performance being excluded by express terms of contract; *Benjamin, Sales*, 5th ed. 565, on necessity of complying with condition precedent before performance can be required of another, although party is unable or refuses to perform contract; *Hollingsworth, Contr.* 518, on necessity for performance by party seeking to recover for nonperformance of other in case of concurrent conditions.

— Rights under contracts impossible of performance.

Cited in *Manitoba Farmers' Hail Ins. Co. v. Fisher*, 14 Manitoba L. Rep. 157, holding the happening of circumstances rendering performance of a condition impossible gives the defaulting party no right to execution of the agreement.

Cited in *Hollingsworth, Contr.* 483, on discharge of contract by impossibility created by act of one of the parties.

Right to sue at once upon prospective refusal to comply with contract.

Cited in *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, holding that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it which will warrant immediate action; *Moore v. Security Trust & L. Ins. Co.* 93 C. C. A. 652, 168 Fed. 496, holding that where party to mutually executory agreement gives notice that he will not fulfil it, other party may sue for damages before time of performance arrives.

Cited in *Benjamin, Sales*, 5th ed. 569, on prospective refusal by promisor amounting to an immediate breach of which promisee can take immediate advantage; 2 *Meechem, Sales*, 936, on anticipatory breach of executory contract by absolute refusal to perform it.

What constitutes complete performance of contract of sale of chattels.

Cited in *Demoss v. Noble*, 6 Iowa, 530, on sufficiency of evidence to show completion of contract to build house in accordance with contract; *Morse v. Moore*, 83 Me. 473, 13 L.R.A. 224, 23 Am. St. Rep. 783, 22 Atl. 362, holding that acceptance of merchandise under executory contract of sale, warranting quality, is not conclusive evidence of complete performance by vendor nor of waiver.

Recovery on implied contract where contract abandoned by both parties.

Cited in *Robson v. Bohn*, 22 Minn. 410, holding that where contract is not performed by either party, and abandoned by both parties, recovery must be had, if at all, upon implied contract for goods received under contract.

Existence of an express contract as negation of an implied one.

Cited in *Hawkins v. United States*, 96 U. S. 689, 24 L. ed. 697, holding implied promises exist only where there is no express promise between the parties; *Jackson v. Jones*, 22 Ark. 158; *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Morrison v. Jones*, 6 Ill. App. 89; *Wolf v. Booker*, 97 Ill. App. 139; *Nicholson v. Munigle*, 6 Allen, 215; *Galloway v. Holmes*, 1 Dougl. (Mich.) 330; *Pendergast v. Meserve*, 22 N. H. 109, 53 Am. Dec. 234; *Pittsburgh & C. R. Co. v. Stewart*, 41 Pa. 54; *Shaw v. Lewiston & K. Turnp. Co.* 2 Penr. & W. 454; *Green v. Dyersburg*, 2 Flipp. 477, Fed. Cas. No. 5,756; *Flinn v. Bagley*, 7 Fed. 785,—holding where there is an express contract the laws will not permit one to be implied; *Rapelye v. Bailey*, 3 Conn. 438, 8 Am. Dec. 199, holding where there is an express contract it extinguishes the implied one; *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982, holding that fact that there exists written obligation, measuring rights of parties, does not necessarily prevent maintenance of action on implied promise; *Voorhees v. Combs*, 33 N. J. L. 494, holding there must be a rescission of the express contract, before the parties will be remitted to the contract the law implies; *Haslack v. Mayers*, 26 N. J. L. 284, holding an assumpsit to pay in money for stock could not be implied in the face of existing contract otherwise; *Stoll v. Ryan*, 3 Brev. 238, 1 Treadway, Const. 96, holding the law will not imply an agreement where the parties have expressly stipulated.

Distinguished in *Sandberg v. Victor Gold & Silver Min. Co.* 24 Utah, 1, 66 Pac. 360, holding conditions, not expressed may be implied from the express terms of an express contract.

Right to recover on quantum meruit.

Cited in *Shaffner v. Killian*, 7 Ill. App. 620, holding that where one party to contract refuses to perform his part, other party may sue at once on quantum meruit; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327; *Forbes v. Appleyard*, 181 Mass. 354, 63 N. E. 894,—to the point that plaintiff may recover on quantum meruit where defendant has broken special contract; *Harris v. Separks*, 71 N. C. 372, holding that where a minor is wrongfully dismissed by his employer before expiration of term for services, the father may treat contract as rescinded and at once sue on quantum meruit frauds actually performed; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295, holding that in action upon contract for labor and materials furnished at agreed price, where complaint also contains allegation of quantum meruit, recovery of reasonable value of services may be had not exceeding contract price; *Wallberg v. Rex*, 13 Can. Exch. 246, to the point that "quantum meruit" is reasonable amount to be paid for services rendered for work done, when price therefor is not fixed by contract.

Cited in note in 30 L.R.A. 52, 60, on right to recover on quantum meruit for services rendered where other party refuses to perform.

General assumpsit on special contract.

Cited in *Dawes v. Peebles Sons*, 6 Fed. 856, holding that where goods are sold under special contract, which has not been fully complied with by plaintiff, he must sue upon contract; *Dermott v. Jones*, 23 How. 220, 16 L. ed. 442, holding where special contract is unperformed indebitatus assumpsit will not lie to recover a compensation for what has been done until the whole shall be

completed; *Krouse v. Deblois*, 1 Cranch, C. C. 138, Fed. Cas. No. 7,937, holding if a special agreement is proved there can be no recovery upon a general indebitatus assumpsit; *Connelly v. Devoe*, 37 Conn. 570, to the point that where defendant prevented plaintiff from performing contract, latter might resort to indebitatus assumpsit for work performed under contract; *Potomac Laundry Co. v. Miller*, 26 App. D. C. 230, 33 Wash. L. Rep. 773, holding that general assumpsit rests only upon legal liability springing out of consideration received and not upon a special agreement or promise; *Dobbins v. Pyrolusite Manganese Co.* 75 Ga. 450, holding that indebitatus assumpsit will lie to recover money, where plaintiff performed contract, and nothing remains, to be done on part of defendant but to make money payment; *Hancock v. Ross*, 18 Ga. 364, holding that where terms of special agreement have been performed on one side, and nothing is to be done on other but to make money payment, such payment may be enforced by indebitatus assumpsit; *Blue v. Ford*, 12 Ga. 45, holding that there could be no recovery on account where there was a special contract; *Tumlin v. Bass Furnace Co.* 93 Ga. 594, 20 S. E. 44, to the point that a special agreement may be taken as evidence of value, where such agreement has been fully performed on one side, and nothing is to be done on other except to make payment of money; *Baldwin v. Lessner*, 8 Ga. 71, holding indebitatus assumpsit will not lie where there is a subsisting unexecuted agreement; *Highway Comrs. v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471, to the point that "special assumpsit" was at common law, brought upon express contract or promise, while "general assumpsit" was brought upon implied contract; *Jackson v. Creek*, 47 Ind. App. 541, 94 N. E. 416, holding that general assumpsit does not lie when there is special contract, except where contract is executed, and where special contract has been altered by mutual consent; *Appleman v. Michael*, 43 Md. 269, holding that measure of damages, in assumpsit will be rate of compensation fixed by special contract, where plaintiff has fully performed contract and time of payment on other side has passed; *Hildreth v. Martin*, 3 Allen, 371, to the point that where one party has fully executed special contract, and time of payment is passed, general assumpsit may be maintained; *Brown v. Morris*, 83 N. C. 251, 3 Mor. Min. Rep. 177, holding that when there is special contract, whole of which has been executed on part of plaintiff, and time of plaintiff is passed, general assumpsit may be maintained for compensation at contract rate; *Allen v. Douglass*, 2 Brev. 93, on recovery in indebitatus assumpsit on failure to prove special agreement; *Hersey v. Northern Assur. Co.* 75 Vt. 441, 56 Atl. 95, holding that, at common law, general count in assumpsit which discloses express promise as indispensable basis of recovery, is demurrable; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80,—holding that general indebitatus assumpsit does not lie for breach of express contract of warranty.

Cited in *Benjamin*, Sales, 5th ed. 815, on action of indebitatus assumpsit or quantum meruit not lying on a special agreement remaining open.

Acceptance by conduct.

Cited in *Demoss v. Noble*, 6 Iowa, 530, on conduct tending to show acceptance.

Merger of contracts.

Cited in *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245, holding where a party has taken a higher security, his suit must be brought on that security; *New Jersey Foundry & Mach. Co. v. United States*, 44 Ct. Cl. 178, holding that whatever may be said or done by parties prior to execution of written contract must be treated as merged in it.

Effect of general custom on subject-matter of contract.

Cited in *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166, holding whenever the custom is shown to exist, it is considered as regulating and controlling of the contract; *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547, holding a general custom is a general law, and forms the law of a contract on the subject-matter though at variance with terms of contract; *Sampson v. Gazzam*, 6 Pert. (Ala.) 123, 30 Am. Dec. 578, holding where a usage is proved to exist, if it be general, all persons engaging in the particular trade to which it applies, are presumed to contract with reference to it; *Waring v. Grady*, 49 Ala. 465, 20 Am. Rep. 286, holding an existing legal usage may be shown in connection with a partnership contract to establish the intentions of the parties in entering into it; *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 468, 14 Am. Dec. 289, holding the terms of an insurance policy may be explained by any other commercial usage as well as by usages of trade; *Bank of Columbia v. Fitzhugh*, 1 Harr. & G. 239, holding a message of universal prevalence enters into contracts and becomes a part of them and must be regarded in their interpretation; *Patterson v. Crowther*, 70 Md. 124, 16 Atl. 531, holding usage admissible to interpret a contract but not to contradict its terms; *Barry v. Morse*, 3 N. H. 132, holding usage and custom admissible for purpose of explaining and defining terms of mercantile contract; *Swamscott Mach. Co. v. Partridge*, 25 N. H. 369, holding proof of usage admissible where language used is equivocal, or susceptible of more than one construction; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105, on usage of trade as aid in construction of contracts; *Beals v. Terry*, 2 Sandf. 127, holding in absence of express stipulations proof of usage is admitted, either to interpret meaning of language used, or to ascertain the nature and extent of the contract; *Morris v. Edwards*, 1 Ohio, 189 (dissenting opinion), on usage as authority in interpretation of contracts.

Disapproved in *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 137, holding evidence of custom is not admissible where terms of contract are plain and unambiguous and would tend to contravene a positive legal requirement.

Entire and serviceable contracts.

Cited in *Talbot v. Selby*, 1 Craneh. C. C. 181, Fed. Cas. No. 13,729, holding where a special contract of sale of four yoke of oxen at a certain price for each yoke is shown, a recovery in general indebitatus assumpsit of a lump sum does not lie; *Stokes v. Baars*, 18 Fla. 656, holding that an agreement to deliver a certain number of pieces of timber, water permitting, by a certain day, all deliverable not later than a certain date, payment to be made in each on handling specifications, is an entire contract; *Dibol v. Minott*, 9 Iowa, 403, holding that contract to paint ten houses for sum of \$70.00 each, is severable contract and action may be brought upon performance of services as to each house; *Maryland Fertilizing & Mfg. Co. v. Lorentz*, 44 Md. 218, on distinction between dependent and independent contracts as covenants; *Wolf v. Welton*, 30 Pa. 202, holding that contract by surety that continuing partner, on dissolution, should pay all debts of firm, and save harmless retiring partner, is severable one, upon which separate actions may be wrought on every breach of agreement; *Bream v. Marsh*, 4 Leigh, 21, holding that where subject is divisible, and failure as to part can be accurately compensated by apportionment, such apportionment should be made; *Manitoba Electric Light & P. Co. v. Winnipeg*, 2 Manitoba L. Rep. 177, holding that whether covenants are dependent, or independent, is determined by intention of parties; *Baxter v. Nurse*, 1 U. C. Q. B. O. S. 120,

holding it a question of fact for jury whether a contract for a year existed in the absence of a legal presumption that a contract for a year was intended.

Cited in 1 Beach, Contr. 890, as to whether a contract is several or joint.

Earnings of freight as affecting recovery of wages of seamen.

Cited in *Worth v. Mumford*, 1 Hilt. 1, holding the right to wages does not grow out of or depend upon the earnings of freight.

Effect on negotiability of a conditional promise to pay.

Cited in *Fletcher v. Thompson*, 55 N. H. 308, holding a note payable upon condition that payee is permitted to occupy the premises, is not a negotiable instrument.

Right of one violating contract to maintain action thereon.

Cited in *Murrell v. Whiting*, 32 Ala. 54, holding that party cannot maintain action on executory contract, which was first violated by him, and which was thereupon abandoned by other party.

Construction of term "full wages."

Cited in *Sims v. Jackson*, 1 Pet. Adm. 157, Fed. Cas. No. 12,890, on meaning of the term "full wages."

Extent of liability of master to his seamen.

Cited in *Ralston v. Barss*, 1 N. S. 75, on liability of master for medical aid to seamen.

Policy of law toward waiver of forfeiture.

Cited in *Lester v. United States*, 1 Ct. Cl. 52, holding one insisting upon a forfeiture must show a clear right to demand it, and even then the law will seize hold of slight circumstances to show the right was waived.

Rights of vendee upon breach of warranty.

Cited in *Wright v. Findley*, 21 Ga. 59, holding that when the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value it is competent for the purchaser, in all cases, to prove the breach of warranty in reduction of the damages; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560, holding that the purchaser of corn under a special contract could receive damaged corn and retain it, relying upon an implied warranty; *North Bros. v. Mallory*, 94 Md. 305, 51 Atl. 89, holding that no action can be maintained under contract to install engine in factory that would develop certain horse power, where engine does not comply with agreement; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. 88, holding that vendee of property sold with warranty may sue for damages for breach of warranty, without returning property although vendor engages that article may be returned; *Bouker v. Randles*, 31 N. J. L. 335; *Wakeman v. Illingsworth*, 40 N. J. L. 431,—holding that in action for price of goods sold under special contract in parol, defendant may show in reduction of damages that goods sold were sold under warranty and did not conform to such warranty; *Cox v. Long*, 69 N. C. 7, holding that if person agrees to purchase articles to be delivered by certain time, and which are to be of certain quality, and after payment for same, he finds out they are inferior quality, he may sustain action to recover damages on account of inferior quality although he retains and uses them; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737, to the point that vendee may, in case warranty be not complied with, refuse to receive article, and if he has paid for same, may sue for recovery of price paid; *Lewis v. Barre*, 14 Manitoba L. Rep. 32, holding that agreement as to quality in contract for sale of latter was condition of contract.

Cited in note in 29 L. ed. U. S. 394, 396, on vendee's remedy for breach of warranty.

Cited in Benjamin, Sales, 5th ed. 998, on buyer's duty to accept goods which are not equal to those required by the contract; Benjamin, Sales, 5th ed. 997, on buyer's right to reject goods for breach of warranty of quality where property has passed.

Refusal authorizing a rescission of contract.

Cited in Cleveland, C. C. & St. L. R. Co. v. Moore, 170 Ind. 328, 82 N. E. 52, holding that breach of contract authorizing rescission, must be unqualified, and must be acted upon by party entitled to rescind.

Non-waiver of right of recovery for damages on special contract by acceptance of property.

Cited in Stewart v. Fulton, 31 Mo. 59, holding that where contractor builds house on lot for owner thereof latter is not debarred of action against former to recover damages for noncompliance with contract on ground that he had accepted such house from contractor.

Kinds of covenants.

Cited in 1 Beach, Contr. 113, on different kinds of covenants.

6 E. R. C. 634, *PLANCHE v. COLBURN*, 8 Bing. 14, 5 Car. & P. 58, 1 L. J. C. P. N. S. 7, 1 Moore & S. 51.

Conduct amounting to abandonment or constructive consent to rescission of contract.

Cited in *Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252, holding the filing of a petition in bankruptcy amounted to a rescission of a contract with an employee; *Chamber of Commerce v. Sollitt*, 43 Ill. 519, holding if one party to an executory contract induces the other to believe he has withdrawn from the contract, the other party need not wait until the day of performance before making other arrangements; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773, holding it enough if conduct of parties is such as to evince a clear determination not to be bound by the contract; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, holding seller having optional period for delivery must fix a refusal by notice that right of delivery is then claimed; *Morang & Co. v. Le Sueur*, 45 Can. S. C. 95, Ann. Cas. 1912B, 602 (dissenting opinion), on right of party to rescind agreement to have published certain literary production where publisher refuses not to publish in the manner fixed by contract; *Allan v. Peters*, 10 N. S. 365, holding that person prevented from performing his part of contract by act of other party, may sue on quantum meruit; *Le Sueur v. Morang*, 20 Ont. L. Rep. 594, holding that where defendant refused to publish biography prepared by plaintiff in violation of agreement to publish it in certain periodical, plaintiff was entitled to return of manuscript; *Panama & S. P. Teleg. Co. v. India-Rubber, Gutta Percha & Teleg. Works Co.* L. R. 10 Ch. 515, 45 L. J. Ch. N. S. 121, 32 L. T. N. S. 517, 23 Week. Rep. 583, holding any set of opposite contractual party which rendered it impossible for plaintiff to have full benefit of the contract entitled him to rescind.

Cited in note in 69 L.R.A. 126, on non-abrogation of a contract with author to write treatise by abandoning publication of periodical.

Cited in 1 Beach, Contr. 297, 299, on effect of impossibility of performance caused by promisee: 2 Mechem, Sales, 950, on disabling one self to perform contract as relieving other party from liability; Benjamin, Sales, 5th ed. 568, on prospective breach of contract of sale by promisor where he disables himself

from performance of contract; 1 Benjamin, Sales, 5th ed. 564, on one party to sale of goods rendering himself incapable of performing amounting to a breach of contract; 3 Page, Contr. 2232, on voluntary disability to perform amounting to a breach of contract; 3 Page, Contr. 2426, on breach of contract by adversary amounting to a discharge and authorizing recovery of reasonable compensation.

Distinguished in *Eames v. Der Germania Turn Verein*, 8 Ill. App. 663, holding in order to show rescission of a contract of sale real estate it must appear party has conveyed to another, or upon offer of performance by purchaser, has neglected or refused to perform his part; *Daniels v. Newton*, 114 Mass. 539, 19 Am. Rep. 384, holding plaintiffs' rights are invalid by repudiation of contract, only when it produces the effect of non-performance, or prevents him from performing his part of contract.

Immediate action on breach by other party to contract.

Cited in *Ricks v. Yates*, 5 Ind. 115, holding upon dismissal of servant by master the contract may be treated as rescinded, and servant may immediately sue on a quantum meruit; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327, holding in such case the injured party may accept the repudiation, and recover upon a quantum meruit the value of his services; *Hale v. Trout*, 35 Cal. 229, holding the party could recover the entire damages, without waiting for the time for full performance to elapse; *Carroll v. Giddings*, 58 N. H. 334, holding assumpsit on a quantum meruit lies where act of defendant gives the plaintiff the right to treat the contract as ended; *Woodley v. Bond*, 66 N. C. 396, holding sale of farm by owner entitled a laborer, under contract for a year, to bring suit upon a quantum meruit for services rendered; *Festing v. Hunt*, 6 Manitoba L. Rep. 381, holding that where agreement was to work for 5 years in consideration of conveyance of 240 acres of land intimation by defendant, that he would convey only 160 acres justified plaintiff in suing at once, on quantum meruit; *Gilbert v. Campbell*, 12 N. B. 474, holding the right of action immediately attaches upon defendant's disabling himself by his own act from performing his contract; *Fitzgerald v. Mandas*, 21 Ont. L. Rep. 312, holding that suit may be commenced for damages for breach of contract where defendant repudiates it.

Cited in *Hollingsworth*, Contr. 481, on discharge of contract by impossibility created by act of one of the parties authorizing suit at once; 2 Beach, Contr. 2222, on action for future profits on continued breach of contract by other party.

— Mode of pleading.

Cited in *Hochster v. De La Tour*, 2 El. & Bl. 678, 17 Jur. 972, 22 L. J. Q. B. N. S. 455, 1 Week. Rep. 469, 6 Eng. Rul. Cas. 576, holding declaration might be founded on the special contract as broken by refusal further to perform.

General assumpsit on special undertaking.

Cited in *Mitchell v. Scott*, 41 Mich. 108, 1 N. W. 968, holding no action of indebitatus assumpsit will lie while the special contract remains unperformed; *Haigh v. United States Bldg. Land & L. Asso.*, 19 W. Va. 792, holding though there has been a special agreement yet if it has been rescinded by mutual consent, recovery may be had on the common counts indebitatus assumpsit; *Crumble v. McEwan*, 9 Manitoba L. Rep. 419, holding while special contract is in existence and open suit cannot be brought on a quantum meruit.

Cited in *Keener*, Quasi-Contr. 30, on right to sue in assumpsit against party in default who had agreed to pay in property or labor.

Recovery where there has been but part performance of contract.

Cited in *Ankeney v. Clark*, 148 U. S. 245, 37 L. ed. 475, 13 Sup. Ct. Rep.

617, holding an action of assumpsit lies, to recover back purchase money paid upon a contract of sale which has been rescinded; *Chicago v. Tilley*, 103 U. S. 146, 26 L. ed. 371, holding the party having performed part of contract may receive compensation for work actually performed, where he was prevented by failure of other party from performing the residue; *Givham v. Dailey*, 4 Ala. 336, holding where party agrees to render services for a definite time, for a sum certain to be paid at expiration of the time, there can be no recovery by personal representative where death terminates the contract; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884, holding where party elects to treat the contract as broken, it ceases to exist except for the purpose of maintaining the action for damages; *McGonigle v. Klein*, 6 Colo. App. 306, 40 Pac. 465, holding that contractor who has wrongfully abandoned work before completion is not entitled to recovery upon quantum meruit for work done; *Mitchell v. Scott*, 41 Mich. 108, 1 N. W. 968, holding that action will lie on common counts for wages fairly earned by past services under express contract of which defendant has prevented full performance; *Jaekel v. Caldwell*, 156 Pa. 266, 26 Atl. 1063, holding an agent, upon the revoking of his authority to sell land may recover compensation for his labor upon a quantum meruit; *Tyson v. Doe*, 15 Vt. 571, holding where contract called for delivery of certain goods on a year's credit, refusal to receive full amount gives a cause of action in quantum meruit for value of goods accepted; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716, holding in a like case his action should be for damages for breach of the special contract; *Dixon v. Fridette*, 81 Me. 122, 16 Atl. 412; *Polsley & Son v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613,—holding there can be a recovery on a quantum meruit count where nonperformance of contract arises from failure of defendant to perform his part of contract; *Buffkin v. Baird*, 73 N. C. 283, holding same where one was prevented by the other party from performing; *Stephen v. Camden & P. Soap Co.*, 75 N. J. L. 648, 68 Atl. 69, holding where abandonment of work has put an end to the special contract it cannot be interposed to prevent a recovery for the reasonable value of services rendered; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648, holding where contract called for installation of a gas machine for a fixed sum and defendant after shipment, refused to permit the installation there can be no recovery on part of contract; *Smith v. Boston, C. & M. R. Co.*, 36 N. H. 458; *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322,—holding the party who disables himself from rendering the agreed consideration cannot require the performance of a promise resting on such consideration.

Cited in notes in 5 L.R.A.(N.S.) 585, on recovery upon quantum meruit by wrongfully discharged servant with respect to services actually rendered; 20 L.R.A. 50, on right of party rescinding contract because of other party's default to recover for what he has done.

Cited in *Hollingsworth Contr.* 470, on right to recover upon quantum meruit upon discharge of contract by breach of performance; *Keener, Quasi-Contr.* 300, on recovery against party in default under contract not being limited to damages suffered.

Recovery for performance under broken agreement.

Cited in *Beckett v. Cockburn*, 31 U. C. Q. B. 610, holding where there was default in time within which contract was to be completed, but notwithstanding the work was accepted, there can be a recovery.

Damages recoverable for breach of contract.

Cited in *Stanton v. New York & E. R. Co.* 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300, holding the one violating his contract is liable for all the direct and

proximate damages which result from such violation: *Aldous v. Swauson*, 20 Manitoba L. Rep. 101, holding that agent who has been given exclusive sale of land for limited period on terms of being paid commission in case of sale is entitled to substantial damages upon revocation of authority, if he has found purchaser.

Cited in notes in 24 L.R.A. 231, 232, on master being liable for damages where he wrongfully discharges servant.

Cited in Reinhard, Ag. 261, on compensation of agent when agency is revoked.

— **Where rescission is made on other side's default.**

Cited in *United States v. Benan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, holding where party injured by stoppage of a contract elects to rescind he can recover only the value of his services actually performed as upon quantum meruit; *Smiley v. Barker*, 55 U. S. App. 125, 28 C. C. A. 9, 83 Fed. 684, holding a recovery may be had to the amount paid on the repudiated contracts of sale, with interest; *Reynolds v. Manhattan Trust Co.* 55 U. S. App. 96, 27 C. C. A. 620, 83 Fed. 593, holding where acts of defendant amounted to a rescission the plaintiff might recover the consideration paid on the contract of sale or sue in damages for breach of contract; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677, holding upon breach of contract to convey land the money paid was recoverable back; *Hudson's Bay Co. v. Macdonald*, 4 Manitoba L. Rep. 237, holding the purchaser of land may sue for return of purchase money where vendor removes fixtures from the land before surrendering possession.

Election of remedies on breach of contract.

Cited in *Boyce v. Green Mountain Falls Town & Improv. Co.* 3 Colo. App. 295, 33 Pac. 77, holding where failure to perform amounted to rescission, the injured party could proceed at law for breach of the contract, or bring action to cancel the conveyance and recover the land.

Ownership of literary compositions.

Cited in *Keene v. Whately*, Fed. Cas. No. 7,644, on the proprietorship of literary compositions.

6 E. R. C. 640, *CUDDEE v. RUTTER*, 1 P. Wms. 570, 5 Vin. Abr. 538, 1 White & T. Lead. Cas. in Eq. 4th ed. *786, 2 Eq. Cas. Abr. 160, pl. 6.

Specific performance.

Cited in *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53, on the peculiar circumstances of case as affecting right to specific performance; *Ralston v. Ihmsen*, 204 Pa. 588, 54 Atl. 365, holding that equity will enforce specific performance of contract made by administrator of deceased partner in glass manufacturing business where continuation of business of great financial importance to surviving partners; *McAllister v. Forsyth*, 12 Can. S. C. 1, holding that where fiduciary relationship is once established court of equity will interpose to enforce trust whatever may be nature of property.

Cited in notes in 18 Eng. Rul. Cas. 289, on specific enforcement of executory agreement to borrow or lend money; 9 E. R. C. 319, on specific performance of contracts.

Cited in *Hollingsworth*, Contr. 536, as to when specific performance of contract will be enforced; *Benjamin*, Sales, 5th ed. 995, on specific performance of contract of sale where the property has passed.

— **Of contract to transfer personality.**

Cited in *Roundtree v. McLain*, Hempst. 245, Fed. Cas. No. 12,084a, holding

specific performance of a contract respecting a chattel is never decreed except in case of peculiar hardship, and when there is no adequate remedy at law; *Pierce v. Plumb*, 74 Ill. 326, holding it does not lie to enforce sale of personalty; *Caldwell v. Myers, Harding* (Ky.) 551, holding it will not be decreed to enforce a contract for sale of a slave.

Distinguished in *Sarter v. Gordon*, 2 Hill, Eq. 121, holding a bill will lie for the specific delivery of slaves.

— **Of contract to transfer corporate stocks or the like.**

Cited in *Megibben v. Perin*, 49 Fed. 183, holding specific performance of a contract for sale of securities issued by the government, will not be decreed; *Strang v. Richmond P. & C. R. Co.* 93 Fed. 71, refusing specific performance of a contract for delivery of railroad bonds; *Jones v. Blalock*, 31 Ala. 180, holding that specific performance of bond for title, executed by agent with verbal authority to sell land, may be enforced against principal; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626, holding it will not decree specific performance of a contract for sale of corporation shares; *Ross v. Union P. R. Co. Woolw.* 26, Fed. Cas. No. 12,080, holding same as to sale of shares in railroad company; *Kimmel v. Stoner*, 18 Pa. 155, holding that agreement to transfer stock will not ordinarily be specifically enforced; *Goodwin Gas Stove & Meter Co's Appeal*, 117 Pa. 514, 2 Am. St. Rep. 696, 12 Atl. 736, 21 W. N. C. 1, 45 Phila. Leg. Int. 36, holding that equity may decree transfer of stock in corporation, where remedy at law would be inadequate and transfer is subject to trust imposed by contract; *Sank v. Union S. S. Co.* 5 Phila. 499, 21 Phila. Leg. Int. 389, holding that specific performance of contract to transfer stock, having no market value, may be decreed in equity.

Cited in note in 50 L.R.A. 501, on specific performance of contract for sale of stock.

Cited in 3 Page, Contr. 2469, on specific performance of contracts for sale of corporate stock; *Pomeroy*, Spec. Perf. 2d ed. 13, on extent and limitations of right to specific performance of contract concerning chattels; *Pomeroy*, Spec. Perf. 2d. ed. 66, on refusal of specific performance of contract concerning chattels where legal remedy is sufficient.

— **Compensation in lieu of specific performance.**

Cited in *Kelly v. Allen*, 34 Ala. 663, on retention of bill filed for specific performance, as a suit for compensation; *Woodman v. Freeman*, 25 Me. 531, holding a court of equity will not decree damages in cases respecting personal property; *Rider v. Gray*, 10 Md. 282, 69 Am. Dec. 135, holding jurisdiction exists to grant compensation, "under special circumstances" in cases of bills for specific performance; *Beck v. Allison*, 4 Daly. 421, holding compensation might be decreed in lieu of performance which defendant has disabled himself to make; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180, on power to decree compensation incidentally to other relief.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 9, on inadequacy of damages as ground for specific performance of contract concerning land.

Power and practice in chancery court to cause assessment of damages.

Cited in *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17,181, holding parties come before the court for discovery and relief on ground of a fraudulent sale of stock for land, the court may refer it to a master to assess damages if sale cannot be set aside; *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396, holding the court has jurisdiction and may either by an issue or by a master, assess damages for taking of private property for public use; *Milkman v. Ord-*

way, 106 Mass. 232; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Phillips v. Thompson*, 1 Johns. Ch. 131,—holding the court may cause damages, to be assessed, either by an issue or by a master, at its discretion.

Measure of damage as applied to stock transactions.

Cited in *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. Rep. 335, holding the measure of damages where stock broker converts stock contrary to orders is the highest intermediate value between time of conversion and a reasonable time after notice; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, on rule of damages where stock has not been paid for; *Bank of Montgomery v. Reese*, 26 Pa. 143, holding where the consideration has not been paid it is to be deducted from the value of the stock.

Remedy of seller of chattels upon refusal of buyer to accept.

Cited in *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374, holding that after due notice to vendee who neglects to accept article sold, vendor may resell same and sue for damages caused by refusal to accept and pay for article.

6 E. R. C. 648, *GERVAIS v. EDWARDS*, 1 Connor & L. 242, 2 Drury & War. 80, 4 Ir. Eq. Rep. 555.

Specific performance where court must superintend.

Cited in *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142, holding provisions of a contract as to daily running and stopping of railroad trains and discharging freight and passengers are not susceptible of specific performance; *Lone Star Salt Co. v. Texas Short Line R. Co.* 99 Tex. 434, 3 L.R.A. (N.S.) 828, 90 S. W. 863, holding there can be no specific performance of a contract calling for delivery of freight "as it accrues;" *Bickford v. Chatham*, 16 Can. S. C. 235, holding same as to maintenance of a station suitable for accommodation of passengers and freight; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84, holding there can be no specific performance where the duties to be performed on the one side are such as to be incapable of being specifically enforced; *Carleton Branch R. Co. v. Grand Southern R. Co.* 21 N. B. 339, holding that contract between two railroad corporations in relation to use of tracks, repairs etc., cannot be specifically enforced; *Gartshore v. Gore Bank*, 13 Grant, Ch. (U. C.) 187, holding that agreement to accept less than amount due on claim, will not be enforced where person who agreed to indorse bill for payment of such amount failed to do so; *Blackett v. Bates*, L. R. 1 Ch. 117, 35 L. J. Ch. N. S. 324, 12 Jur. N. S. 151, 13 L. T. N. S. 656, 14 Week. Rep. 319, holding there can be no specific performance of specified daily duties during the term of a lease.

Cited in note in 20 L.R.A. 168, on refusal of the courts to assume the care, supervision and control of contracts not mutually enforceable or where there is a remedy at law, or where details are indefinite.

Cited in *Parsons*, Partn. 4th ed. 278, on decree for specific performance of partnership agreement, where no adequate remedy at law; *Hollingsworth*, Contr. 537, as to when specific performance of contract will be enforced.

— Acts not susceptible of coercion.

Cited in *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408, holding contracts requiring performance of varied and continuous acts, or the exercise of special skill, taste or judgment will not generally be enforced; *Henderson v. Dickson*, 9 Grant, Ch. (U. C.) 379, holding that specific performance of contract will only be decreed when court can perform whole contract; *Hunt v. Spencer*, 13 Grant, Ch. (U. C.) 225, to the point that court will not decree specific performance of contract where it is

impossible to enforce contract as a whole: *Wilkinson v. Clements*, L. R. 8 Ch. 96, 27 L. T. N. S. 834, 42 L. J. Ch. N. S. 38, 21 Week. Rep. 90, on specific performance where unenforceable conditions exist.

Partial relief on entire covenant.

Cited in *Ross v. Union P. R. Co.* Woolw. 26, Fed. Cas. No. 12,080, holding the court will not grant partial relief on a covenant, which is a unit; *Rigby v. Great Western R. Co.* 15 L. J. Ch. N. S. 266, 10 Jur. 488, 4 Eng. Ry. & C. Cas. 175, 2 Phill. Ch. 44, 1 Coop. t. cott. 3, 4 Eng. Ry. & C. Cas. 491, 10 Jur. 531, 1 Coop. t. cott. 7, holding each party may enforce his mutual covenant rights.

Injunction against violation of negative covenants.

Cited in notes in 7 E. R. C. 92, on injunction to restrain violation of negative covenants; 15 E. R. C. 279, on necessity of purchaser observing negative stipulations known to him.

6 E. R. C. 652, *LUMLEY v. WAGNER*, 1 De G. M. & G. 604, affirming the decision of the vice Chancellor reported in 5 De G. & S. 485, 16 Jur. 871, 21 L. J. Ch. N. S. 898.

Equitable relief on actionable covenants.

Cited in *Steinau v. Cincinnati Gaslight & Coke Co.* 48 Ohio St. 324, 27 N. E. 545, holding an exception to the general rule is made where peculiar skill and labor are involved, on the ground that in such cases the chances of damages at law would be uncertain; *Ryan v. Lockhart*, 14 N. B. 127, holding fact that one has a remedy at law on a covenant does not oust a court of equity of its jurisdiction.

— Specific performance of contracts.

Cited in *Godwin v. Collins*, 3 Del. Ch. 189 (affirming 4 Houst. (Del.) 28), on decree for specific performance of contract of sale as not matter of course but resting entirely in discretion of court in view of all circumstances; *Suburban Constr. Co. v. Naugle*, 70 Ill. App. 384, holding that courts will not enforce railroad building contract; *Marsh v. Blackman*, 50 Barb. 329, to the point that equity may decree specific performance of contract where damages cannot be estimated with any exactness; *Keene v. Wheatley*, 5 Clark (Pa.) 501, Fed. Cas. No. 7,644, to the point that contracts concerning literary productions independently of statute, may be specifically enforced; *Jackson v. Jessup*, 5 Grant, Ch. (U. C.) 524, holding that contract to convey land to railroad company, upon which to build station, might be specifically enforced, although defendant swore condition upon which he agreed to convey was that certain crossings would be secured to him but which had not been secured.

Cited in *Hollingsworth*, Contr. 537, as to when specific performance of contract will be enforced; *Parsons*, Partn. 4th ed. 278, 279, on decree for specific performance of partnership agreement.

— Specific enforcement where service is personal or skilled or discretionary.

Cited in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 5 Inters. Com. Rep. 522, 19 L.R.A. 387, 54 Fed. 730, holding the court of equity cannot compel personal services as against either the employer or the employed; *Wollensak v. Briggs*, 20 Ill. App. 50, holding the courts will not compel the specific performance of personal services requiring mechanical skill and exercise of judgment; *Park v. Minneapolis*, St. P. & S. S. M. R. Co. 114 Wis. 347, 89 N. W. 532, holding the court will not attempt to enforce a contract for the location of a railroad where terms depend on the will, discretion or personal acts of individuals; *Formby v.*

Barker, [1903] 2 Ch. 539, 72 L. J. Ch. N. S. 716, 51 Week. Rep. 646, 89 L. T. N. S. 249, holding an injunction does not lie to enforce a personal and collateral covenant restrictive of use of land; *Leech v. Schweder*, L. R. 9 Ch. 463, 43 L. J. Ch. N. S. 487, 30 L. T. N. S. 586, 22 Week. Rep. 633, on extent of jurisdiction in granting specific performance.

Cited in note in 6 L.R.A.(N.S.) 1116, 1118, 1124, 1131, 1138, on enforcement of contract of service by equity.

Cited in *Pomeroy*, Spec. Perf. 2d. ed. 384, on right to specific performance of contract for personal services; *Pomeroy*, Spec. Perf. 2d. ed. 31, on extent and limitations of right to specific performance of contracts for building and construction; 3 Page, Contr. 2487, on equitable relief in contracts for personal services.

Distinguished in *Kennicott v. Leavitt*, 37 Ill. App. 435, holding a court will not decree specific performance if the matter involves personal trust and confidence; *Mowers v. Fogg*, 45 N. J. Eq. 120, 17 Atl. 296, holding specific performance upon agreement to care for the complainant in case of "general debility or sickness" will not be decreed.

Injunction against breach of contract.

Cited in *Shubert v. Woodward*, 92 C. C. A. 509, 167 Fed. 47, holding the power and duty of the court to grant an injunction is measured by the same principles and practice as its power and duty to decree specific performance; *Singer Sewing-Mach. Co. v. Union Buttonhole & Embroidery Co.* Holmes, 253, Fed. Cas. No. 12,904, holding where the negative remedy of injunction will do substantial justice by obliging the defendant to carry out his contract or lose all benefits of the breach an injunction will lie—there being no adequate remedy at law; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. 516, holding a breach of a contract to establish a dispatch freight line for the mutual profit of the parties may be enjoined; *Colgate v. James T. White & Co.* 189 Fed. 882, holding that injunction lies to prevent publication of complainant's biography in set of books other than set issued under auspices of Federal government, where he gave facts for use in said case only; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449, on specific performance by means of injunction restraining violation of contract; *Beek v. Indianapolis Light & P. Co.* 36 Ind. App. 600, 76 N. E. 312, on granting an injunction to restrain breach of a contract; *Il. W. Gossard Co. v. Crosby*, 132 Iowa. 155, 6 L.R.A.(N.S.) 1115, 109 N. W. 483, holding there must be a plain negative covenant in the contract of employment, and the services must be of a special and unusual character; *Chonteau v. Union R. & Transit Co.* 22 Mo. App. 286, holding the violation of a contract requiring continuous duties may be enjoined, although the court would not decree its specific performance; *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408, (affirming 30 App. Div. 564, 52 N. Y. Supp. 433, which reversed 22 Misc. 624, 50 N. Y. Supp. 1056), holding where the effect of an injunction would be to compel either a performance of the agreement, or loss of benefits from breach of it, if persisted in, the injunction should lie; *American Electrical Works v. Varley Duplex Marget Co.* 26 R. I. 295, 58 Atl. 977, 3 Ann. Cas. 975, holding the fact that an injunction, if granted, would indirectly result in compelling specific performance of the contract in the case is not a valid objection; *Kingston v. Kingston, P. & C. Electric R. Co.* 25 Ont. App. Rep. 462, holding an injunction will not lie to restrain company from running cars unless they are run over the entire system; *United Shoe Mach. Co. v. Brunet*, Rap. Jud. Quebec, 27 C. S. 200, holding *prima facie* case for interlocutory in-

junction made out where defendants admitted violation of contract, but denied that they had violated parts thereof which were legal; *Rossin v. Joslin*, 7 Grant, Ch. (U. C.) 198, to the point that injunction will not lie to enforce contract unless whole of contract can be enforced; *Montague v. Flockton*, L. R. 16 Eq. 189, 42 L. J. Ch. N. S. 677, 28 L. T. N. S. 580, 21 Week. Rep. 668, holding there must be a negative stipulation in the contract in order for court to act; *Warne v. Routledge*, L. R. 18 Eq. 497, 43 L. J. Ch. N. S. 604, 30 L. T. N. S. 857, 22 Week. Rep. 750, holding the injunction will not be extended unless a clear contract is shown; *Fothergill v. Rowland*, L. R. 17 Eq. 132, 43 L. J. Ch. N. S. 252, 29 L. T. N. S. 414, 22 Week. Rep. 42, holding the court has no jurisdiction to restrain the breach of a contract for sale and delivery of chattels; *Keith v. National Teleph. Co.* [1894] 2 Ch. 147, 8 Reports, 776, 70 L. T. N. S. 276, 42 Week. Rep. 380, 58 J. P. 573, on cases where an injunction should be granted where specific performance is impossible; *Adamson v. Gill*, 17 L. T. N. S. 464, holding breach of charter party by taking other cargo after sea damage of that shipped was restrainable on proper conditions.

Cited in 2 Beach, Contr. 2073, on agreements for exclusive service and exclusive dealings being enforceable by injunction only.

Distinguished in *Suburban Constr. Co. v. Naugle*, 70 Ill. App. 384, holding where the object of a bill in equity is to enforce specific performance of a contract, and that object cannot be obtained, the writ of injunction, ancillary thereto, falls with the bill.

Questioned in *Fredericks v. Mayer*, 1 Bosw. 227, holding that if allowable the proof was not clear enough for injunction *pendente lite*.

— Nonmutual agreements.

Cited in *Welty v. Jacobs*, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696,—holding an injunction to restrain breach of contract will not lie where contract is lacking in mutuality.

Distinguished in *Johnson v. Shrewsbury & B. R. Co.* 22 L. J. Ch. N. S. 921, 3 De G. M. & G. 914, 17 Jur. 1015, refusing specific performance of a railway construction agreement because of lack of mutuality.

— Contract for personal services.

Cited in *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467, holding where the services are material or mechanical, or are not peculiar or individual the court will not grant an injunction in aid of a specific performance; *Rabinovich v. Reith*, 120 Ill. App. 409, holding an injunction will not lie restraining a hat trimmer from entering the employment of any one else in a city of two million people; *Citizens Loan Assn. v. Boston & M. R. Co.* 196 Mass. 528, 14 L.R.A. (N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365, holding contracts for personal services are of such a character that their breach is in appropriate cases enjoined; *Bronk v. Riley*, 50 Hun. 489, 3 N. Y. Supp. 446, holding mere fact that the contract calls for personal services is no ground for injunction or to compel specific performance; *Daly v. Smith*, 6 Jones & S. 158, holding that action lies by employer against employee, who contracts to render personal services, and during time of employment not to render them to any other person, to prevent employee from rendering his services to any other person; *Standard Fashion Co. v. Siegel-Cooper Co.* 22 Misc. 624, 50 N. Y. Supp. 1056, on injunction where contract calls for special personal services; *Crane v. Peer*, 43 N. J. Eq. 553, 4 Atl. 72, on interference by court to prevent breach of contract for personal services; *Cort v. Lassard*, 18 Or. 221, 6 L.R.A. 653, 17 Am. St. Rep. 726, 22 Pac. 1054, holding the injunction

will lie where the contract calls for personal services of a special and unique character; *Ford v. Jermon*, 6 Phila. 6, 22 Phila. Leg. Int. 44, holding that contract for personal services of actor will not be specifically enforced; *William Robinson & Co. v. Heuer* [1898] 2 Ch. 451, 67 L. J. Ch. N. S. 644, 79 L. T. N. S. 281, 47 Week. Rep. 34, granting an injunction restraining a servant under a contract of hiring and service from "engaging in any other business" during term of employment; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 1 Eng. Rul. Cas. 717, 17 Eng. Rul. Cas. 285, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, on the proper relief against a servant breaking his contract, for exclusive personal services.

Cited in 2 *Beach Contr.* 2265, on injunction against breach of contract for personal service.

Distinguished in *Taylor Iron and Steel Co. v. Nihols*, 70 N. J. Eq. 541, 64 Atl. 742, holding the court will not restrain one from entering the employment of another during the term of employment where the services to be performed do not affirmatively appear to be of a special nature; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106, 94 N. W. 78, holding a court of equity will not restrain an expert mechanic from quitting the employment of one person and entering that of another; *Arthur v. Oakes*, 11 C. C. A. 209, 4 Inters. Com. Rep. 744, 24 U. S. App. 239, 25 L.R.A. 414, 63 Fed. 310, holding equity will not, under any circumstances, prevent one individual from quitting the personal services of another; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135, holding a court of equity will not interfere at the suit of one partner to prevent the dissolution of the partnership.

Disapproved in *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432, holding the personal services must be of an unique, individual and peculiar character for a court of equity to restrain breach of.

— Contracts for theatrical or like performances.

Cited in *McCaull v. Braham*, 16 Fed. 37, holding an injunction will lie to restrain a singer from performing elsewhere where the contract calls for an exclusive service; *Daly v. Smith*, 49 How. Pr. 150, holding court will restrain an actress from performing at a rival theater in violation of an existing contract; *House v. Clemens*, 24 Abb. N. C. 381, 9 N. Y. Supp. 484, 16 Daly, 3, holding an injunction restraining the performance of a play will lie where a contract for exclusive production is found to exist; *Philadelphia Ball Club v. Hallman*, 20 Phila. 276, 47 Phila. Leg. Int. 130, 8 Pa. Co. Ct. 57, holding a ball player under an express contract will be restrained from giving services to another during term of contract; *Harrisburg Base-Ball Club v. Athletic Asso.* 8 Pa. Co. Ct. 337, refusing to enforce a ball player's contract by injunction against playing for another.

Limited in *Philadelphia Base Ball Club v. Lajoie*, 10 Pa. Dist. R. 309, refusing an injunction restraining an expert base ball player from giving services to another.

Enforcement of separate or alternative covenants in equity.

Cited in *Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co.* 110 Mass. 1, holding fact that court is not able to give full relief as to all matters stated in bill will not deter court from giving all the relief in its power; *Hunt v. Spencer*, 13 Grant, Ch. (U. C.) 225, holding where two covenants are separate and distinct the court will not be deterred from enforcing the one by reason of its inability to enforce the other; *Ryan v. Mutual Tontine Westminster Chambers Asso.* [1893] 1 Ch. 116, 62 L. J. Ch. N. S. 252, 2 Reports 156, 67 L. T. N. S. 820,

41 Week. Rep. 146, holding in some cases contracts may be treated as divisible for the purpose of specific performance.

Distinguished in *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18, 40 L. J. Ch. N. S. 515, 24 L. T. N. S. 861, 19 Week. Rep. 707, holding where the stipulation sought to be enforced is a part of the contract itself, the court must perform in its entirety if performed at all.

Equitable enforcement of negative covenants.

Cited in *General Electric Co. v. Westinghouse Electric Co.* 151 Fed. 664, holding the court will enjoin the violation of the negative part of an agreement where party has changed his position in reliance thereon and no adequate remedy at law lies; *Southern Fire Brick & Clay Co. v. Garden City Sand Co.* 223 Ill. 616, 9 L.R.A. (N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50, holding where contract contains a direct negative covenant not to sell brick to be manufactured to other parties the court will enjoin such sales; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L.R.A. 822, 66 N. E. 436, holding the courts will enjoin a gas company from the breach of a negative covenant in franchise fixing price of gas to consumers; *Hahn v. Concordia Soc.* 42 Md. 460, on enforcement of a negative covenant by injunction; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, holding that part of contract of employment in which party bound himself not to disclose secret process of manufacture will be specifically enforced though the other part could not; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189, holding that specific performance of negative covenant in written contract will not be denied merely because affirmative covenant with which negative covenant is allied is kind of one which is not enforced specifically; *Bailey v. Collins*, 59 N. H. 459, holding courts of equity have jurisdiction of personal negative covenants, and will enforce their performance by injunction; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 24 L.R.A. (N.S.) 933, 133 Am. St. Rep. 753, 69 Atl. 186, holding that contract for personal services which forbids employee never to divulge any information known to him as to secret processes of manufacture of article, is void; *Myers v. Steel Mach. Co.* 67 N. J. Eq. 300, 57 Atl. 1080, holding the court will restrain the defendant company, which agreed to produce machines of a certain kind, from making them for any other person, where the contract provided for exclusive service; *Christian Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703, on enforcement of negative covenants; *Fredericks v. Mayer*, 13 How. Pr. 566; *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 393.—holding that court may enforce stipulation in contract for personal services that servant will not during period of employment work for anyone else; *Standard Fashion Co. v. Siegel-Cooper Co.* 30 App. Div. 564, 52 N. Y. Supp. 433, (dissenting opinion), on enforcement of a negative covenant by injunction; *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93, holding where contract calls for the disclosure of secret processes in manufacture, with stipulation not to disclose these secrets to any body else, the courts will restrain party from making the disclosure to anyone else; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 544, holding the court will control the conduct of a party by injunction where a contract calls for personal services and at same time not to do acts tending to defeat objects intended by the contract; *Roekafellow v. Hanover Coal Co.* 2 Pa. Dist. R. 108, 12 Pa. Co. Ct. 241, 6 Kulp. 507, holding the jurisdiction of the court to enforce a negative covenant, is as undoubted as its jurisdiction to enforce specific performance of the affirmative agreement; *Ex parte Warfield*, 40 Tex. Crim. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933, holding equity will re-

strain a servant from breaking a negative stipulation; *La Societe Anonyme Des Theatres v. Lombard*, Rap. Jud. Quebec, 15 B. R. 267 (dissenting opinion), on equitable enforcement of negative covenants; *Ontario Salt Co. v. Merchants' Salt Co.* 18 Grant, Ch. (U. C.) 540, holding the court will restrain a breach of a negative covenant not to sell salt except through the trustees named in contract; *Holecomb v. Nixon*, 5 Grant, Ch. (U. C.) 278, holding where sale of vessels was upon an express condition that vendor would not engage as forwarder in a certain part of the St. Lawrence river, an injunction will lie restraining breach of covenant; *Star Newspaper Co. v. O'Connor* [1893] W. N. 114, on necessity of an express negative covenant to support injunction; *Catt v. Tourle*, L. R. 4 Ch. 654, 38 L. J. Ch. N. S. 665, 21 L. T. N. S. 188, holding the court will enforce a negative stipulation in a sale of land giving the exclusive right to supply beer to any public house erected on the land; *Metropolitan Electric Supply Co. v. Ginder* [1901] 2 Ch. 799, 70 L. J. Ch. N. S. 862, 65 J. P. 519, 49 Week. Rep. 508, 84 L. T. N. S. 818, 17 Times L. R. 435, holding the court will enforce an implied stipulation in the contract not to take gas from any one else; *Ehrman v. Bartholomew* [1898] 1 Ch. 671, 67 L. J. Ch. N. S. 319, 78 L. T. N. S. 646, 14 Times L. R. 364, 46 Week. Rep. 509, holding the court will not enforce a negative stipulation not to engage in any other business during the term of ten years, on ground of its being unreasonable; *Alexander v. Mausions Proprietary*, 16 Times L. R. 431, enforcing agreement not to use passenger lifts in a particular manner; *Yorkshire Miner's Asso. v. Howden* [1905] A. C. 256, 74 L. J. K. B. N. S. 511, 53 Week. Rep. 667, 92 L. T. N. S. 701, 21 Times L. R. 431 (dissenting opinion), on the enforcement of negative stipulation in a contract.

Cited in notes in 31 L.R.A.(N.S.) 262, on right, in absence of negative covenant, to enjoin former employee from soliciting customers of employer; 20 L.R.A. 167, on power to grant mandatory injunctions in negative form prohibiting rendering of services for third persons.

Distinguished in *Harlow v. Oregonian Pub. Co.* 45 Or. 520, 78 Pac. 737, holding the injunction will not lie although the remedy suggested of a negative character, if it be in effect a decree for specific performance of a contract where the law afforded an adequate redress.

Limited in *Davis v. Foreman* [1894] 3 Ch. 654, 64 L. J. Ch. N. S. 187, 8 Reports, 725, 43 Week. Rep. 168, holding where stipulation is negative in form but affirmative in substance it will not be enforced.

Disapproved in *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180, holding this court is not disposed to enforce a negative covenant, where, if the court had power, it would not enforce an affirmative covenant.

Contracts enforceable in specie.

Cited in *Beckman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332, on distinction between contracts specifically enforceable in equity and other contracts.

Reciprocal negative and affirmative in promises.

Cited in *American Asso. Base Ball Club v. Pickett*, 20 Phila. 298, 47 Phila. Leg. Int. 212, 8 Pa. Co. Ct. 232, holding every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promiser from doing the act he has engaged to do; *Donnell v. Bennett*, 22 Ch. Div. 835, 52 L. J. Ch. N. S. 414, 48 L. T. N. S. 68, 31 Week. Rep. 316, 47 J. P. 342, holding there is no tangible difference between an express contract with a negative stipulation and a contract containing an affirmative stipulation which implies a negative; *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37, 70 L. J. Ch. N. S. 468, 49 Week. Rep. 418, 84 L. T. N. S. 436, 17

Times L. R. 410, holding a stipulation to give a party the "first refusal" implies a negative contract.

Distinguished in *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416, 60 L. J. Ch. N. S. 428, 64 L. T. N. S. 716, 39 Week. Rep. 433, holding a negative stipulation is not contained in an agreement of the manager of a manufacturing company to give his entire time to the business.

Criticized in *Wolverhampton & W. R. Co. v. London & N. W. R. Co.* L. R. 16 Eq. 433, 73 L. J. Ch. N. S. 131, holding it the safer and better rule to look to the substance and not to the form to determine whether a negative agreement exists.

Duty of theatrical performers to employers.

Cited in *Keene v. Wheatley*, Fed. Cas. No. 7,644, on the duties of theatrical performers to their employers.

Proper parties defendant in injunction proceedings.

Cited in *Strobridge Lithographic Co. v. Crane*, 20 N. Y. Civ. Proc. Rep. 15, 12 N. Y. Supp. 834, holding in an action against an employe who is charged with violating the restrictive covenant, one he has subsequently contracted with has an interest in the controversy such as to make him a proper party.

Substituted or secondary evidence.

Cited in note in 34 L.R.A. 585, 589, on admissibility of affidavit of contents of letter not produced.

6 E. R. C. 668, *KNATCHBULL v. GRUEBER*, 3 Meiv. 124, 17 Revised Rep. 35, aff'g the opinion of the Vice Chancellor reported in 1 Madd. Ch. 153.

Specific performance.

Cited in *Jacobs v. Revell* [1900] 2 Ch. 858, 69 L. J. Ch. N. S. 879, 49 Week. Rep. 109, 83 L. T. N. S. 629; *Re Arnold* L. R. 14 Ch. Div. 270, 42 L. T. N. S. 705, 28 Week. Rep. 635,—on habit of court in holding parties to contracts made; *Paul v. Blackwood*, 3 Grant, Ch. (U. C.) 394 (dissenting opinion), on right to a decree for specific performance.

—Where complainant has deprived defendant of part of benefit of contract.

Cited in *O'Neal v. McMahon*, 2 Grant, Ch. (U. C.) 145, holding a plaintiff, having deprived the defendant of the possession to which by terms of contract he was entitled, cannot claim a specific performance.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 518, on right to specific performance where vendor is the actor, demanding a partial specific performance or a specific performance with compensation; *Pomeroy*, Spec. Perf. 2d ed. 493, on conduct of vendor defeating right to specific performance of contract; *Pomeroy*, Spec. Perf. 2d ed. 429, 430, on affirmative acts of plaintiff in violation of contract, specific performance of which is sought; *Pomeroy*, Spec. Perf. 2d ed. 421, on refusal of specific performance where vendor's title is defective; *Pomeroy*, Spec. Perf. 2d ed. 520, on vendor's right to specific performance when title to a material part of the land fails.

Distinguished in *Colby v. Gadsden*, 34 Beav. 416, 5 New Reports, 456, 11 Jur. N. S. 760, 12 L. T. N. S. 197, holding the preventing of further rents to a purchaser, let into the receipt of rents without payment of purchase money, after great delay and no payment as agreed, will not deprive him of right to specific performance of contract.

Attempted resale by purchaser as evidence of waiver of defect in title.

Cited in *Thompson v. Dulles*, 5 Rich. Eq. 370, holding purchaser's noncomplaint was binding only if cause was removed before he finally abandoned contract;

Goddin v. Vaughn, 14 Gratt. 102, holding attempting to resell is an important circumstance upon the question of waiver of vendor's title but is not conclusive; *McCord v. Harper*, 26 U. C. C. P. 96, on waiver of objection to title by offering property for sale.

Defenses to payment of purchase money.

Cited in *Allan v. Newman*, 16 Grant, Ch. (U. C.) 607, on circumstances raising an equity to resist payment of purchase money.

Prevention of possible nuisance as ground for equitable relief.

Cited in *Com. v. Reim/r*, 15 Phila. 72, 39 Phila. Leg. Int. 108, granting injunction against projection of bay windows which might become a nuisance.

What constitutes a marketable title.

Cited in note in 38 L.R.A.(N.S.) 9, on what is a marketable title.

6 E. R. C. 684, *MILNES v. GERY*, 9 Revised Rep. 307, 14 Ves. Jr. 400.

Nonenforcement of agreement to arbitrate.

Cited in *Tobey v. Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065, holding agreement to refer question to arbitration not specifically enforceable in equity; *Castle Creek Water Co. v. Aspen*, 76 C. C. A. 516, 8 Ann. Cas. 660, 146 Fed. 8, holding contract for sale of water-works at valuation to be fixed by appraisers specifically enforceable where stipulation for appraisers was not essence of agreement; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L.R.A. 616, 6 So. 113, holding contract cannot be specifically enforced in equity so long as referees remain unappointed or fail to assess value; *Kennedy v. Monarch Mfg. Co.* 123 Iowa, 344, 98 N. W. 796, holding court cannot compel parties to agree as to person who shall arbitrate their differences; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69, holding contract of sale of gas works not specifically enforceable before price was fixed by arbitrators in pursuance of contract; *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458, holding contracts to refer any matters of dispute that may arise between the parties are not specifically enforceable in equity; *Whitlock v. Duffield*, Hoffm. Ch. 111, holding where parties in pursuance of stipulation have appointed valuers who cannot agree upon estimate nor as to an umpire, court will not fix valuation by umpire or otherwise; *Heath v. New York Gold Exch.* 38 How. Pr. 168, 7 Abb. Pr. N. S. 251, holding enforcement of agreements to arbitrate is refused because their enforcement is deemed against public policy, and because courts are presumed to be better capable of administering and enforcing real rights of parties than private arbitrators; *Norfleet v. Southall*, 7 N. C. (3 Murph.) 189, holding where parties have agreed to arbitrate price court will not have it ascertained by a master in equity and compel performance of contract; *Graham v. Murray*, 20 Pa. Dist. R. 298, holding that court cannot enforce revocable contract to submit partnership affairs to arbitration according to partnership agreement where representative of deceased partner refuses to arbitrate; *Cooke v. Miller*, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30, on refusal of court to substitute itself for arbitrators and make award where contract is executory; *Pillow v. Pillow*, 3 Humph. 644, holding where by terms of agreement price at which lands were to be taken in payment by administrators was to be fixed by commissioners appointed upon oath, court could not substitute others in their stead; *Akely v. Akely*, 16 Vt. 450, holding specific performance may be decreed where arbitrators have made an award; *Baker v. Glass*, 6 Munf. 212, holding contract not specifically enforceable where it provided for taking of property in payment at valuation to be fixed by arbitrators; *Hopkins v. Gilman*, 22 Wis. 476,

holding agreement to renew lease upon basis of value of property to be fixed by arbitrators not specifically enforceable; *Quebec Street R. Co. v. Quebec*, 15 Can. S. C. 164, holding court without right to appoint arbitrator to make valuation provided for in agreement; *McCaffrey v. Gerrie*, 3 Manitoba L. Rep. 559, holding agreement to purchase land at price to be fixed by another is valid and will be enforced in equity, if price has been fixed by party agreed upon; *Purdy v. Porter*, 38 N. B. 465, holding one liable to pay value to be determined in specific manner and by separate tribunal, cannot be in default for nonpayment until such value is ascertained; *McGill v. Proudfoot*, 4 U. C. Q. B. 33, holding covenant that a fair deduction and allowance should be made in rent, to be ascertained by arbitrators excluded court from determining what would be fair deduction; *Collins v. Collins*, 28 L. J. Ch. N. S. 184, 26 Beav. 306, 5 Jur. N. S. 30, 7 Week. Rep. 115, holding court without authority under statute to appoint umpire; *Vickers v. Vickers*, L. R. 4 Eq. 529, 36 L. J. Ch. N. S. 946, holding contract to purchase, at valuation to be fixed by values not specifically enforceable; *Tillett v. Charing Cross Bridge Co.* 28 L. J. Ch. N. S. 863, 26 Beav. 419, 5 Jur. N. S. 994, holding agreement to refer difference between parties to arbitrator not specifically enforceable.

Cited in note in 15 L.R.A. 142, on agreements to arbitrate.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 382, on specific performance of contracts for sale at a price fixed by valuers; *Benjamin*, Sales, 5th ed. 145, on agreement that price of goods sold shall be fixed by valuers.

Referred to as leading case and distinguished in *Tscheider v. Harrison*, 4 Dill. 55, Fed. Cas. No. 14,210, where parties could not be put in statu quo, mala fides was imputed, and remedy at law did not satisfy covenant or demands of justice.

Distinguished in *United States Sugar Ref. Co. v. Edward P. Allis Co.* 45 C. C. A. 108, 105 Fed. 881, where there was prevention of arbitration by fraud; *Strohamier v. Zeppenfeld*, 3 Mo. App. 429, where parties had by written contract definitely agreed upon all substantial terms and one party refused to perform; *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359, holding where contract to sell is merely subsidiary part of another contract for more extensive purpose, performance of which has already been entered upon, matter of determining price is one of form rather than substance, and court may determine it; *Sullivan v. Susong & Co.* 30 S. C. 305, 9 S. E. 156, where by courts order it was left to parties to make selection of engineers and give it to the court, and it was only in case of their refusal to do as agreed that selection was to be made by court; *Anchor Marine Ins. Co. v. Corbett*, 9 Can. S. C. 73, where award had been made by arbitrators; *Richardson v. Smith*, L. R. 5 Ch. 648, 39 L. J. Ch. N. S. 877, 19 Week. Rep. 81, where, agreement to arbitrate was minor and subsidiary part of contract of sale.

Referred to as leading case and limited in *Coles v. Peek*, 96 Ind. 333, 49 Am. Rep. 161, where lessor refused to join in reference to fix price in accordance with lease allowing lessee to purchase.

Limited in *Kaufmann v. Liggett*, 209 Pa. 87, 67 L.R.A. 353, 103 Am. St. Rep. 988, 58 Atl. 129, holding that while court of equity will not compel an arbitration it will in case of renewal lease, make appraisement of rent itself, or direct it to be made by its own officer, and thereafter enforce specific performance; *Schneider v. Hildenbrand*, 14 Tex. Civ. App. 34, 36 S. W. 784, where stipulation to determine price by arbitration was treated as immaterial.

Disapproved in *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac.

176, holding contract to purchase waterworks specifically enforceable, notwithstanding arbitration clause.

Enforcement of contract to sell at fair valuation.

Cited in *Estes v. Furling*, 59 Ill. 298, holding contract to sell land at fixed valuation and buildings at fair valuation specifically enforceable; *Duffy v. Kelly*, 55 N. J. Eq. 627, 37 Atl. 597, holding contract to sell building at fair valuation specifically enforceable; *Kirkpatrick v. Lyster*, 16 Grant, Ch. (U. C.) 17 (dissenting opinion), on right of court to ascertain price when agreement is to sell at fair price.

Enforcement of contract to sell at price definitely ascertainable.

Cited in *Meyer v. Jenkins*, 80 Ark. 209, 96 S. W. 991, holding that agreement of lease which provides that at expiration of lease lessee shall have privilege of purchasing land at agreed price "exclusive of improvements which shall be paid for extra" is enforceable; *Hayes v. O'Brien*, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73, holding contract specifically enforceable where it prescribed mode by which price was definitely ascertainable; *Providence v. St. John's Lodge*, 2 R. I. 46, holding court of equity will not enforce contract of sale, where price is to be fixed by the parties, or by arbitrators chosen by the parties but where agreement is to pay value as appraised it is duty of court to ascertain value by appointing appraisers; *Dike v. Greene*, 4 R. I. 285, holding where contract of purchase and sale provides for an appraisal, and from neglect or refusal of other party, accident or mistake, there has been failure to appraise by joint action of contractors, court of equity may make appraisal itself through master; *House v. Brown*, 14 Ont. L. Rep. 500, holding where agreement specifies particular mode of ascertaining price, court cannot compel parties to submit to any other mode, and contract cannot be enforced if mode is future agreement of parties.

Cited in note in 53 L.R.A. 295, on effect on contract of leaving price indefinite.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 212, 214, on necessity that contract provide means for fixing the price to be specifically enforceable; 2 *Underhill, Land. & T.* 1293, on appraisal of improvements by person appointed by court where parties fail to indicate appraiser.

Distinguished in *Howison v. Bartlett*, 147 Ala. 408, 40 So. 757, holding that a contract of sale of timber which can be identified may be specifically enforced where the contract fixes the price of the land, although it further provides that the land be surveyed by a surveyor to be agreed upon, and this has not been done.

Enforcement of contract according to its written terms only.

Cited in *Godwin v. Collins*, 4 *Houst. (Del.)* 28, holding court can only decree specific performance according to written terms of the agreement; *Whitlock v. Duffield*, Hoffm. Ch. 111, holding that to justify performance of contract, all its material terms and conditions must be in writing, either in agreement itself, or by plain reference to written paper, supplying an omission.

Nonenforcement of incomplete agreement.

Cited in *Manning v. Ayres*, 23 C. C. A. 405, 46 U. S. App. 537, 77 Fed. 690, holding contract is not specifically enforceable when any material part of it remains to be settled by negotiation; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635 (dissenting opinion), on necessity that party asking specific performance be able to state some contract, legal or equitable, between the parties, which other refused to execute; *McKibbin v. Brown*, 14 N. J. Eq. 13, holding contract of sale in which times or credits to be given were subject to arrangement between

the parties not specifically enforceable; *Harris v. Knickerbacker*, 5 Wend. 638, holding leaving matter uncertain as to what constitutes good and sufficient conveyance does not render contract so uncertain that equity will refuse specific execution; *Shaw v. Lowiston & K. Turnp. Co.* 2 Penn. & W. 454, holding court of chancery never professes to bind a man to any agreement he has not substantially entered into; *Hinchman v. Ballard*, 7 W. Va. 152, holding equity will not decree specific performance when writing appears to be only basis of an agreement, and not the agreement itself.

Distinguished in *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8, where agreement was complete on its face.

Denial of relief by reformation of nonenforceable contract.

Cited in *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio), 412, holding reformation will not be decreed, unless matter between parties has taken shape of agreement which either party might legally enforce.

Termination of contract by failure of arbitrators to act.

Cited in *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. ed. 524, on termination of agreement by refusal of arbitrator agreed upon to act; *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964, holding there is no contract of sale if persons appointed as valuers fail to act; *Preston v. Smith*, 67 Ill. App. 613, holding contracts for sale at valuation price, to be fixed by persons named, are impliedly conditional upon those persons surviving and making the valuation and are terminated by their death before doing so; *Lingeman v. Shirk*, 15 Ind. App. 432, 43 N. E. 33, on rule that if A agrees to sell to B certain lands at price to be fixed by C, and C fails to fix price, contract fails.

Cited in 2 *Underhill, Land & T.* 983, on nonspecific performance of contract to sell at appraised valuation in lease where no agreement by appraisers.

Specific performance of contract to convey land.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 42, on extent and limitations of right to specific performance of contracts to convey land invalid at law.

6 E. R. C. 693, *FLIGHT v. BOLLAND*, 4 Russ. Ch. 298, 28 Revised Rep. 101.

Specific performance of contract where remedy at law is adequate.

Cited in *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626, holding that equity will not decree specific performance of contract for sale of shares of stock, when it appears that remedy at law is adequate.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 67, on refusal of specific performance of contracts concerning chattels where legal remedy is sufficient.

Necessity of mutuality of remedy to justify specific performance of contract.

Cited in *Chrisman v. Partee*, 38 Ark. 31, to the point that equity will not direct performance of terms of agreement by one party, when at time of such order, other party is at liberty to reject obligation of agreement; *Woodward v. Aspinwall*, 3 Sandf. 272; *Vassault v. Edwards*, 43 Cal. 458,—holding contract signed by one party only specifically enforceable; *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53, on necessity that remedy of specific performance be mutual and reciprocal for both vendor and purchaser; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84, holding that equity cannot specifically enforce contract lacking in mutuality of remedy; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332, holding that equity will not enforce contract where parties are not mutually bound to fulfill it; *Richards v. Green*, 23 N. J. Eq. 536, holding that unilateral contract

will in no case be enforced in equity, unless at time of decree both parties can be bound by it; *Offerman v. Paeker*, 26 Phila. Leg. Int. 205, holding that if agreement be not binding on one party, it cannot bind other; *Kroener v. Calhoun*, 5 Phila. 468, 21 Phila. Leg. Int. 141, holding it is fundamental that each party have right to compel specific performance; *Doyle v. Harris*, 11 R. I. 539; *Pugh v. Good*, 3 Watts & S. 56, 37 Am. Dec. 534,—on necessity of mutuality of remedy to justify specific performance of contract; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500, holding that mutuality of remedy, existing at time of action brought Dec. 500, holding that mutuality of remedy, existing at time of action brought, is all that is required to enable plaintiff to maintain action for specific performance; *Blackwood v. Paul*, 4 Grant, Ch. (U. C.) 550, holding requisite reciprocity wanting where if defendant were seeking performance against plaintiff his inability to perform would be good answer.

Cited in *Pomeroy, Spec. Perf.* 2d ed. 230, on mutuality as essential to specific performance of contract.

—Legal disability of plaintiff as bar.

Cited in *Guard v. Bradley*, 7 Ind. 600, holding that where contract has been made by one competent to contract on behalf of infant, infant may sue for specific performance; *Stone v. Morgan*, 13 Ind. App. 48, 41 N. E. 79 (dissenting opinion), on right of infant to sue for specific performance of contract; *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900, holding that husband cannot maintain suit for specific performance of agreement to exchange land, where at time of decree, land which husband agreed to convey in exchange belonged to his wife; *Moore v. Moore*, 74 N. J. Eq. 733, 70 Atl. 684, holding that amendment may be made inserting name of next friend, on motion of defendant to dismiss where bill was filed by plaintiff as adult, and it is discovered that he is infant; *Tarr v. Scott*, 4 Brewst. (Pa.) 49, holding contract not specifically enforceable by feme covert; *Hoover v. Calhoun*, 16 Gratt. 109, as to whether husband and wife can enforce against purchaser specific execution of contract made with them for sale of her land.

Cited in 2 *Beach, Contr.* 1190, on specific enforcement of contract by husband for himself and wife.

Representation of infant in suit by guardian.

Cited in *Bartlett v. Batts*, 14 Ga. 539, holding court properly appointed guardian ad litem for infant plaintiff; *Guy v. Hansow*, 86 Kan. 933, 122 Pac. 879, holding that guardian's sale of infant ward's interest in land, may be specifically enforced at suit of infant brought through guardian; *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942, holding guardian without right to prejudice case by changing burden of proof by inconsiderate, unnecessary and prejudicial admission.

Specific performance of contract against party signing; and to be charged.

Cited in *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Ivory v. Murphy*, 36 Mo. 534; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Shirley v. Shirley*, 7 Blackf. 452,—holding that contract for sale of land signed by party to be charged may be specifically enforced against one who signs it; *Lockett v. Williamson*, 37 Mo. 388, on granting specific performance of contract of sale of land when signed by vendor but not by purchaser.

Cited in note in 28 L.R.A.(N.S.) 683, as to who must sign memorandum of executory sale contract within statute of frauds.

Cited in *Pomeroy, Spec. Perf.* 2d ed. 109, by what parties memorandum re-

quired by statute of frauds is to be signed; *Browne*, Stat. Frauds, 5th ed. 496, on necessity that only party to be charged sign memorandum required by statute of frauds.

Right to relief from agreement of counsel.

Cited in *Caswell v. Toronto R. Co.* 24 Ont. L. Rep. 339, holding that agreement of junior counsel in open court that there would be no appeal in negligence case against defendant if action was dismissed without costs, was not enforceable where neither senior counsel or client was present and junior counsel acted without authority.

6 E. R. C. 698, *TWINING v. MORRICE*, 2 Bro. Ch. 326.

Refusal of court of equity to enforce contract because of unfairness.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding that in order to have special contract specifically enforced, it must appear that it is legal and honest one; *Lynch v. Bischoff*, 15 Abb. Pr. 357, note, to the point that court may refuse to grant specific performance where there is want of fairness in contract; *Stearns v. Beckham*, 31 Gratt. 379, holding that contract for sale of land will not be enforced where there is want of fairness in contract although no actual fraud is present; *Crooks v. Davis*, 6 Grant, Ch. (U. C.) 317, upholding decree for specific performance of bid upon auction sale of land where defense was that owner employed puffer; *Rodgers v. Rodgers*, 13 Grant, Ch. (U. C.) 143, holding that specific performance of contract of sale will not be decreed where son of testator bid at chancery sale of father's property, not for himself, but for another, result of which was to deter others from bidding; *Re Davis*, 17 Grant, Ch. (U. C.) 603, to the point specific performance of contract will be refused where purchaser employed former solicitor for vendor to bid for him.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 255, on extrinsic circumstances rendering contract unfair; *Pomeroy* Spec. Perf. 2d ed. 244, on necessity that contract to be specifically enforceable be fair equal and just in its terms.

— Fraud.

Cited in *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11,114, holding that contract made in fraud of law or against public policy cannot be enforced; *Barnes v. Starr*, 64 Conn. 136, 28 Atl. 980, to the point that contract will not be enforced where there has been fraud or surprise in making thereof; *Randall v. Lautenberger*, 16 R. I. 158, 13 Atl. 190, holding that, if without seller's consent, auctioneer makes bids for purchaser, his conduct is fraudulent, and sale is not enforceable by purchaser.

— Inadequacy of consideration.

Cited in *January v. Martin*, 1 Bibb, 586, holding that inadequacy of consideration will not prevent specific performance of contract, unless inadequacy is such as to carry evidence of fraud.

— Inadvertency, surprise or mistake.

Cited in *Henderson v. Hays*, 2 Watts, 148, holding that specific performance of contract will not be decreed because of inadvertency and surprise, not amounting to fraud, if there is remedy at law.

Cited in *Pomeroy* Spec. Perf. 2d ed. 314, on freedom from mistake as essential to specific performance of contract; *Pomeroy*, Spec. Perf. 2d ed. 519, on vendor's right to specific performance where there has been a material misdescription in the contract.

Inadequacy of consideration as affecting validity of sale under execution.

Cited in *Chisholm v. Sheldon*, 2 Grant, Ch. (U. C.) 178, on validity of sale of

equity of redemption under *fi. fa.* where right to sell was denied, and property was sold at merely nominal price.

Validity of sales at auction.

Cited in *Veazie v. Williams*, 3 Story, 611, Fed. Cas. No. 16,907, holding that purchase by auctioneer, for himself, is not void but voidable by principal, and not by third persons.

— Of agreement of creditor to bid in property and resell to debtor.

Cited in *Freeman v. Cooper*, 14 Ga. 238, holding that equity will enforce agreement to purchase land of debtor at sheriff's sale, with agreement upon part of creditor to resell to debtor.

Surprise as evidence of fraud.

Cited in *Gibson v. Carson*, 3 Ala. 421, to the point that word "surprise" may be used so as to indicate presumptive evidence of fraud but it usually means case where something is done unexpectedly which causes confusion and may be deemed fraud.

Cancellation of contracts.

Cited in *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721, holding that court of equity will refuse to rescind contract, in many cases where it would also refuse to decree specific performance.

Granting of specific performance where vendor has interest different from what he agreed to sell.

Cited in *Waters v. Travis*, 9 Johns. 450, holding that court of equity will compel vendor to specifically perform contract for sale of land, for part of land where he has incapacitated himself from conveying whole.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 418, on refusal of specific performance where estate or interest is different from that which vendor agreed to sell.

6 E. R. C. 702, *BEDFORD v. BRITISH MUSEUM*, 2 L. J. Ch. N. S. 129, 2 Myl. & K. 552.

Enforcement of restrictive covenants concerning use of land.

Cited in *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668,—holding that building restrictions in conveyance of fee are regarded unfavorably and will be strictly construed, and such restrictions will not be enforced, where other familiar principles of equity would be thereby violated; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190, on enforcement of restrictive covenants regarding land in accordance with justice and right; *McClure v. Leayercraft*, 35 N. Y. Civ. Proc. Rep. 159, holding that injunction will not lie to enforce building restriction against erection of apartment houses, where such enforcement would be inequitable; *Clark v. Martin*, 49 Pa. 289, enforcing covenant as to height of back buildings; *Van Koughnet v. Denison*, 11 Ont. App. Rep. 699, holding that restrictive covenants in deed of land will be specifically enforced by injunction, where person seeking to enforce covenant had nothing to do with changed position.

Cited in notes in 13 Eng. Rul. Cas. 108, 109, 111, on injunction to restrain breach of covenant; 15 E. R. C. 280, on necessity of purchaser observing restrictive stipulations known to him.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 262, on time to which hardship of remedy by specific performance must be referred; *Hollingsworth*, Contr. 408, on non-enforcement of covenants relating to land where the change of circumstances has

been such that the enforcement under the changed circumstances could not have been in the contemplation of the parties.

Distinguished in *Squire v. Campbell*, 6 L. J. Ch. N. S. 41, 1 Myl. & C. 459, on ground that in cited case there was a covenant and only a question was, whether benefit of it had been lost by covenantee.

— **Where neighborhood conditions have essentially changed.**

Cited in *McClure v. Leaycroft*, 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45, 35 N. Y. Civ. Proc. Rep. 159; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691,—refusing enforcement of covenants designed to preserve a residential section which was no longer fit for that use; *Carroll v. Asbury*, 28 Pa. Super. Ct. 354, on discharge of covenants by change of circumstances; *Doherty v. Allman*, L. R. 3 App. Cas. 709, 39 L. T. N. S. 129, 26 Week. Rep. 513, holding where there are negative words circumstances may change, so that though covenant still remains it would not be reasonable that it should be enforced; *Graham v. Craig* [1902] 1 Ir. Ch. 264, on loss of right to enforce restrictive covenant by alteration of character of adjoining lands.

Cited in note in 28 L.R.A.(N.S.) 707, on enforcement of restrictive covenant as affected by change in neighborhood.

— **Where complainant has assented to or aided in changes.**

Cited in *Coughlin v. Barker*, 46 Mo. App. 54; *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14; *Ocean City Asso. v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 891, 1 Ann. Cas. 601; *Perkins v. Coddington*, 4 Robt. 647; *Lattimer v. Livermore*, 72 N. Y. 174,—holding right is defeated by plaintiff's own violation of covenant; *Ewertsen v. Gerstenberg*, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1050, holding restrictions made unenforceable by acts of grantor and his grantees changing neighborhood so as to make them oppressive; *Duncan v. Central Pass. R. Co.* 85 Ky. 525, 4 S. W. 228, holding restrictions discharged by sale of part of lots free from them; *Peek v. Matthews*, L. R. 3 Eq. 515, 16 L. T. N. S. 991, 15 Week. Rep. 689, holding covenant to secure uniformity in mode of building not enforceable after breach by other covenantors had been allowed.

Referred to as leading case and distinguished in *Van Koughnet v. Denison*, 11 Ont. App. Rep. 699, where acts relied on as having changed character of square and surrounding property, were acts to which plaintiff was not party.

Distinguished in *Orne v. Fridenberg*, 143 Pa. 487, 24 Am. St. Rep. 567, 28 W. N. C. 545, 22 Atl. 832; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145,—where change was in no way attributable to complainant; *Knight v. Simmonds*, 65 L. J. Ch. N. S. 583 [1896] 2 Ch. 294, 65 L. J. Ch. N. S. 583, 74 L. T. N. S. 563, 44 Week. Rep. 580, where there was no material departure from scheme originally adopted and no substantial change; *Mitchell v. Steward*, L. R. 1 Eq. 541, 35 L. J. Ch. N. S. 393, 14 L. T. N. S. 134, 14 Week. Rep. 453, where plaintiff had not proceeded against person who had sold beer at back of his premises in violation of covenant before proceeding against defendant who had done likewise on his own; *Reilly v. Otto*, 108 Mich. 330, 66 N. W. 228, where all of complainant's breaches of the conditions were in law related to a time prior to the restrictive covenant; *Kilbey v. Haviland*, 24 L. T. N. S. 353, 19 Week. Rep. 698, where there was no intention to relax stipulation in covenant as to submission of building plans to vendors in allowing erection of temporary hovel; *Kemp v. Sober*, 1 Sim. N. S. 517, 20 L. J. Ch. N. S. 602, 15 Jur. 458, where plaintiff permitted houses to be used as schools and defendant agreed to let premises for ladies' school in violation of covenant; *Johnstone v. Hall*, 2 Kay & J. 414, 25

L. J. Ch. N. S. 462, 2 Jur. N. S. 780, 4 Week. Rep. 417, where it was sought to restrain use of premises for school, other schools being carried on upon same estate, but without proof they were allowed to be carried on in violation of like covenants as that sought to be enforced: *Western v. Maedermott*, L. R. 2 Ch. 72, 12 Jur. N. S. 366, 15 L. T. N. S. 641, 15 Week. Rep. 265, where breach of covenant immediately affected enjoyment of house of plaintiff, though there had been other breaches.

Explained in *Sayers v. Collyer*, L. R. 24 Ch. Div. 180, L. R. 28 Ch. Div. 103, 54 L. J. Ch. N. S. 1, 51 L. T. N. S. 723, 33 Week. Rep. 91, 13 Eng. Rul. Cas. 101, 49 J. P. 244, 52 L. J. Ch. N. S. 770, 48 L. T. N. S. 939, 32 Week. Rep. 200, 47 J. P. 741, holding plaintiff barred from enforcing covenant by acquiescence: *German v. Chapman*, L. R. 7 Ch. Div. 271, 47 L. J. Ch. N. S. 250, 37 L. T. N. S. 685, 26 Week. Rep. 149, holding right to enforce covenant as to nature and use of buildings to be erected not waived by giving permission to one purchaser to open school in his house.

— Against grantees of covenantor.

Cited in *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, holding restrictive covenant binding because part of the estate purchased and not because of assignment to purchaser; *Weyman v. Ringold*, 1 Bradf. 40, holding grantee bound only when covenant is incident to a granted estate: *Ball v. Milliken*, 31 R. I. 36, 37 L.R.A.(N.S.) 623, 76 Atl. 789, Ann. Cas. 1912B, 30, holding that specific performance of contract to convey land for breach of condition as to use thereof will not be decreed where breach was made by prior owners, and present owner might believe that condition was waived; *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911, holding personal covenant enforceable against one who took with notice; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676, holding covenants for mercantile privileges on a tract of land at a railroad junction were personal; *Tulk v. Moxhay*, 2 Phill. Ch. 774, 18 L. J. Ch. N. S. 83, 12 L. T. O. S. 469, 15 Eng. Rul. Cas. 254, 1 Hall & Tw. 105, 13 Jur. 89, holding question of enforcement against purchaser with notice does not depend upon whether covenant runs with land but on burdens incident to estate.

Cited in note in 15 E. R. C. 280, on necessity of purchaser observing restrictive stipulations known to him.

Referred to as leading case and distinguished in *Craig v. Greer* [1899] 1 Ir. Ch. 258, where defendants held under series of instruments which repeatedly and expressly mentioned restrictions and covenants as still subsisting and affecting tenement in question.

Distinguished in *Osborne v. Bradley* [1903] 2 Ch. 446, 73 L. J. Ch. N. S. 49, 89 L. T. N. S. 11 where covenant was taken by vendor for his own benefit.

— Who may enforce.

Distinguished in *Patchling v. Dubbins*, 1 Kay. 1, 17 Jur. 1113, 2 Week. Rep. 2, where landlord stipulated for benefit of several tenants not to build upon opposite land and their right was not joint.

Restrictive covenants.

Referred to as leading case in *Mackenzie v. Childers*, L. R. 43 Ch. Div. 265, 59 L. J. Ch. N. S. 188, 62 L. T. N. S. 98, 38 Week. Rep. 243, holding vendors bound by covenants as to building scheme, though they did not expressly covenant.

Cited in *Barron v. Richards*, 3 Edw. Ch. 96, on restrictive covenants for protection of a neighborhood; *Roth v. Jung*, 79 App. Div. 1, 79 N. Y. Supp. 822, holding erection of flat or tenement no violation of covenant for exclusive residence uses made when "dwelling" had no distinctive meaning.

Equitable remedies to protect rights in land.

Cited in *Brooke v. Kavanagh*, Ir. L. R. 23 Eq. 97, on equitable principles governing cases of alleged waste or breach of covenants as to use; *Shrewsbury & B. R. Co. v. Stour Valley R. Co.* 2 DeG. M. & G. 866, refusing on the facts to apply the doctrine of loss of equities by acquiescence in changed conditions.

When covenants runs with land.

Cited in *Savage v. Mason*, 3 Cush. 500, to the point that covenant is said to run with land, when either liability to perform it or right to take advantage of it passes to assignee of land.

6 E. R. C. 721, *CLINAN v. COOKE*, 9 Revised Rep. 3, 1 Sch. & Lef. 22.

Construction of statute of frauds.

Cited in *Workman v. Guthrie*, 29 Pa. 495, 72 Am. Dec. 654, holding statute does not say written agreement shall bind, but that unwritten agreement shall not bind.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 145-147, 150, on fraud as principal foundation for specific performance of partly performed contract within statute of frauds.

Taking contract for sale or use of lands out of statute of frauds.

Cited in *Caldwell v. Carrington*, 9 Pet. 86, 9 L. ed. 60, holding case taken out of statute by complete execution by conveyance of land: *Keatts v. Rector*, 1 Ark. 391, holding courts of equity will enforce specific performance of contract within statute when the parol agreement has been partly carried into effect; *Eastburn v. Wheeler*, 23 Ind. 305, holding true ground of relief against statute is that of fraud; *Moale v. Buchanan*, 11 Gill & J. 314, holding where part performance is relied upon, fact agreement was partly by parol and partly in writing can make no difference; *Hibbard v. Whitney*, 13 Vt. 21, holding part performance will never enable party to sustain an action at law in direct violation of terms of statute.

Cited in note in 15 E. R. C. 413, on effect of part performance of lease.

Cited in *Browne*, Stat. Frauds, 5th ed. 570, on effect of part performance of oral agreement.

— Sufficiency of part performance.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, on what constitutes sufficient part performance; *Broek v. Cook*, 3 Port. (Ala.) 464, holding that parol contract for sale of lands, accompanied with possession and improvements, may be specifically enforced; *Arguello v. Edinger*, 10 Cal. 150, holding nothing can be regarded as part performance, to take case out of operation of statute, which does not place party in situation which is a fraud upon him, unless contract be executed; *Sands v. Thompson*, 43 Ind. 18, holding exchange of property insufficient to take contract out of statute; *Moreland v. Lemasters*, 4 Blackf. 383, holding purchaser's taking possession of estate, and making improvements on same, under parol contract of sale, sufficient part performance to take case out of statute; *Ham v. Goodrich*, 33 N. H. 32, holding taking possession of land, rendition of services and making of repairs was not enough; *Ann Berta Lodge* No. 42, 1 O. O. F. v. *Leverton*, 42 Tex. 18, holding same as to delivery of possession; *Allen's Estate*, 1 Watts & S. 383, holding same as to delivery of possession of part of property in pursuance of oral agreement; *Pepper v. Carter*, 11 Mo. 540, holding where there is such part performance of parol contract as places party performing it in situation which is fraud upon him unless agreement is executed, equity will not permit party to protect

himself from executing contract, by pleading that it was not in writing: *Dean v. Anderson*, 34 N. J. Eq. 496, to same effect; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, holding case taken out of statute where services were of peculiar character after performance of which party could not be placed in statu quo or compensated in damages; *Anthony v. Leftwich*, 3 Rand. (Va.) 238 (dissenting opinion), as to what constitutes part performance; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391, denying importance of distinction between purchaser taking and vendor delivering possession; *Bowen v. Warner*, 1 Pinney (Wis.) 600, holding act of remaining in possession insufficient; *Ducie v. Ford*, 138 U. S. 587, 34 L. ed. 1091, 11 Sup. Ct. Rep. 417, holding withdrawal in favor of another and refraining to prosecute adverse claim to mineral lode insufficient; *Butler v. Church*, 18 Grant. Ch. (U. C.) 190 (dissenting opinion); *Greenshields v. Barnhart*, 3 Grant. Ch. (U. C.) 61 (dissenting opinion); *Freeman v. Harrington*, 5 N. S. 352,—holding possession and use of land sufficient; *Maddison v. Alderson*, L. R. 8 App. Cas. 467, 52 L. J. Q. B. N. S. 737, 49 L. T. N. S. 303, 31 Week. Rep. 820, on doctrine of part performance.

Cited in *Pomeroy Spec. Perf.* 2d ed. 136, on part performance of contract within statute of frauds; *Pomeroy, Spec. Perf.* 2d ed. 164, on possession of land as part performance of contract within statute of frauds; 1 *Beach, Contr.* 843, on acts which do not constitute part performance of contract; 1 *Beach, Contr.* 99, on necessity of certainty in contract; *Browne Stat. Frauds*, 5th ed. 599, on purchaser going into possession as part performance within statute of frauds; 1 *Devlin, Deeds*, 3d ed. 212, on possession of realty as ground for enforcement of parol agreement to purchase.

Disapproved in *Lenington v. Campbell, Tappan* (Ohio) 137, holding part performance does not take any case out of the statute.

—Payment as part performance.

Cited in *Townsend v. Houston*, 1 Harr. (Del.) 532, 27 Am. Dec. 732 (affirming 1 Del. Ch. 416, 12 Am. Dec. 109), on sufficiency of part payment to take contract out of statute and proof of terms of contract after part performance has been established; *Finucane v. Kearney*, *Freem. Ch. (Miss.)* 65, holding payment of part or whole of purchase money insufficient to take case, out of statute, where there is no other circumstances to induce interference of court; *Hood v. Bowman*, *Freem. Ch. (Miss.)* 290, holding payment of part of purchase money insufficient to remove case from operation of statute; *Shipman v. Shipman*, 65 N. J. Eq. 556, 56 Atl. 694; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Garner v. Stubblefield*, 5 Tex. 552; *Poland v. O'Connor*, 1 Neb. 50, 93 Am. Dec. 327,—holding same as to part payment; *Brown v. Brown*, 33 N. J. Eq. 650; *Kidder v. Barr*, 35 N. H. 235,—holding same as to payment of price; *Le Targe v. De Tuyll*, 1 Grant. Ch. (U. C.) 227; *Johnson v. Canada Co.* 5 Grant. Ch. (U. C.) 558; *Lloyd v. Strobbridge*, 16 Nat. Bankr. Reg. 197, Fed. Cas. No. 8,435,—holding same as to payment of purchase money; *Hatcher v. Hatcher*, *McMull. Eq.* 311, holding same as to payment of money; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, holding payment of whole consideration insufficient to take case out of statute; *Townsend v. Fenton*, 32 Minn. 482, 21 N. W. 726, holding insolvency of vendor at time contract is made does not take contract out of statute in case of part payment; *Galway v. Shields*, 1 Mo. App. 546, as to whether payment or partial payment takes case out of statute; *Jackson v. Cutright*, 5 Munf. 308; *Russell v. Briggs*, 165 N. Y. 500, 53 L.R.A. 556, 59 N. E. 303 (dissenting opinion); *Malins v. Brown*, 4 N. Y. 403,—as to whether payment of money will take contract as to lands out of statute; *Miller v.*

Lorentz, 39 W. Va. 160, 19 S. E. 391, holding that payment of purchase money will not take verbal contract to sell land out of statute of frauds, although vendor has become insolvent: *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530, holding mere payment of purchase money in whole or in part not sufficient.

Cited in 1 Devlin, Deeds, 3d ed. 252; Browne, Stat. Frauds, 5th ed. 592,—on payment as part performance of contract within statute of frauds; *Pomeroy*, Spec. Perf. 2d ed. 159–161, on payment of the purchase price as insufficient part performance of contract within statute of frauds.

—Partpayment coupled with other acts.

Cited in *Church v. Sterling*, 16 Conn. 388, holding contract relieved from any objection arising from statute by payment, entry and occupation, and improvements on the lands; *Bassler v. Niesly*, 2 Serg. & R. 352, holding payment of part of purchase money and delivery of possession sufficient to take case out of statute where contract is clearly proved; *Smith v. Smith*, 1 Rich. Eq. 130, holding payment of purchase money and continued possession sufficient; *Quinn v. Quinn*, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808, holding exception to general rule that payment will not take case out of statute is made in case of agreement to make child heir at law by person adopting it; *Sutton v. Sutton*, 13 Vt. 71, holding taking possession and payment of debts for owner sufficient part performance to justify equity in compelling execution of writings not fully executed; *Smith v. Finch*, 8 Wis. 245, holding that verbal contract to sell land will not be enforced upon payment of part of purchase price and delivery of mortgage to secure balance, unless vendee has been let into possession.

Cited with special approval and distinguished in *Le Farge v. De Tuyll*, 1 Grant, Ch. (U. S.) 227, holding continued possession and payment sufficient to take contract out of statute.

—Implied statutory negation of part payment rule respecting lands.

Cited in *Fannin v. McMullin*, 2 Abb. Pr. N. S. 224, holding partial payment of purchase money will not take case out of statute, because legislature having said it should have that effect in case of goods, and having omitted to say so in respect to lands, it is to be inferred that they meant partial payment should not make contract binding in case of lands.

—Necessity that the contract be the inducement to the partial performance.

Cited in *Weber v. Marshall*, 19 Cal. 447, holding it should clearly appear improvements were made in reference to, or induced by the contract, where parol contract rests upon oral proof, possession, and improvements made; *Phillips v. Thompson*, 1 Johns. Ch. 131, holding that if party sets up part performance to take parol agreement out of statute, he must show acts unequivocally referring to, and resulting from that agreement; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378, holding acts must be done in strict pursuance of specific and certain agreement.

—Degree of proof required.

Cited in *Harris v. Kniekerbocker*, 5 Wend. 638, holding parol contract for sale of lands not enforceable in equity unless part performance is clearly proved; *Phillips v. Thompson*, 1 Johns. Ch. 131, holding that to entitle party to take case out of statute of frauds on ground of part performance, he must make out by clear and satisfactory proof existence of contract as laid in bill.

Sufficiency of memorandum to satisfy statute of frauds.

Cited in *Barry v. Coombe*, 1 Pet. 640, 7 L. ed. 295, holding courts of equity are not particular with regard to direct and immediate purpose for which

written evidence of contract was created; *Hodgkins v. Bond*, 1 N. H. 284, holding writings under the statute of frauds must have such authenticity that they cannot be contradicted nor explained by parol testimony; *Sale v. Darragh*, 2 Hill. 184, on inadmissibility of parol proof to help out writing required by statute as evidence of agreement; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, holding memorandum ought to state terms of contract with reasonable certainty, so substance of it can be understood from writing itself without recourse to parol proof; *Peltier v. Collins*, 3 Wend. 459, 20 Am. Dec. 711, holding parol evidence inadmissible to show warranty; *Ma Gee v. Blankenship*, 95 N. C. 563, holding it a sufficient evidence in writing, when writing contains all stipulations assumed by person to be charged, and authenticated by his signature; *Dalton v. McBride*, 7 Grant, Ch. (U. C.) 288 holding a signed agreement stating the subscribers had purchased the lots of land set opposite their names and agreed to make payments according to the conditions of sale contained a sufficient reference to such conditions of sales as to incorporate them into contract and satisfy statute of frauds.

Cited in *1 Meehem, Sales*, 356, on several papers as constituting note or memorandum within statute of frauds; *Pomeroy, Spec. Perf.* 2d. ed. 119, 120, on contracts by correspondence as constituting memorandum required by statute of frauds; *Pomeroy, Spec. Perf.* 2d ed. 129, 130, 132, on subject matter of memorandum required by statute of frauds; *Browne, Stat. Frauds*, 5th ed. 467, on form of memorandum required by statute of frauds; *Browne, Stat. Frauds*, 5th ed. 471, on memorandum required by statute of frauds being contained in more than one paper.

— Descriptions of land or other subject.

Cited in *Farwell v. Mather*, 10 Allen, 322, 87 Am. Dec. 641, holding memorandum which does not show whether it relates to estate in fee, for life, or for years, insufficient to take case, out of statute; *Hornsby v. Johnston*, 9 N. S. 1, holding statute not satisfied by memorandum of land contract wherein description was vague; *Stretton v. Stretton*, 24 Grant, Ch. (U. C.) 17, holding that a memorandum of sale of land is insufficient to satisfy the statute of frauds where it defines the land by reference to a certain survey that had not been made at the time but was afterwards made.

Receipt as memorandum of sale or lease of lands.

Cited in *Soles v. Hickman*, 20 Pa. 180, holding court will not enforce specific performance of agreement for sale of land, of which there is no written evidence except receipt for part of purchase money, defining lot to be sold but not defining price or any other terms of sale.

Exclusion of parol testimony to vary or contradict written instrument.

Referred to as leading case *Blakely v. Hampton*, 3 McCord, L. 469, holding parol proof admissible on part of defendant to show note was by mistake given for more than was really due.

Cited in *Ellis v. Burden*, 1 Ala. 458, holding if any material term of written contract has been omitted by the parties, it cannot be supplied by parol; *Godwin v. Collins*, 4 Houst. (Del.) 28, to same effect; *Wyche v. Greene*, 11 Ga. 159, holding mistake in written contract may be shown by parol proof; *Doyle v. Teas*, 5 Ill. 202, holding parol proof inadmissible where language itself shows parties using it had no fixed and definite idea; *Streator v. Jones*, 10 N. C. (3 Hawks) 423 (dissenting opinion), on admissibility of parol evidence to vary a written contract; *Westbrook v. Harbeson*, 2 McCord, Eq. 112, holding complainant in suit to correct deed cannot introduce parol testimony to set up different

deed than that executed; *Ryan v. Goodwyn*, McMull. Eq. 451, holding parol testimony inadmissible to control legal effect of deed; *Stretton v. Stretton*, 24 Grant, Ch. (U. C.) 20, holding definition of lands referred to in agreement for sale thereof not ascertainable by parol.

Cited in notes in 17 L.R.A. 272, on extent of rule that parol evidence is inadmissible to vary, etc. written contract; 28 L.R.A.(N.S.) 876, on inadmissibility of parol evidence to vary a written instrument; 22 Eng. Rul. Cas. 865, on parol evidence as to contract sought to be specifically enforced.

Cited in *Browne Stat. Frauds* 5th ed. 543, on admissibility of oral evidence of written contract.

Distinguished in *Creigh v. Boggs*, 19 W. Va. 240, where mistake was admitted in answer.

Limited in *Hunter v. Bilyew*, 30 Ill. 228, holding parol evidence admissible to show mistake in written contract; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, holding plaintiff may show mistake in agreement by parol proof.

Reformation of agreement and specific performance as reformed.

Referred to as leading case in *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133, holding written agreement respecting sale of real estate cannot be rectified in equity court by parol testimony and then enforced.

Cited in *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205, holding parol testimony inadmissible to vary terms of written contract, for purpose of having it amended and specifically enforced; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, holding operation of statute of frauds cannot be avoided by reformation of instrument involving specific enforcement of oral agreement within the statute, or by adding term which would make it convey interest or secure right conveyable or securable only in writing unless plea of statute is met by estoppel; *Streator v. Jones*, 10 N. C. (3 Hawks) 423 (dissenting opinion), as to whether parol proof is admissible on part of plaintiff who seeks specific performance of agreement in writing and wishes to vary it by parol proof; *Davis v. Ely*, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138, holding executory contract for sale of land cannot be corrected, upon parol testimony by making it include larger quantity than is stated in writing and thereafter be enforced; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910, holding contract for sale of lands cannot be changed by parol and then specifically enforced.

Cited in *Pomeroy, Spec. Perf.* 2d ed. 343, on agreement being binding although alleged by plaintiff as ground for reforming agreement and enforcing specific performance of contract as reformed.

Distinguished in *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33, where complainant sought to show mistake and have bond reformed.

Specific performance of contract.

Cited in *Patrick v. Sears*, 19 Fla. 856, holding contract to sell lands to be selected by agent not specifically enforceable, parol evidence being inadmissible to supply description; *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427 (reversing 1 Johns. Ch. 273), holding when part performance is made basis of claim for specific execution of an agreement, parol proof may be connected with written evidence for purpose of making out the contract; *Mason v. Scott*, 22 Grant, Ch. (U. C.) 592, holding party seeking to enforce land contract could not supply omission therein by oral evidence.

Cited in *Pomeroy, Spec. Perf.* 2d ed. 89, on agreement being binding, although a formal contract is to be prepared; *Pomeroy, Spec. Perf.* 2d ed. 216, 217, on subject matter of contract as essential to specific performance; *Pomeroy, Spec. Perf.*

2d ed. 314, on freedom from mistake as essential to specific enforcement of contract; Pomeroy, Spec. Perf. 2d ed. 192, 194, on non-granting of specific performance of partially performed contract within statute of frauds where contract is ambiguous or uncertain and is not clearly proved; Hollingsworth, Contr. 536, as to when specific performance of contract will be enforced; 2 Beach, Contr. 1178, on right to specific performance of oral contract for conveyance of land.

— Defenses resting in parol.

Cited with special approval in *Best v. Stow*, 2 Sandf. Ch. 298, holding defendant in answer to bill for specific performance may prove by parol evidence, that written instrument sought to be enforced against him does not correctly and truly express agreement of parties.

Cited in *Bradbury v. White*, 4 Me. 391, holding parol evidence which goes to alter written instrument cannot be received in court of equity any more than in court of law, but party to be charged may show fraud, mistake or surprise, when specific performance is asked; *Chambers v. Lecompte*, 9 Mo. 575, on distinction between parol in defense and bill founded thereon; *Jarrett v. Johnson*, 11 Gratt. 327, holding there is well settled distinction, in regard to admission of parol evidence between seeking and resisting specific performance of an agreement.

Sufficiency of proof of essential terms of contract or of subject matter.

Cited in *Church of the Advent v. Farrow*, 7 Rich. Eq. 378, holding certain evidence inadequate to define subject to be conveyed, and purposes and estate for which it was to be conveyed; *Baker v. Wiswell*, 17 Neb. 52, 22 N. W. 111, holding court cannot supply by conjecture what should be established by clear and satisfactory proof; *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding court cannot determine sum to be paid as premium for insurance where parties have not agreed upon such sum.

Cited in *Browne*, Stat. Frauds, 5th ed. 615, on sending case to master to ascertain terms of oral contract when not sufficiently shown.

Distinguished in *Booz v. Philadelphia & L. Transp. Co.* 124 Fed. 430, where statement of lien and purpose for which it was created were held not so ambiguous or uncertain as to be bad on demurrer.

Necessity of fixing term and other particulars in agreement for lease.

Cited in *Delashmutt v. Thomas*, 45 Md. 140, holding contract leaving to lessor absolute right to fix rate of rent, and terms upon which he would let property to lessee after expiration of term conferred no rights upon lessee which he could enforce; *Reed v. Campbell*, 43 N. J. Eq. 406, 4 Atl. 433, holding agreement that lessee shall have first right to lease premises not enforceable; *Whitlock v. Duffield*, Hoffm. Ch. 110, holding lease containing covenant to grant new lease upon terms to be fixed by the parties not enforceable; *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377, holding covenant void where parties failed to state term for which new lease was to be given; *Hodges & Co. v. Howard*, 5 R. I. 149, holding term for which lease was to be granted cannot be ascertained by anything short of written proof; *Laird v. Boyle*, 2 Wis. 431, 7 Mor. Min. Rep. 301, 12 Mor. Min. Rep. 82, holding that a provision in a lease for a renewal which is silent as to the terms and the length of time the lease should be renewed is void for uncertainty.

Cited in 2 *Underhill, Land. & T.* 1367, on covenant to re-let on expiration of existing term void for uncertainty; 1 *Underhill, Land. & T.* 386, on necessity that writing to take case out of statute of frauds state duration of term.

Distinguished in *Kelso v. Kelly*, 1 Daly, 419, where rent was to be fixed by arbitrators.

Specifically enforceable leases.

Cited in *Dawson v. Graham*, 41 U. C. Q. B. 532, holding no court will decree specific performance of agreement for lease where there is no definite term expressed for which lease is to be granted.

Authority of agent to execute writing for principal.

Cited in *Turnbull v. Trout*, 1 Hall, 336, holding authority to execute written agreement in another's name need not be in writing; *Hornsby v. Johnston*, 9 N. S. 1, holding signature of person as agent sufficient to bind principal if agent has authority.

Cited in 1 Brandt, *Suretyship* 3d ed. 210, on non-necessity that agent who signs be appointed in writing; Brown, *Stat. Frauds*, 5th ed. 504, on appointment without writing of agent to sign memorandum required by statute of frauds. Pomeroy, *Spec. Perf.* 2d ed. 115, upon whom authority to execute memorandum required by statute of frauds may be conferred.

Validity of parol authority to sell land.

Cited in *Brandon v. Pritchett*, 126 Ga. 286, 55 S. E. 241, 7 Ann. Cas. 1093. (dissenting opinion), on delegation of authority to sell land by parol; *Chaplin v. Parish*, 11 Paige, 405, holding statutes do not require that agent of vendor has written power to subscribe executory contract of sale of land, for his principal; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661, holding parol agency to sign contract for vendor of land, etc. sufficient.

Cited in note in 15 Eng. Rul. Cas. 357, 358, on validity of parol authority to sell land.

Cited in 1 Devlin, *Deeds*, 3d ed. 631, on non-necessity that authority of agent contracting to sell land be under seal or in writing.

Distinguished in *Parrish v. Koons*, 1 Pars. Sel. Eq. Cas. 79, denying under statute legality of contract in writing for purchase or sale of lands, made by an agent created by parol, but only in reference to specific execution of such contract; *Mortimer v. Cornwell*, Hoffm. Ch. 351, where denial of agent's power in answer was wholly uncontradicted by evidence.

Collateral promises.

Cited in *Hodgkins v. Bond*, 1 N. H. 284, holding promise to pay existing debt of another is collateral to original contract.

Connection of writings by reference.

Cited in *Robinson v. Heard*, 15 Me. 296, holding paper inadmissible because not made part of bond, nor referred to in bond; *Wallace v. McCollough*, 1 Rich. Eq. 426, on making separate writing part of instrument by reference, to it therein.

Cited in 1 Brandt, *Suretyship*, 3d ed. 192, on necessity that, in order that several papers may be read together, they must on their face refer to each other, and, their mutual relation cannot be shown by parol evidence.

—Parol evidence.

Cited in *Crockett v. Green*, 3 Del. Ch. 466, holding that deficiency in memorandum as to terms or subject matter cannot be supplied by extraneous evidence, unless extraneous matter be referred to in memorandum, so as to be, in legal effect incorporated into it; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67, holding parol proof admissible to show what was meant by letter referring to trust, where written evidence clearly established the trust; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243, holding connection between signed and unsigned papers

cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred; *Re Washington Park*, 52 N. Y. 131, holding parol evidence may be resorted to, to prove identity of paper referred to in written instrument; *Blair v. Snodgrass*, 1 Sneed, 1, holding when several papers are relied on for written evidence of sale of land, they must afford intrinsic proof that they relate to same contract of sale.

Retention of bill in equity to allow damages or compensation.

Cited in *Kelly v. Allen*, 34 Ala. 663, on retention of bill as suit for compensation when it has been filed for specific performance and failed in that; *Woodman v. Freeman*, 25 Me. 531, holding court of equity must give relief by compensation or damages when contract or conveyance is properly set aside or rescinded under circumstances requiring, that some compensation should be made to one of the parties to adjust equities and do complete justice; *Beck v. Allison*, 4 Daly (N. Y.) 421, holding that court of equity may if specific performance is denied, award issue to ascertain plaintiff's damage; *Almy v. Wilbur*, 2 Woodb. & M. 371. Fed. Cas. No. 256, holding in bill in equity to compel redemption of mortgage on personal property against one who held possession of and claimed it, he may be required to pay damages for value of the property, if destroyed; *Ferguson v. Sanger*, 5 N. Y. Leg. Obs. 43, Fed. Cas. No. 4,751, holding court of equity will not take jurisdiction of suit for damages when that is sole object of bill, and when no other relief can be given; *Ellis v. Ellis*, 16 N. C. (1 Dev. Eq.) 398, holding where special circumstances prevent plaintiff in suit for specific performance from recovering back money paid at law, equity may decree its return, though refusing specific performance; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521, denying specific performance of contract to convey land but holding orator entitled to amount paid; *Payne v. Graves*, 5 Leigh, 561, holding where bill is filed to carry contract into execution, plaintiff having paid purchase money, and court refuses specific execution, it may decree repayment of the purchase money.

Apportionment of costs between parties.

Cited in *Coleman v. Brooks*, 15 Phila. 302, 39 Phila. Leg. Int. 158, apportioning costs between the parties where plaintiff failed in litigation of principal issued.

Effect of lapse of time upon rights of title-holder seeking evidence of title.

Cited in *Foulk v. Brown*, 2 Watts, 209, holding lapse of time shall not prejudice person who has title, while seeking discovery of that title from persons in possession of evidences of it.

Right to election where thing granted is expressed by an alternative.

Cited in note in 2 Eng. Rul. Cas. 762, on grantee's right of election where thing granted is expressed by an alternative.

6 E. R. C. 733, *SUTHERLAND v. BRIGGS*, 1 Hare, 26, 5 Jur. 1151, 11 L. J. Ch. N. S. 36.

Necessity of mutuality in contract sought to be specifically enforced.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, on absence of necessity for mutuality in executed trust; *Estes v. Furlong*, 59 Ill. 298, holding party who has not signed agreement relating to lands, may enforce it against one who has signed it, although he could not himself have been compelled to

execute it; *Morel v. Mead*, 3 N. M. 39, 1 Pac. 222, holding an optional right to purchase a mine may be specifically enforced though unilateral.

— **Inability of defendant to make the agreed title.**

Cited in *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732, holding want of evidence of defendant's title to land in controversy, no defense where vendee insists upon performance of contract, and is willing to accept vendor's title.

Cited in note in 10 L.R.A.(N.S.) 121, on right of vendee to specific performance with abatement from price where vendor unable to give clear title.

Memorandum under statute of frauds signed by one person only.

Cited in *Hodges v. Kowing*, 58 Conn. 12, 7 L.R.A. 87, 18 Atl. 979, holding weight of authority is that statute of frauds is satisfied by signature to contract of party sought to be charged only.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 109, by what parties memorandum required by statute of frauds is to be signed.

Part performance taking oral agreement out of statute of frauds.

Cited in *Towle v. Jones*, 19 Abb. Pr. 449, 1 Robt. 87 (dissenting opinion), on existence of equitable cause of action upon oral contract as to land partly performed; dissenting opinion in *Butler v. Church*, 18 Grant, Ch. (U. C.) 190 (affirming 16 Grant, Ch. (U. C.) 205), on taking case out of statute; *Jennings v. Robertson*, 3 Grant, Ch. (U. S.) 513, on part performance of oral contract for purchase of lands.

Cited in *Browne Stat. Frauds*, 5th ed. 582, on sufficiency of part performance of contract within statute of frauds; *Pomeroy*, Spec. Perf. 2d ed. 153, on necessity that acts of part performance be done in pursuance of agreement alleged and with the design of carrying it into complete execution; *Pomeroy Spec. Perf.* 2d ed. 195, on admissibility of parol evidence where contract partly performed.

— **Making improvements fitting to alleged contract or estate.**

Cited in *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167 (dissenting opinion), on rule that improvements made by lessee of kind natural to existence of contract for lease, made on faith of it and subsequent to it may establish partial performance of the contract; *Butler v. Church*, 16 Grant, Ch. (U. C.) 205, holding that continued possession by tenant coupled with acts inconsistent with tenancy is sufficient part performance to let in parol evidence of contract of sale.

Cited in *Browne Stat. Frauds*, 5th ed. 605, on tenant continuing in possession and making improvements as showing a change in the holding; 1 *Devlin, Deeds*, 3d ed. 239, on erection of improvements by vendee under a parol contract as part performance; *Pomeroy*, Spec. Perf. 2d ed. 172, on sufficiency of possession as part performance of contract within statute of frauds; *Pomeroy*, Spec. Perf. 2d ed. 175, on possession of tenant continued from previous tenancy as sufficient part performance within statute of frauds; *Pomeroy*, Spec. Perf. 2d ed. 179, on making of valuable improvements as sufficient part performance of contract within statute of frauds.

6 E. R. C. 747, *FLIGHT v. BOOTH*, 1 Bing. N. C. 370, 4 L. J. C. P. N. S. 66, 1 Scott, 190.

Avoidance or rescission of contract on account of misrepresentation, mutual mistake, or fraud.

Cited in *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16, holding that mistaken representations, not going to main inducement to plaintiff in

making contract of compromise, will not justify rescission, after large expenditures have been made; *Chase v. Willard*, 67 N. H. 369, 39 Atl. 901, holding that technical breach of warranty of title to chattels, resulting in no appreciable damage to vendee does not give him right to rescind contract; *Wheaton v. Fay*, 62 N. Y. 275, holding that contract may be avoided because of misrepresentation although there was no intent to defraud; *Ketchum v. Catlin*, 21 Vt. 191, holding that contract, which is made while parties are under mutual mistake as to material facts affecting its subject matter, is invalid and may be avoided in court of law; *Pope v. Pieton S. B. Co.* 6 N. S. 18, holding that fraud and misrepresentation are good defense in action for goods sold and delivered; *Molsons Bank v. Turley*, 8 Ont. Rep. 293, holding that guaranty that certain goods represented by warehouse receipts were actually held in warehouse is void where maker signed same upon representation of officer of plaintiff bank that such goods were so held.

Cited in note in 12 E. R. C. 293, on misrepresentation as ground for rescission of a contract.

Cited in *Hollingsworth, Contr.* 157, on effect of misrepresentation on validity of contract.

Contract of purchase of land because of misrepresentation or misdescription.

Cited with special approval in *Re Fawcett & Holmes's Contract* L. R. 42 Ch. Div. 150, 58 L. J. Ch. N. S. 763, 61 L. T. N. S. 105, holding purchaser must complete with compensation notwithstanding misdescription of area; *Re Puckett & Smith's Contract* [1902] 2 Ch. 258, 71 L. J. Ch. N. S. 666, 50 Week. Rep. 532, 87 L. T. N. S. 189, holding good title to property in accordance with contract not shown where it was represented as suitable for building purposes but had culvert lying underneath.

Cited in *Rayner v. Wilson*, 43 Md. 440, to the point that any misdescription of estate, so far affecting subject-matter of contract, that it may be reasonably supposed, that but for such misdescription, contract would not have been made, avoids contract; *Van Blareom v. Hopkins*, 63 N. J. Eq. 466, 52 Atl. 147, holding that purchaser at judicial sale of town lot advertised to be 100 feet front and 255 feet deep, will be required to specifically perform contract although lot was only 93 feet front and 255 feet deep, where he knew property; *Kelsey v. Northern Light Oil Co.* 54 Barb. 111 (dissenting opinion), on right to rescind contract because of misrepresentation in absence of fraud; *Rittenburg v. Freeman*, 33 Pa. Co. Ct. 467, 16 Pa. Dist. R. 8, holding that misdescription in material matter, upon which purchase may reasonably rely and did rely, is ground for avoidance of contract; *Cox v. Hoban*, 12 C. L. R. (Austr.) 256, holding that purchaser may rescind contract for purchase of land where misdescription is such that he would not have purchased it if correct description had been given; *Cottingham v. Cottingham*, 11 Ont. App. Rep. 624, holding that sale of land in bulk will not be rescinded for error in description, where price to be paid was intended to cover whole parcel; *Moorhouse v. Hewish*, 22 Ont. App. Rep. 172, holding that where city lot was described as having depth of 130 feet more or less; and had in fact depth of only 117 feet, specific performance of agreement was refused; *Canada Life Assur. Co. v. Peel General Mfg. Co.* 26 Grant, Ch. (U. C.) 477, holding that deficiency in quantity of land small in proportion to quantity sold, is not, necessarily, bar to specific performance of contract; *Re Davis & Cavey*, L. R. 40 Ch. Div. 601, 58 L. J. Ch. N. S. 143, 60 L. T. N. S. 100, 37 Week. Rep. 217, 53 J. P. 407, holding recovery of deposit on ground of misdescription can be had only

by raising question which affects validity of contract; *Jacobs v. Revell* [1900] 2 Ch. 858, 69 L. J. Ch. N. S. 879, 49 Week. Rep. 109, 83 L. T. N. S. 629, holding purchaser entitled to rescind where material part of property offered for sale was not vendor's.

Cited in *Hollingsworth, Contr.* 171, on invalidity of contract for sale of land because of misdescription affecting title, value or character of property sold; *Pomeroy, Spec. Perf.* 2d ed. 518, on vendor's right to specific performance where there has been a material misdescription in the contract.

6 E. R. C. 759, *VENEZUELA R. CO. v. KISCH*, 36 L. J. Ch. N. S. 849, L. R. 2 H. L. 99, 16 L. T. N. S. 500, 15 Week. Rep. 821.

Fraud, misrepresentation, or concealment in securing contract.

Cited in *Walker v. Walbridge*, 68 C. C. A. 569, 136 Fed. 19, holding where seller represented tract of land contained more than actual area thereof buyer could recover difference in value; *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325, holding defendants liable for damages sustained by purchasers of bonds purporting on their face to be first mortgage bonds, but being in reality second mortgage bonds; *Laner's Appeal*, 12 W. N. C. 165, on barring relief by agreement compromising fraud.

Cited in notes in 37 L.R.A. 595, on right to rely upon representations made to effect contract as basis for charge of fraud; 6 Eng. Rul. Cas. 815, on nondisclosure of material facts as ground for rescission of contract.

Cited in 2 *Beach, Contr.* 1602, on how far building and loan association is bound by acts of officers in making representations to members; *Hollingsworth, Contr.* 183, on necessity that representations actually deceive to constitute actionable fraud.

—As to ascertainable facts.

Cited with special approval in *Morrison v. Earle*, 5 Ont. Rep. 434, holding party may handle and read document, which if his attention were called to the matter would have caused him to make further inquiries, without being necessarily fixed with the knowledge such inquiries might have produced.

Cited in *American Freehold Land Mortg. Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Sabbe v. Corbett*, 69 Tex. 503, 6 S. W. 808,—holding when once it is established that there has been any fraudulent representation by which person has been induced to enter into contract it is no answer to his claim to be released from it to tell him he might have learned the facts; *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189, holding failure of passenger injured by railroad company to investigate truth of representations made to her regarding her physical condition for purpose of securing release from her no defense to cancellation of contract; *Crompton v. Beedle*, 83 Vt. 287, 30 L.R.A.(N.S.) 748, 75 Atl. 331, Ann. Cas. 1912A, 399, holding that one who induces sale of land by fraudulent representations as to value cannot avoid liability to recovery, on theory that vendor has no right to rely on his representations; *McClellan v. Scott*, 24 Wis. 81, holding every contracting party has absolute right to rely upon express statement of existing fact, truth of which is known to opposite party and unknown to him, as basis of mutual engagement; *Neiles v. Ontario Invest. Asso.* 17 Ont. Rep. 129, holding misrepresentation is not to be got rid of by constructive notice.

—Effect of.

Cited in *Bullivant v. Manning*, 41 U. C. Q. B. 517, holding contract induced by

fraud is not void but voidable and may be enforced by others than party guilty of fraud, in proper case.

— **Relief or remedy.**

Cited in *Webb v. Roberts*, 16 Ont. L. Rep. 279, on recovery of damages for deceit at law or securing relief by rescission in equity in case of contract of sale where there has been misrepresentation.

Misrepresentation in obtaining subscription for shares.

Cited in *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509, holding party not bound by note given in part payment of stock subscription secured by false representation; *Todd v. Mina Grande Min. Co.* 135 Ill. App. 152, holding that equity has jurisdiction to set aside sale of corporate stock induced by fraudulent representations of those in charge of corporation; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414, holding as against company itself shareholder may rescind contract of subscription procured through fraud of company, within reasonable time after discovery of the fraud; *Sawyer v. Menominee Loan & Bldg. Asso.* 103 Mich. 228, 61 N. W. 521 (dissenting opinion), on right of stockholder to relief against corporation for false representations in selling stock to him; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188, holding contracts to take stock in corporation, if induced by fraud, create no obligation, and injured party has right to have them abrogated; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360, holding that persons who have been induced by same fraudulent misrepresentation to subscribe to stock of corporation have common interest, and may join in suit to cancel subscription; *Cote v. Stadacona Ins. Co.* 6 Can. S. C. 193, on invalidity of contract to purchase shares induced by fraud.

Cited in note in 33 L.R.A. 724, 732, 735, on rescission for fraud or misrepresentation in procuring subscription to stock.

Cited in 2 Beach, Contr. 1330, 1331, on effect of fraud in procuring subscription to corporate stock.

— **In prospectus of common enterprise or company.**

Cited in *Morgan v. Skiddy*, 62 N. Y. 319, holding all material facts should be disclosed or at least none concealed in prospectus; *Cox v. National Coal & Oil Invest Co.* 61 W. Va. 291, 56 S. E. 494, holding that when prospectus misrepresenting condition of corporation is issued by promoter and directors of corporation, no other relation between parties need be shown, by person deceived thereby; *Petrie v. Guelph Lumber Co.* 11 Can. S. C. 450, holding alleged misrepresentations in prospectus insufficient to support action for deceit; *Farrell v. Portland Rolling Mills Co.* 3 N. B. Eq. 508, holding that directions adopting resolution to sell shares and to employ broker for purpose are not responsible for misrepresentations in prospectus issued by broker.

Cited in note in 7 E. R. C. 562, on right of purchaser of shares from original allottee to maintain action for misrepresentations in prospectus of corporation.

— **As to ascertainable facts respecting corporate stocks subscribed.**

Cited in *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *American Alkali Co. v. Salom*, 65 C. C. A. 284, 131 Fed. 46,—holding that as against corporation itself subscriber for stock is not bound to investigate truth of statements upon strength which he subscribed; *Sawyer v. Menominee Loan & Bldg. Asso.* 103 Mich. 228, 61 N. W. 521, holding failure of complainant to find out what by-laws of corporation were, where secretary represented they were interpreted in certain way, not a bar to his relief upon contract made in light of such representation.

Laches of defrauded subscriber to stock.

Cited in *Park v. Krigs*, 24 Tex. Civ. App. 650, 60 S. W. 905, holding reason for requiring diligence on part of stockholder who has been induced to take stock by fraud to take prompt measures to discover the fraud and rescind contract are first, that by remaining in company he may mislead others into becoming members of it upon credit of his name and second, that he may induce others to deal with corporation and give credit to it for same reason; *Farrell v. Manchester*, 40 Can. S. C. 339, (reversing 38 N. B. Rep. 364 which affirmed 3 N. B. Eq. 508), holding court will not refuse relief merely because of delay between repudiation and action where shareholder's shares have been fully paid up and he has repudiated within reasonable time.

Distinguished in *Oakes v. Turquand*, L. R. 2 H. S. 325, 36 L. J. Ch. N. S. 949, 16 L. T. N. S. 808, 15 Week. Rep. 120, 6 Eng. Rul. Cas. 879, where contract of subscription was obtained by fraud and subscriber's name was thereafter placed on register of shareholders.

Duty of promoters or solicitors to make full disclosure.

Cited in *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168, holding where person solicited to subscribe has no other information than that which agent chooses to convey, statements of agent ought to be characterized by utmost truth and candor.

Cited in 1 Page, Contr. 297, on necessity that promoters of corporations disclosing material facts regarding property transferred, by them to the corporation.

Relation of promoter to his company and future shareholders. •

Cited in *Cortes Co. v. Thumhauser*, 45 Fed. 730, holding there is fiduciary relation between promoters and between a promoter and company in its corporate capacity which imposes duty of full and fair disclosure of all material facts; *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, holding promoter stands in fiduciary relation to future shareholders; *Morgan v. Skiddy*, 62 N. Y. 319, holding when false prospectus has been issued no other relation or privity between parties need be shown, except that created by wrongful and fraudulent act of defendant in issuing or circulating the prospectus, and resulting injury to plaintiff.

Cited in note in 25 L.R.A. 100, on duties and liabilities of promoters to corporation and its members.

Decision of appeal on grounds other than those passed upon below.

Cited in *Watt v. South-West. Boom Co.* 19 N. B. 646 (dissenting opinion), on limitation of appeal to specific matter decided and appealed from; *Brown v. Vaughan*, 22 N. B. 258, holding court of appeal may support judgment of court appealed from on ground other than that upon which it was decided below.

6 E. R. C. 777, *ERLANGER v. NEW SOMBRERO PHOSPHATE CO.* L. R. 3 App. Cas. 1218, 48 L. J. Ch. N. S. 73, 39 L. T. N. S. 269, 27 Week. Rep. 65, affirming the decision of the Vice Chancellor, reported in 46 L. J. Ch. N. S. 425, L. R. 5 Ch. Div. 73, 36 L. T. N. S. 222, 25 Week. Rep. 436.

Promoters and their relation to company and shareholders.

Referred to as leading case in *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600, holding promoters stand in fiduciary relation to company and its stockholders.

Cited in *Las Ovas Co. v. Davis*, 35 App. D. C. 372; *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030; *Wills v. Nehalem Coal Co.* 52 Or. 70, 96 Pac. 528; *Commonwealth*

S. S. Co. v. American Shipbuilding Co. 197 Fed. 797,—holding that promoters stand in fiduciary relation to corporation in behalf of which they are acting; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, 40 L.R.A. (N.S.) 314, 89 N. E. 193, holding that duties of promoters as fiduciaries to company are matters of common law cognizance; *Brewster v. Hatch*, 122 N. Y. 319, 19 Am. St. Rep. 498, 25 N. E. 505, holding promoters of corporation occupy, before its organization, position of trust and confidence towards those whom they induced to invest in the enterprise; *Hood v. Eden*, 36 Can. S. C. 476 (dissenting opinion), on definition of term promoter; *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. Div. 396, 48 L. J. C. P. N. S. 257, 40 L. T. N. S. 168, 27 Week. Rep. 836, holding persons who get up and form company have duties towards it before it comes into existence.

Cited in notes in 25 L.R.A. 91, 99, on duties and liabilities of promoters to corporation and its members; 7 Eng. Rul. Cas. 521, 522, on necessity, on formation of corporation, of disclosure of all contracts to which a promoter, director, or trustee is a party; 40 L.R.A. 219, 222, on relations and rights of syndicate members.

Cited in 1 Elliott Railr. 2d ed. 22, on duties and liabilities of railroad promoters.

The decision of Vice Chancellor was cited in *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311, holding promoter is agent of corporation and subject to disabilities of ordinary agent; *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. R. 893, 57 Pittsb. L. J. 221, holding that promoters of company stand in fiduciary relation to company, and to subscribers who form company; *Re Leeds & H. Theatres* [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, holding persons invited to accept allotments of shares cestui que trust of promoters.

—Fraud on subscribers.

Cited in *Walker v. Anglo-American Mortg. & T. Co.* 72 Hun. 334, 25 N. Y. Supp. 432, holding that if promoters make material misrepresentations or conceal material facts in respect to enterprise to injury of those induced to subscribe, they become liable for damages.

The decision of Vice Chancellor was cited in *Cortes Co. v. Thannhauser*, 45 Fed. 730, holding it is duty of promoter towards those invited to co-operate in the enterprise not only to abstain from stating as fact that which is not so, but not to omit to state any material fact within his knowledge; *Hornblower v. Grandall*, 7 Mo. App. 220, holding that promoters are liable to stock purchasers for false representations as to material facts of inducement peculiarly within the knowledge of the promoters or their agents.

—Disclosure in prospectus.

The decision of the Vice Chancellor was cited in *Twyeross v. Grant*, L. R. 2 C. P. Div. 469, 46 L. J. C. P. N. S. 636, 36 L. T. N. S. 812, 25 Week. Rep. 701, on duty of promoters to disclose contracts they have entered into in prospectus.

—Liability of promoters for secret profits.

Cited in *Wilcox v. Foley*, 64 Conn. 101, 25 L.R.A. 90, 29 Atl. 303, holding that corporation instead of its stockholders should sue for avails of secret agreement between promoter and one from whom corporation bought property; *Tompkins v. Sperry*, 96 Md. 560, 54 Atl. 254, to the point that promoters of corporation act in fiduciary relation and are liable for secret profits made in that capacity; *Hutchinson v. Simpson*, 92 App. Div. 382, 87 N. Y. Supp. 369, holding that promoters who have made secret profits are bound to account therefor at

instance of party who suffered by their acts; *Re Hess Mfg. Co.* 23 Ont. Rep. 182, holding that promoter of corporation has fiduciary relation towards company, and will not be permitted to make secret profits in his dealing with company.

Cited in 2 Beach, Contr. 1980, on invalidity of promoters' secret contracts.

The decision of the Vice Chancellor was cited in *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153, holding that corporation may hold jointly and severally liable promoters who have acquired secret profits by joint acts.

— Definition of secret profits.

Cited in *Arnold v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762, holding that "secret profits," which promoters are prohibited to make are such profits as are made without disclosure to real parties in interest and obtaining their express or implied consent.

— Sale of promoter's property to company making secret profit.

Referred to as leading case in *Yeiser v. United States Board of Paper Co.* 46 C. C. A. 567, 52 L.R.A. 724, 107 Fed. 340, holding stock issued to promoters representing profits made on sale of property to corporation under circumstances of concealment of true value of property sold will be cancelled.

Cited in *Northrup Min. Co. v. Dinock*, 27 U. S. 112, holding transaction wherein vendors of mine and promoter acting together obtained price from buyers which allowed vendors to pay promoter secret profit not sustainable; *Wilcox v. Foley*, 64 Conn. 101, 25 L.R.A. 90, 29 Atl. 303, holding test of validity of such transaction is that it must, in all its parts, be open and fair, so that promoters shall not in fact, substantially "act both as vendors and vendees and in latter capacity, approve transaction; *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133, holding promoters bound to act toward corporation in good faith in matter of purchase by corporation of property in which they are interested; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094, holding promoter cannot retain stock or money obtained from corporation by having it purchase property from himself without his having made full and fair disclosure; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, holding fact that property was bought with view to reselling it to corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give corporation subsequently organized right to benefit of the purchase; *Heckman's Estate*, 15 Pa. Co. Ct. 264, holding contract vitiated by stipulation of organizer of company for secret profit; *Pietsch v. Milbrath*, 123 Wis. 647, 68 L.R.A. 945, 107 Am. St. Rep. 1017, 101 N. W. 388, holding that promoters cannot escape liability to corporation for fraudulent profits in transferring property at excessive value, by limiting stock subscriptions to themselves until transaction is consummated, and then selling remaining stock to outsiders as treasury stock; *Re Hess Mfg. Co.* 23 Can. S. C. 644 (affirming 21 Ont. App. 66, which reversed 23 Ont. Rep. 182), holding shares allotted to alleged promoter in part consideration of factory sold to company might be treated as fully paid up in case of company's insolvency; *Ladywell Min. Co. v. Brookes*, L. R. 34 Ch. Div. 398, L. R. 35 Ch. Div. 400, 56 L. J. Ch. N. S. 684, 56 L. T. N. S. 677, 35 Week. Rep. 785, holding it not sufficient to show it was contemplated, at time of purchase by alleged promoter, that company should be formed or even that property should be sold to company in order to render person liable for profit; *Re Lady Forrest Gold Mine* [1901] 1 Ch. 582, 70 L. J. Ch. N. S. 275, 84 L. T. N. S. 559, 17 Times L. R. 198, holding member of selling syndicate not liable to purchasing corporation for profits made where syndicate did not acquire property

in character of promoters; *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690, on attempt of promoters to make profit for themselves out of what is apparently paid vendors; *Re Cape Breton Co.* L. R. 26 Ch. Div. 221, L. R. 29 Ch. Div. 795, holding one not in position of trustee when he acquired property not obliged to account for profit on sale to company; *Re Olympia* [1898] 2 Ch. 153, holding persons forming company owe duties not to make secret profit out of it without informing it of the fact and giving company opportunity to decline to allow such profit to be made at its expense; *Phosphate Sewage Co. v. Hartmont*, 25 Week. Rep. 743, holding promoter making sale to his company acts in fiduciary capacity but is not trustee in such sense that Debtors' Act authorizing imprisonment of debtor who does not pay money when ordered to do so by court applies.

Referred to as leading case and distinguished in *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392, 68 L. J. Ch. N. S. 699, 48 Week. Rep. 74, 81 L. T. N. S. 334, 15 Times L. R. 436, where there was no fraud.

Distinguished in *Milwaukee Cold Storage Co. v. Dexter*, 99 Wis. 214, 40 L.R.A. 837, 74 N. W. 976, where subscribers for stock knew what price was to be paid for property purchased and could have ascertained its value; *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, where corporation was in full life and had assented to sale with knowledge of the facts before an outsider joined, and members of selling syndicate, though members of corporation were not joined as defendants; *Larocque v. Beauchemin* [1897] A. C. 358, 66 L. J. P. C. N. S. 59, 76 L. T. N. S. 473, 45 Week. Rep. 639, where every shareholder was perfectly aware of all circumstances attending formation of company; *Salomon v. Salomon & Co.* [1897] A. C. 22, 66 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, where agreement was adopted by company itself in full knowledge of the facts, and by all shareholders who ever were or were likely to be members of the company.

The decision of the Vice Chancellor was cited in *Chandler v. Bacon*, 30 Fed. 538, holding law forbids promoters from their position, to secretly derive any benefit over other stockholders, and makes them accountable to company for any profit so derived; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390, *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444,—holding promoter selling property to corporation occupies fiduciary relation; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, holding promoters assume position of agents and trustees of corporation in transaction of its business and are liable to corporation for profits made in selling property to it; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804; holding promoter cannot take secret profit; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243, on fiduciary obligation of promoters buying for resale to corporation; *Craig v. Phillips*, L. R. 7 Ch. Div. 249, 47 L. J. Ch. N. S. 239, 37 L. T. N. S. 772, 26 Week. Rep. 293, on duty to disclose price paid.

—Effect of payment in stock.

Cited in *Re Hess Mfg. Co.* 21 Ont. App. Rep. 66, holding that to make promoter liable for amount of paid up shares allotted to him in consideration of transfer of property, it must be shown that he stood in such relation to company that he could not claim property was purchased by him for himself.

The decision of the Vice Chancellor was cited in *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094, holding fact consideration is to be paid

in stock of company, is not conclusive evidence purchase was made by promoter for corporation, though very important in determining the question.

— **Effect of promoter being employed by person dealing with corporation.**

Cited in *Hickman's Estate*, 3 Pa. Dist. R. 479, holding that secret employment by proposed lessor of promoter of corporation to which lease was expected to be made avoids whole transaction.

— **Control of "dummy" directors by promoters.**

Cited in *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401, holding proof of want of independent board of directors, at time of sale, without knowledge of stockholders, will entitle corporation to rescission, if applied for with diligence which equity requires for institution of such suit; *Gluckstein v. Barnes* [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, holding where speculators have formed, exclusively of themselves, directorate of company, to be immediately floated for purpose of buying property which those same persons are associated to acquire and resell, they have brought themselves within rule of cited case; *Stratford Fuel Ice Cartage & Constr. Co. v. Mooney*, 21 Ont. L. Rep. 426, to the point that promoter-vendor cannot evade his liability by making disclosures merely to board of directors who are under his influence or pay.

The decision of the Vice Chancellor was cited in *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, holding payment to promoters of remuneration for their services is not made valid by vote passed by corporation, when corporation is in sole control of promoters before capital has been issued to public.

— **Affirmance or rescission of contract by corporation.**

Cited in *Beatty v. North-West Transp. Co.* 12 Can. S. C. 598, holding by-law authorizing purchase from director holding large amount of stock invalid, though afterwards ratified by a majority of the stock; *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, holding corporation may rescind sale but cannot affirm it and compel director who sold it to account for his profit.

The decision of the Vice Chancellor was cited in *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, holding corporation is not precluded from recovering for fraud upon it because party committing fraud is stockholder.

Rescission, avoidance, or recovery of damages in case of fraud in contract.

Cited in *Insurance Press v. Montauk Fire Detecting Wire Co.* 103 App. Div. 472, 93 N. Y. Supp. 134, on remedy of corporation that had been induced to purchase property from officers, to rescind sale and recover back consideration; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931, holding that a rescission of a contract may be had where a party has been defrauded in making it and the property remains in a form unaffected by accruing bona fide rights and where such change has not been vested in the rights of third parties as would render inequitable such rescission as applied to therein; *United Shoe Machinery Co. v. Brunet*, Rap. Jud. Quebec, 18 B. R. 511; *United Shoe Machinery Co. v. Brunet*, C. R. [1909] A. C. 148,—holding that a contract into which a person was induced to enter by false and fraudulent representations is merely voidable after notice of fraud, and is binding until he elects to avoid it; *Morrison v. Earls*, 5 Ont. Rep. 434, holding where defendant was member of partnership to purchase land and gave note upon basis of agreed price which was greater than real worth of the land his remedy was not by rescission but by cross action or counterclaim; *Stocks*

v. Boulter, 5 D. L. R. 268, holding that one induced to purchase land by misrepresentations, does not waive right to rescind purchase because he took possession, when at time of doing so he was not aware of fraud.

Cited in Benjamin, Sales, 5th ed. 440, on misrepresentation as ground for avoiding contract of sale.

Distinguished in *Hamilton Provident & Loan Soc. v. Cornell*, 4 Ont. Rep. 623, holding decedent's estate not liable in action for deceit when no cause of action existed against him.

—Laches, delay, or impossibility of restoration of statu quo.

Referred to as leading case in *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600, holding mere lapse of time less than statutory period will not bar an action for equitable relief, unless delay, under circumstances, has been such as to justify presumption that defendant may have been prejudiced thereby.

Cited with special approval in *Rochevoucauld v. Boustead* [1897] 1 Ch. 196, 66 L. J. Ch. N. S. 74, 75 L. T. N. S. 502, 45 Week. Rep. 272, holding not only time, but conduct of the parties must be considered.

Cited in *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81; *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527,—holding it always important what length of delay and nature of acts done during interval, which might affect either party, and cause balance of justice or injustice in taking one course or the other, as far as relates to remedy; *Snow v. Boston Blank Book Mfg. Co.* 153 Mass. 456, 26 N. E. 1116, on what constitutes laches; *DuPont v. DuBos*, 52 S. C. 244, 29 S. E. 665, holding law allows reasonable time in which to bring action to cancel alleged fraudulent deed, so that plaintiff may make inquiries and take advice of counsel; *Findlay v. Baltimore Trust & G. Co.* 97 Md. 716, 55 Atl. 379, holding that when situation of parties is altered and changed by fraud of vendor, defrauding party will be granted relief in equity, although the parties cannot be restored to state they were in before the contract; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 92 N. W. 246, to the point that deceived party may forfeit his right to rescind contract by failing to make his claim in that regard with reasonable promptness after discovery of fraud; *Farrell v. Portland Rolling Mills Co.* 3 N. B. Eq. 508, holding that delay in suing for rescission of contract induced by fraud may bar suit; *Northrup Min. Co. v. Dimock*, 27 N. S. 112, holding delay not a bar to action to rescind but that rescission could not be decreed because parties could not be placed in statu quo; *Mack v. Mack*, 26 N. S. 24, holding lapse of eighteen years not a bar to action against executors of partner to have conveyance set aside for fraud and for an accounting; *Hamilton Provident & Loan Soc. v. Cornell*, 4 Ont. Rep. 623, holding if alleged fraudulent transaction is to be repudiated there should be restoration of status quo; *Lee v. MacMahon*, 11 Ont. App. Rep. 555, holding doctrine of laches not confined to cases where fiduciary position exists between parties, but is applied whenever, as between vendor and purchaser, either party seeks to avoid contract on ground of fraud; *Beatty v. Neelon*, 12 Ont. App. Rep. 50, on doctrine of laches; *Webb v. Roberts*, 16 Ont. L. Rep. 279, on loss of right to rescind contract for misrepresentation by delay; *Re Sharpe* [1892] 1 Ch. 154, holding defense based on staleness of demand renders it necessary to consider time which has elapsed and balance of justice or injustice in affording or refusing relief.

—Want of inquiry as badge of laches.

Cited in *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757, holding duty of inquiry more imperative where property involved is of uncertain value, considerable expenditures are being made, and is liable to increase greatly in value;

Mehus v. Pabst Brewing Co. 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518, holding where question of laches is in issue, plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided facts already known to him were such as to put ordinary man on duty of inquiry; *Re Gallard* [1897] 2 Q. B. 8, 66 L. J. Q. B. N. S. 484, 76 L. T. N. S. 327, 45 Week. Rep. 556, holding remedy not barred by lapse of time though plaintiff had information which might have led to discovery of truth if followed up.

Laches by stockholder.

Cited in *Farrell v. Manchester*, 40 Can. S. C. 339 (reversing 38 N. B. Rep. 364, which affirmed 3 N. B. Eq. 508), holding delay in bringing action to rescind by subscribers for shares whose subscription was made on faith of statements in prospectus did not bar his remedy.

Contribution by joint-tort feorsors.

Cited in *Avery v. Central Bank*, 221 Mo. 71, 119 S. W. 1106, holding that one joint tort feor cannot recover back his pro rata share of judgment against him which he has paid.

Stipulation for secret profit to agent of lessor as vitiating contract between lessor and lessee.

Cited in *Heckman's Estate*, 35 W. N. C. 199, holding that where agent of lessor occupies position of trust and confidence towards lessee, stipulation for secret profit to himself is sufficient fraud to vitiate contract.

Right of minority shareholders for relief from fraudulent diversion of corporate property.

Cited in *Cann v. International Trust Co.* 40 N. S. 65, holding that acts of shareholders, directors, fraudulently divesting company's property, to their own benefit, and to injury of minority of stockholders, would entitle minority stockholder to relief.

Binding effect of acts assented to by all the members of a corporation upon the corporation.

Cited in *Walsh v. North West Electric Co.* 11 Manitoba L. Rep. 629, holding that corporation is not necessarily bound by transaction assented to by all who are for time being its only members.

Liability and duty of trustees of corporation.

Cited in *Brewster v. Hatch*, 10 Abb. N. C. 400, holding that trustee for corporations must exercise uberrima fides towards those whose interests they guard.

Personal representatives of trustees as proper parties to an action for breach of trust.

Cited in *Tiffany v. Hess*, 67 Misc. 258, 122 N. Y. Supp. 482, to the point that personal representatives are always proper parties in settlement of controversies involving examination of quality of acts of agents or trustees.

Cited in note in 2 Eng. Rul. Cas. 12, on liability for breach of trust surviving against representatives of trustee.

Affirmance by appellate court of decision of lower court.

Cited in *Jones v. North Vancouver Land & Improv. Co.* C. R. [1910] A. C. 1; *Jones v. North Vancouver Land & Improv. Co.* 14 B. C. 285,—to the point that appellate court should affirm court of first instance where question at issue largely depends on turn of mind of those who have to decide,

6 E. R. C. 817, *BATES v. HEWITT*, 36 L. J. Q. B. N. S. 282, L. R. 2 Q. B. 595, 15 Week. Rep. 1172.

Vitiating of insurance policy by concealment of material facts.

Cited in *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631, holding contract of life insurance invalidated by fraudulent concealment of actual condition of health of person whose life is insured; *Deweese v. Manhattan Ins. Co.* 34 N. J. L. 244, holding plea setting up misrepresentation collateral to contract of insurance, in avoidance of policy, must show that it was in material matter or that it was fraudulently made; *Dodge v. Western Canada F. Ins. Co.* 6 D. L. R. 355, to the point that applicant for insurance must disclose facts within his knowledge and which are essential to full knowledge as to nature of risk; *Mahoney v. Provincial Ins. Co.* 12 N. B. 633, holding that applicant for insurance upon vessel on voyage, was bound to tell company that at time of application hurricane visited port of destination of vessel; *Stevenson v. Nova Scotia Marine Ins. Co.* 25 N. S. 210 (dissenting opinion), on necessity of applicant for insurance disclosing facts essential to risk; *Bleakley v. Niagara Dist. Mut. Ins. Co.* 16 Grant, Ch. (U. C.) 198, holding that applicant for insurance is bound to state truthfully as to incumbrances on property; *Redford v. Mutual F. Ins. Co.* 38 U. C. Q. B. 538, on principles which governed insurance disputes at time of citing case, 1876; *Mercantile S. S. Co. v. Tyser*, L. R. 7 Q. B. Div. 73, 29 Week. Rep. 790, 5 Asp. Mar. L. Cas. 6, holding marine insurance policy vitiated by concealment of power to cancel charter party.

Cited in note in 55 L.R.A. 202, on actions on Lloyd's policies of insurance.

Distinguished in *Samo v. Gore Dist. Mut. F. Ins. Co.* 1 Ont. App. Rep. 545, where omission was considered not to be of fact material to risk; *Re Universal Non-Tariff F. Ins. Co.* L. R. 19 Eq. 485, 44 L. J. Ch. N. S. 761, 23 Week. Rep. 464, where it was held that whether roof was felt covered with tarpaulin or slate was immaterial; *Gandy v. Adelaide M. Ins. Co.* L. R. 6 Q. B. 746, 40 L. J. Q. B. N. S. 239, 25 L. T. N. S. 742, 1 Asp. Mar. L. Cas. 188, where material fact was matter of positive knowledge to party proposing insurance and only matter of possible inference to underwriter.

6 E. R. C. 834, *HUGUENIN v. BASELEY*, 9 Revised Rep. 148, 9 Revised Rep. 276, 14 Ves. Jr. 273, affirmed by the House of Lords as noted in 14 Ves. Jr. 607.

Presumption as to undue influence from relation of parties.

Cited in *Cowen v. Adams*, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 536, on gifts between persons who stand in no confidential relation to each other being watched with jealousy; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L.R.A. 605, 16 Am. St. Rep. 81, 7 So. 108, holding because of frailty of human nature the law scrutinizes with vigilance any pecuniary transaction where confidential or fiduciary relation exists; *Gaither v. Gaither*, 20 Ga. 709, holding gifts between persons holding confidential or fiduciary relations labor under the suspicion of having been obtained by abuse of influence; *Sears v. Shafer*, 1 Barb. 408, holding the principle is applicable in all cases where the relation is such as to give one a controlling influence over another; *Williams v. Williams*, 63 Md. 371 (dissenting opinion), on deed obtained by person in fiduciary or confidential relation as prima facie invalid; *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. 218; *Worrall's Appeal*, 110 Pa. 349, 1 Atl. 380; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918,—holding that donation to one in confidential relations, is presumed to have been obtained by undue influence;

Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Holman's Will*, 42 Or. 345, 70 Pac. 908,—on presumption of undue influence from close confidential relationship; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428, holding whenever the relations are such the parties do not deal on terms of equality the transaction is presumed void, and the stronger party must show affirmatively that no deception was practiced; *Re De Baum*, 2 Connoly, 304, 32 N. Y. S. R. 279, holding the court ought to interfere upon the least suspicion of undue influence being used; *Deaton v. Munroe*, 57 N. C. (4 Jones, Eq.) 39, holding the court looks with suspicion upon all dealings as to property where the relations are such that dominion may be exercised by one person over another: *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022,—holding it applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed; *Kennedy v. Kennedy*, 2 Ala. 571; *Bishop v. Bishop*, 13 Ala. 475; *Lockhart v. Lockhart*, 22 N. S. 233,—holding the principle applies where one person standing in a fiduciary relation to another sells to him, directly or indirectly, on terms advantageous to the former: *Bayliss v. Williams*, 6 Coldw. 440; *Ward v. Buckley*, 1 Wash. Terr. 280; *Atwater v. Hadley*, Fed. Cas. No. 639; *Bellamy v. Andrews*, 151 N. C. 256, 65 S. E. 963,—holding that conveyance obtained by one whose position gave him power and influence over grantor, without proof of actual fraud, shall not stand at all, if without consideration; *Yardley v. Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765, 16 W. N. C. 472, holding that it is always ground for suspicion where one, holding confidential relations to testator, prepares and directs execution of will, under which he takes considerable interest; *Hartman v. Strickler*, 82 Va. 225, holding that when will of old man differs from his previously expressed intention, and is made in favor of those who stand in relations of confidence to him, it raises violent presumption of undue influence: *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928, holding that fact that act was done by reason of influence resulting from affection and attachment, or mere desire to gratify wishes of another, if free agency of party is not impaired, does not affect validity of act: *Sanfley v. Jackson*, 16 Tex. 579, on fraud and undue influence as ground for declaring a deed void; *Emerson v. Shortis*, Newfoundl. Rep. (1874-84) 289, on the relations in which dominion may be exercised: *Re White*, 22 Grant, Ch. (U. C.) 547; *Lavin v. Lavin*, 27 Grant, Ch. (U. C.) 567,—to the point that gift to one in confidential relation to donor must appear to be pure, voluntary, well understood act of settlor's mind: *Powell v. Powell* [1900] 1 Ch. 243, 69 L. J. Ch. N. S. 164, 82 L. T. N. S. 84, on validity of gift where fiduciary relations exist.

Cited in note in 12 E. R. C. 434, on setting aside a gift because of undue influence.

Cited in *Hollingsworth Contr.* 200, on effect of undue influence on validity of gift; 1 Page, *Contr.* 341, on undue influence in case of confidential relationship and inadequacy of consideration.

— Particular relations.

Cited in *Bowen v. Kutzner*, 93 C. C. A. 33, 167 Fed. 281, holding an agreement between brother and sister void for fraud and undue influence, where the brother, who was thoroughly acquainted with the value of property, and sister was not, secured the bulk of the estate by reason of the agreement; *Pye v. Jenkins*, 4 Cranch, C. C. 54, Fed. Cas. No. 11,487, setting aside a deed from a young woman to her father, of all her estate, where the father had a life tenancy

in the property; *Eddy v. Eddy*, 93 C. C. A. 586, 168 Fed. 590, holding equity will grant relief from consequences of an election by the widow, who ignorant of her rights and by reason of counsel of her son who was named executor, elected to take a small legacy when the estate amounted to \$400,000; *Fuller v. Fuller*, 40 Ala. 301, holding a deed of an old and illiterate man giving his property to some of his children to the exclusion of others, contrary to his expressed intentions will be cancelled as affected by undue influence; *Noble v. Moses*, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217, holding business transactions between a father and his unmarried daughter living with him are such as the law carefully scrutinizes and will set aside where not appearing fair and just; *Kyle v. Perdne*, 95 Ala. 579, 10 So. 103, holding that conveyance by old woman to wealthy men in trust that they would collect rents pay taxes etc. and give her balance, should be set aside where it appeared that they were intimate friends of hers that they represented, to her that instrument bound them to support her; *McQueen v. Wilson*, 131 Ala. 606, 31 So. 91, holding that presumption of undue influence arises where beneficiary under will who had confidential relation with testator took active part in preparation of will; *White v. Ward*, 26 Ark. 445, holding any interest derived from a purchase by an agent of property he has for sale inures to the benefit of his principal; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 318, upholding sufficiency of complaint filed to set aside deed from wife to husband, on ground of undue influence although facts showing undue influence were not set up; *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502, holding that upon grounds of public utility, courts of equity set aside donations of property made to a child by a parent who is unduly influenced; *McClure v. Lewis*, 72 Mo. 314, holding a conveyance from an aunt to her nephew and niece for an inadequate consideration will be set aside where the positions of the parties were such that confidence was imposed; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786, holding a conveyance by a wife to her husband, at his request, presumptively invalid; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. 545, holding there is no presumption that a gift from an uncle to his nieces is invalid from fact of their nursing him during his last sickness; *Munson v. Carter*, 19 Neb. 293, 27 N. W. 208, holding a deed properly set aside where induced by threats and persistence of a son toward his mother; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, holding that deed obtained by son from aged mother, who reposed utmost confidence in him, cannot be sanctioned if confidence is abused, if there is inadequacy of price; *Taylor v. Draper*, 71 N. J. Eq. 309, 63 Atl. 844, holding that deed directed by father to be made to trustees as advancement to children is not presumptively void because of undue influence; *Geyer v. Geyer*, 75 N. J. Eq. 124, 78 Atl. 449, holding that fiduciary relation which exists between parent and child will not permit son to take unfair advantage of aged father; *Sears v. Shafer*, 6 N. Y. 268, holding equity will decree a cancellation of a deed for undue influence executed by an invalid sister in favor of a brother upon slight evidence of an improper exercise of control; *Weller v. Weller*, 44 Hun. 172, holding the presumption is against the propriety of a voluntary donation to a son from an aged and infirm parent; *Edwards v. Bowden*, 107 N. C. 58, 12 S. E. 58, on presumption of influence of husband over wife; *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159, holding that no trust grew out of relationship of parties, where brother of execution debtor, who was alleged to be insane, purchased at execution sale such insane brother's land; *Stewart's Estate*, 26 W. N. C. 553, 137 Pa. 175, holding where the alleged

gift is from a father eighty-four years old and childish to his son it must appear by satisfactory evidence that it was the clear intent of donor to confer the benefit; *Earle v. Chace*, 12 R. I. 374, holding that gift from wife to husband will not be set aside except on proof that it was unfairly obtained and burden of proof lies on party attacking it; *Davis v. Strange*, 86 Va. 793, 8 L.R.A. 261, 11 S. E. 406, holding equity is especially jealous to guard the welfare of the weak party in all contracts between parent and child; *Parris v. Cobb*, 5 Rich. Eq. 450, setting aside a conveyance of property, by a grandfather ninety year's old to a grandson and agent where consideration was money advanced and love and affection; *Womack v. Austin*, 1 S. C. 421, holding that it is not necessary to show actual fraud in order to invalidate release given to guardian shortly after arrival of former at age; *Dea v. Tarehin*, Newfoundl. Rep. (1897-1903) 187, holding a deed executed by children years after emancipation in favor of a parent but by which the parent receives no personal benefit cannot be impeached after lapse of years on ground of undue influence; *Stuart v. Bank of Montreal*, 17 Ont. L. Rep. 436, on the relation existing between husband and wife; *Davis v. Walker*, 5 Ont. L. Rep. 173 (dissenting opinion), on right of one standing in fiduciary relation to exert his influence to obtain legacy in absence of coercion or fraud; *Trusts & Guarantee Co. v. Hart*, 2 Ont. L. Rep. 251, holding that relationship of father and son does not give rise to presumption that voluntary conveyance is made because of undue influence; *Lavin v. Lavin*, 27 Grant, Ch. (U. C.) 567, holding a deed from father to son of all his property in consideration of a small monthly payment during life will be set aside where the grantor was ninety years old and executed the deed without proper advice; *Re White*, 22 Grant, Ch. (U. C.) 547, holding that mere fact that clergyman goes to his mother-in-law, when he is in need of her aid and takes power of attorney to enable him to dispose of some property, is not basis for charge of undue influence; *McConnell v. McConnell*, 15 Grant, Ch. (U. C.) 20, holding that no presumption of undue influence arises, in case of gift from father to son unless son occupied towards father, at time, relation of confidence and influence; *Mason v. Seney*, 11 Grant, Ch. (U. C.) 447, holding that deed from father and mother to son will be set aside where there was no consideration, and son was confidential adviser of father and business manager for years; *Rowe v. Grand Trunk R. Co.* 16 U. C. C. P. 500, holding that relationship of medical man to his patient is one of trust and he must act bona fide in advising him, and any settlement made through him, in consequence of advice given mala fides, will be set aside; *Barron v. Willis* [1899] 2 Ch. 578, 68 L. J. Ch. N. S. 604, 48 Week. Rep. 26, 81 L. T. N. S. 321, 15 Times L. R. 468, holding the relation of husband and wife is not one of those relations to which the doctrine, that a voluntary deed is presumptively invalid, applies.

Cited in notes in 45 L.R.A. 34, 38, 53, on fraud and secret dealings or interest of real estate brokers as affecting commissions; 18 Eng. Rul. Cas. 357, on relief in equity against mortgage for inadequate consideration towards person in fiduciary relation; 18 E. R. C. 357, on relief in equity against mortgage for inadequate consideration towards person in fiduciary relation.

Cited in 1 Beach, Contr. 1018, on right to rescind deed from wife to husband or son; 1 Beach, Contr. 1015, on right to rescind contract between persons in confidential relations; 2 Beach, Contr. 1747, on validity of husband's note to wife; 2 Beach, Contr. 1824, on undue influence in execution of deed between parent and child.

Distinguished in *Muhlke v. Uhlich*, 61 Ill. 499, holding a conveyance from principal to agent is not void merely by reason of the relation; *Jones v. Calkin*, 16 N. B. 356, holding no confidential relations existed where parties dealt merely as mortgagor and mortgagee.

— **Sinister or meretricious relations.**

Cited in *Shipman v. Furness*, 69 Ala. 555, 44 Am. Rep. 528, holding a deed to grantor's paramour will be scrutinized and set aside when procured by undue influence; *Smith v. Hentline*, 174 Ill. 184, 51 N. E. 227, holding that existence of illicit relation between testator and his beneficiary, does not as matter of law, raise presumption of undue influence; *Lyon v. Home*, L. R. 6 Eq. 655, 37 L. J. Ch. N. S. 674, 18 L. T. N. S. 451, 16 Week. Rep. 824, 6 Eng. Rul. Cas. 852, setting aside gifts of an aged woman to one who, claiming to be a "spiritual medium," secured from her a will, without power of revocation, in his favor.

— **Advisorial relations.**

Cited in *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23, holding that, after relation of attorney and client is established no subsequent agreement with client for compensation can be supported, unless it is fair and just remuneration for his services; *Waddell v. Lamier*, 62 Ala. 347, cancelling on ground of fraud and undue influence voluntary conveyance by principal to agent; *Voltz v. Voltz*, 75 Ala. 555, holding fuller proof of fairness will be exacted where one seeks to set aside a conveyance which he ratified upon coming of age, where the relation of guardian and ward had existed at time of transactions; *Ryan v. Price*, 106 Ala. 584, 17 So. 734, holding a deed from an illiterate woman in feeble health, to a boy 6 years old, and not related, where boy's father was a trusted friend and adviser, should be set aside in absence of proof that deed was fair and just in every respect; *Hindman v. O'Connor*, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052, holding quasi guardians and all other persons occupying the relation of confidential advisers come within the rule; *Morris v. Stokes*, 21 Ga. 552, holding a gift from the ward to the guardian will be more thoroughly scrutinized and sifted than any other; *Re Sparks*, 63 N. J. Eq. 242, 51 Atl. 118, holding that confidential relations existing between testator and his spiritual as well as secular adviser, who was made residuary legatee, is not alone sufficient to raise presumption of undue influence; *Crocheron v. Savage*, 71 N. J. Eq. 629, 70 Atl. 353, holding that solicitor, who purchases from his client property which is subject matter of employment, must show, not only that bargain is fair, but that he gave reasonable advice against himself as he would have done against third person; *Vreeland v. McClelland*, 1 Bradf. 393, holding the legal presumption is against a devise to an executor, where the testator, who was of weakened capacity by reason of intemperance, depended on him for guidance; *Gale v. Wells*, 12 Barb. 84, holding the law infers undue influence from fact of note being given by ward, soon after becoming of age and before guardian's accounts are settled, for payment of debt of guardian; *Re Smith*, 95 N. Y. 516, holding that fact that beneficiary was attorney of decedent, has not alone created presumption that testamentary gift was procured by fraud or undue influence; *Futrill v. Futrill*, 58 N. C. (5 Jones, Eq.) 61, holding relief will be given where a bond obtained from a confiding principal, by one who had undertaken entire management of his affairs; *Schuyler v. Stephens*, 28 R. I. 506, 68 Atl. 311, holding a gift to a physician by his patient whom he had attended in a professional capacity of personal property, thereby defeating the plan of her will, will be rejected upon the slightest suspicion of undue

influence; *Smart v. Waterhouse*, 10 Yerg. 94, holding that equity would grant relief where widow was induced, by misstatements of executor as to condition of estate, from dissenting from will; *Matthews v. Crockett*, 82 Va. 394, on right of attorney to purchase from his client, *pendente lite*, subject matter of litigation; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, holding that dealings between attorney and client for former's benefit, are presumptively invalid, as constructively fraudulent; *Statham v. Ferguson*, 25 Gratt. 28, holding evidence of undue influence sufficient to set aside a deed shown by the deed of a widow whereby she gave up some \$25,000 which amount came to the administrators, who were beneficiaries by law; *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. 63, holding that gift to guardian soon after coming of age may be allowed to stand, if shown to have been made deliberately, and with sufficient opportunity for consultation and advice; *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611, holding that it is incumbent upon attorney to show that transactions with client were fair and fees reasonable and just, where it appears client was old and ignorant.

Cited in *Weeks*, Attys. 2d ed. 564, on necessity that third person be present to witness gift by client to attorney; 1 Page, Contr. 332, on undue influence of religious adviser.

Distinguished in *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737, holding mere fact that a conveyance was suggested by the administrator, and the one claiming through it a mere volunteer, is not ground for setting it aside, where no benefit passed to the administrator or through him to the grantee; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, holding a deed from client to his attorney where a valuable consideration is shown will not be set aside unless fraud or imposition appears; *Livingston v. Wells*, 8 S. C. 347, upholding settlement between guardian and ward, made soon after ward became of age, where it appeared that estate of ward had been lost without fault of guardian and that he was insolvent.

—Gifts to churches or to clerical persons.

Cited in *Stevenson v. Dowie*, 3 Ill. C. C. 135, holding that transactions between clergyman and his parishioner where influence of relation prevailed are held void upon ground of public policy; *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. 567, 50 Atl. 244, 19 Lane. L. Rev. 1, upholding a gift of bonds to a church, in consideration of payment of interest on bonds during donor's life; *Re Welsh*, 1 Redf. 238, 7 N. Y. Leg. Obs. 153, holding a will presumptively void where one in the relation of spiritual adviser procures gifts to a church in which he is interested; *Church of Jesus Christ, L. D. S. v. Watson*, 25 Utah, 45, 69 Pac. 531, holding a conveyance by one whose mind is impaired by a physical weakness, will be set aside where the benefit accrues to the spiritual adviser or to some other person who may have become the beneficiary through such influence; *Collins v. Kilroy*, 1 Ont. L. Rep. 503, holding that spiritual adviser may use influence to obtain legacy so long as testator understands what he is doing and is free agent, and burden of showing undue influence is upon those who assent to it.

Distinguished in *Merrill v. Rolston*, 5 Redf. 220, holding no adverse presumption is indulged by reason of Catholic priest being present and signing as witness to will giving property to church where the will in no ways differed from her previously declared intentions.

Evidence considered in proof of undue influence or fraud.

Cited in *Shailer v. Bumstead*, 99 Mass. 112, holding that subsequent declara-

tions of aged testator that the will made was contrary to his real intentions, and that he was ignorant of its contents admissible on an issue of fraud and undue influence; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282, holding that undue influence which is sufficient to avoid will must be such that when exercised, instrument cannot be free and unconstrained act of testator; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, holding where there is an investigation of the question of abused confidence and fraud the whole transaction is to be looked to; *Nichols v. McCarthy*, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621,—holding the question, in cases where a conveyance is made, without consideration, to one standing in a fiduciary relation to the grantor, is how the intention, under which he acted, was produced; *Greenwood v. Cline*, 7 Or. 17, on what constitutes undue influence as depending upon the circumstances of each case; *Millican v. Millican*, 24 Tex. 426; *Anthony v. Hutchins*, 10 R. I. 165,—holding that in order to avoid grant on ground of undue influence, it must be shown that influence existed, and was exercised for undue and disadvantageous purposes; *Denison v. Denison*, 13 Grant, Ch. (U. C.) 596, holding presence of undue influence is not to be evidenced by the transaction alone, unless the whole train of circumstances establish the existence of such influence.

—Indicia of fraud or unfairness in nature of transaction.

Cited in *Thompson v. Lee*, 31 Ala. 292, holding a release of equity of redemption will be set aside where mortgagee had control over the property and the mortgagor, for whom he professed great friendship and promised indulgence; *Gillespie v. Holland*, 40 Ark. 28, 48 Am. Rep. 1, holding the gifts will be avoided in all cases where they are of such a nature, as a judicious friend regarding the interests of the donor, would not have advised; *Van Kleeck v. Phipps*, 4 Redf. 99, holding undue influence may be inferred from all the facts and circumstances surrounding the transaction; *Fellows v. Heermans*, 4 Lans. 230 (dissenting opinion), on undue influence being inferred from nature of transaction; *Mullen v. McKeon*, 25 R. I. 305, 55 Atl. 747, holding where the only natural and reasonable inference to be drawn is that undue influence was practiced the duty of the jury was to find accordingly; *Pressley v. Kemp*, 16 S. C. 334, 42 Am. Rep. 635, holding a conveyance by deed of property to a young man by a lady residing in the home of the grantee, under the direction of her attorney, will not raise a presumption of undue influence—no coercion appearing; *Cavendish v. Strutt* [1903] 19 Times L. R. 483, holding a voluntary conveyance by one weakened by drink and under the belief that he was in communication with spirits, will be set aside where made to those he made his home with where it appeared he was under the influence and control of the parties benefited.

—Inference from irrevocability of gift.

Cited in *Jones v. Clifton*, 18 Nat. Bankr. Reg. 125, Fed. Cas. No. 7,457, holding the failure of a conveyancer to insert a power of revocation in a deed of family settlement is regarded as a strong badge of fraud; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908, holding a reservation of a power of revocation in the deed does not tend to create an imputation upon the good faith and honesty in the transaction; *Crumlish v. Security Trust & S. D. Co.* 8 Del. Ch. 375, 68 Atl. 388, holding a voluntary conveyance will not be disturbed because made irrevocable where there appears a sufficient motive, as to protect as against the grantor's own extravagance; *Couchman v. Couchman*, 98 Ky. 109, 32 S. W. 283, holding a voluntary gift by an adopted daughter to her foster

mother of her estate without power of revocation will be upheld where it does not appear improvident and unreasonable; *Brown v. Mercantile Trust & D. Co.* 87 Md. 377, 40 Atl. 256, holding a declaration of a trust is not invalid merely because it contains no power of revocation; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Haydock v. Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385; *Martling v. Martling*, 47 N. J. Eq. 122, 20 Atl. 41; *Kleeman v. Peltzer*, 17 Neb. 381, 22 N. W. 793,—holding that if voluntary settlement does not contain power of revocation, parties who rely on it must prove that settlor was properly advised when he executed it; *Ricks' Appeal*, 105 Pa. 528, 41 Phila. Leg. Int. 367, holding in the absence of any motive for an irrevocable gift, it is unreasonable that a voluntary conveyance should be without a power of revocation; *Miskey's Appeal*, 107 Pa. 611, 40 Phila. Leg. Int. 414, holding the absence of a power of revocation is a circumstance which throws the burden of proof upon the party taking the benefit; *Sargent v. Baldwin*, 60 Vt. 17, 13 Atl. 854, holding a voluntary conveyance with a mortgage back and no power of revocation, where the object is to secure settlements, cannot be abrogated by a later agreement; *Miskey's Appeal*, 3 Pennyp. 409, holding in the absence of a distinct intention to make the gift irrevocable if the other circumstances of the case require it, the conveyance will be set aside.

Distinguished in *Hall v. Hall*, L. R. 8 Ch. 430, 42 L. J. Ch. N. S. 444, 28 L. T. N. S. 383, 21 Week. Rep. 373, holding the absence of a power of revocation does not render a voluntary settlement invalid, but is considered as bearing on the question of its validity.

—As affected by state of donor's mind.

Cited in *Couch v. Couch*, 148 Ala. 332, 42 So. 624, holding it is not enough that the donor by declarations manifested an understanding of his act and approved the transaction; *Owing's Case*, 1 Bland, Ch. 370, 17 Am. Dec. 311, holding the weakness of mind will be taken into account with other circumstances in making up that amount of fraud necessary to relief; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257, holding the question not to be whether party knew what he was doing or proposed to do, but how the intention was produced; *Scovill v. Barney*, 4 Or. 288, holding that mere mental weakness, or inadequacy of consideration, standing alone will not warrant interference of court of equity in ordinary cases; *Samuel v. Marshall*, 3 Leigh, 567, holding a conveyance, without consideration, of his estate, by one reduced to a state of mental imbecility by habitual intoxication, to the exclusion of his near relatives, will be set aside as fraudulent; *Baugh's Estate*, 9 Pa. Dist. R. 459, holding the general principle is not affected by the fact that the mind of the donor was not impaired or that the donee did not actually draw the instrument by which the gift was effected; *Birdsong v. Birdsong*, 2 Head, 289, holding that conveyance by man habitually intemperate, but not actually drunk, of all his property in trust for his wife and children, will not be set aside on ground of undue influence, apart from fraud; *Finn v. St. Vincent de Paul Hospital*, 22 Ont. L. Rep. 381, holding that where donee was so situated in relation to donor, that undue influence might have been exercised by donee over donor, transaction would be set aside, if undue influence was used, whether donor knew what he was doing or not; *McCaffrey v. McCaffrey*, 18 Ont. App. Rep. 599, upholding decree setting aside voluntary conveyance from husband in weak mental condition to wife.

—Absence of independent advice.

Cited in *Zimmerman v. Frushour*, 108 Md. 115, 16 L.R.A.(N.S.) 1087, 69

Atl. 796, 15 Ann. Cas. 1128, holding a voluntary gift from principal to agent will not be declared invalid, merely from fact of donor's not having independent advice; *Hester v. Hester*, 13 Lea, 189, on necessity that donor, who is easily subject to undue influence having the advice of a disinterested person; *Stuart v. Bank of Montreal*, 41 Can. S. C. 516 (dissenting opinion), on necessity of donor having independent advice, where relation of donee was of confidential nature; *Cox v. Adams*, 35 Can. S. C. 393; *Dawson v. Dawson*, 12 Grant, Ch. (U. C.) 278,—holding that, it is essential to validity of deed of gift in favor of person occupying relation of trust and confidence, that grantee should show that grantor had independent advice in transaction; *Clarke v. Hawke*, 11 Grant, Ch. (U. C.) 527, holding that unequal division of estate will be set aside where woman interested entered into agreement with trustees without independent advice.

Cited in note in 16 L.R.A.(N.S.) 1088, on independent advice as condition of a valid gift inter vivos between parties in confidential relation.

Distinguished in *Fonseca v. Jones*, 21 Manitoba L. Rep. 168, holding that trustees in deed of trust for benefit of grantor are not beneficiaries and independent advice in execution of deed is not important.

—Effect of withholding facts bearing on transaction.

Cited in *Mason v. Crosby*, 1 Woodb. & M. 342, Fed. Cas. No. 9,234, holding an imperfect examination of the property, by reason of reliance on the false statements as to the property will not relieve the party practicing the fraud; *Smith v. Sweeney*, 69 Ala. 524, holding one hired by the owner to train a horse for a reward occupied a relation of trust and confidence and commits a fraud in making gains without disclosing known facts; *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720, holding a sale of the client's property to the attorney and another will be set aside where fact that he was interested was not disclosed by attorney; *White v. Walker*, 5 Fla. 478, holding a partner purchasing must give a full account of the property; *Welbourn v. Kleinle*, 92 Md. 114, 48 Atl. 81, holding where a failure of a surviving partner to disclose actual condition of firm's books in purchasing interest of the deceased partner, mislead the representative, he should be compelled to account; *Rogers v. Rogers*, 97 Md. 573, 55 Atl. 450, on one in a fiduciary relation withholding that which he was bound to communicate; *Farnam v. Brooks*, 99 Pick. 212, holding the trustee is bound not only not to misrepresent and not to conceal, but he must disclose every thing known which in the mind of a prudent man would be likely to affect the bargain; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571, holding in an accounting between the widow and trustees where there was an omission to inform her of her legal rights, the trustees should be allowed reasonable expenses and charges for caring for the property; *McRory v. Henderson*, 14 Grant, Ch. (U. C.) 271, holding the confidence of a purchaser in an attorney acting for him, was ground for relief where the true state of the title was suppressed.

Distinguished in *Western U. Teleg. Co. v. Schriver*, 72 C. C. A. 596, 141 Fed. 538, 4 L.R.A.(N.S.) 678, holding there is no duty owed by a telegraph company to the undisclosed principal of the addressee of a telegram to receive authorized messages only.

—Dictation of instrument by beneficiary.

Cited in *Yardley v. Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765, 16 W. N. C. 461, 42 Phila. Leg. Int. 476, holding it ground for suspicion where one, taking under a will and in confidential relation to the testator prepares the will.

Rebuttal of fraud or undue influence.

Cited in *Nesbit v. Lockman*, 34 N. Y. 167, holding the presumption may be overcome by affirmative proof that the gift was made without fraud or undue influence.

Negation of undue influence by proof of voluntary act.

Cited in *Cherbonnier v. Evitts*, 56 Md. 276, holding it is not inconsistent with undue influence that the instrument assailed was executed voluntarily; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918, holding though the party had competent and independent advice, still the question would remain whether she acted under influence improperly exerted; *Bergen v. Udall*, 31 Barb. 9, holding a party relying upon a voluntary conveyance by a daughter, upon arriving at lawful age to her father, must show affirmatively not only voluntary act but an absence of undue influence; *Boyd v. Hawkins*, 17 N. C. (2 Dev. Eq.) 195, holding though it appear the transaction between trustee and beneficiary was of the free judgment of beneficiary still it remains to inquire how that judgment was produced; *Nedby v. Nedby*, 5 De G. & S. 377, 21 L. J. Ch. N. S. 446, on setting aside a voluntary settlement by reason of abused confidence; *Turner v. Collins*, L. R. 7 Ch. 329, 41 L. J. Ch. N. C. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305, on validity of a voluntary act.

— Assent or initiative by grantor subsequent to influence.

Cited in *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645, holding where influence of a father was cause of daughter's agreement to sign a voluntary conveyance of her property in trust, her own suggestions as to the deed after yielding, are to be considered as the outgrowth of the influence that obtained the signature; *Tyler v. Gardiner*, 35 N. Y. 559, holding where it appears the mother was merely executing the daughter's will in affixing her signature it is no answer to the presumption of undue influence that the testatrix assented to all the contents; *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67, holding that where the fiduciary relation has been completely dissolved and the parties are no longer under the antecedent influence they are restored to their common competency to deal with each other, especially where grantor made deed with knowledge of facts and on advice of counsel.

Burden of proving good faith in voluntary transfer or in other transactions.

Cited in *O'Connell v. Koob*, 16 App. D. C. 161, holding that burden of proof is on party receiving deed, without consideration, in action to set same aside; *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136; *Cadwallader v. West*, 48 Mo. 483; *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970; *Sands v. Sands*, 112 Ill. 225,—holding that where person enfeebled in mind by disease or old age, is so placed that as to be likely to be subjected to influence of another, and makes voluntary disposition of property in favor of that person, burden is upon latter to show honesty of transaction; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831, holding the burden on the attorney to prove good faith in a transaction with his client; *Smith v. Cuddy*, 96 Mich. 562, 56 N. W. 89, holding where the circumstances point to undue influence, the burden rests upon the defendant to show the intention to execute the instrument was not produced by undue influence; *Limington v. Dickinson*, 67 Ill. App. 266; *Thiede v. Startzman*, 113 Md. 278, 77 Atl. 666; *Graves v. White*, 4 Baxt. 38; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Darlington's Estate*, 147 Pa. 624, 30 Am. St. Rep. 776, 23 Atl. 1046, 30 W. N. C. 15,—holding that where confidential relations exist party in whom confidence is placed is held to strictest accountability, and burden

is upon him to show that transaction between himself and principal, by which he derives benefit was fair and beyond reach of suspicion; *Condit v. Blackwell*, 22 N. J. Eq. 481, holding the burden of establishing perfect fairness of a contract between principal and agent is upon the agent; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, holding that where wife and her husband, who was lawyer, executed deed of trust of her separate property by which he acquired advantage, burden is on him to show that she thoroughly understood its effect; *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905, holding that law does not impose upon husband burden of proving that a voluntary settlement made by his wife to him is fair or reasonable or was made under independent advice; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197, holding the burden of proving a gratuitous transfer of property from a wife to her husband was freely and deliberately made is thrown upon the husband; *Stewart's Estate*, 137 Pa. 175, 20 Atl. 554, on necessity of donee who occupies confidential relation to donor shown by that latter was clearly advised in respect to gift and that it was donor's intent to make gift; *Peirce v. Palmer*, 31 R. I. 432, 77 Atl. 201, Ann. Cas. 1912B, 181 (dissenting opinion), on necessity of donee showing that transaction was pure, voluntary and well understood act of donor; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, holding it incumbent upon the attorney to show the transaction was fair, was entered into freely by client, and with a full understanding of the nature and extent of his rights; *Coutts v. Aeworth*, L. R. 8 Eq. 558, 38 L. J. Ch. N. S. 694, 21 L. T. N. S. 224, 17 Week. Rep. 1121, holding the party taking a voluntary gift containing no power of revocation has thrown on him the burden of proving the transaction was fair and proper, and understood by the donor; *Topham v. Portland*, L. R. 5 Ch. 40, 1 De G. J. & S. 517, 39 L. J. Ch. 259, 22 L. T. N. S. 847, 18 Week. Rep. 235, 1 New Reports, 496, 32 L. J. Ch. N. S. 257, 8 L. T. N. S. 180, 11 Week. Rep. 507, holding the onus of proof on the appointee where appointment appeared to be an evasion of a former appointment declared invalid; *Morley v. Loughnan* [1893] 1 Ch. 736, 62 L. J. Ch. N. S. 515, 3 Reports, 592, 68 L. T. N. S. 619, holding where large voluntary gifts are made and accepted inter vivos, the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing.

Necessity of proving all allegations of fraud alleged.

Cited in *Moxon v. Payne*, L. R. 8 Ch. 881, 43 L. J. Ch. N. S. 240, holding a party entitled substantially to the relief asked for where he substantially proves the allegations of fraud by which another had appropriated his property.

Grounds of avoidance of transfers or contracts.

Cited in *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314,—holding relief in such cases rests on the ground of public policy; *Rice v. Rice*, 5 Luzerne Leg. Reg. 207, holding that equity will relieve against transactions on the ground of inequality of position between the parties where influence is acquired and abused, or where confidence is reposed and betrayed; *Neisler v. Pearsall*, 22 R. I. 367, 52 L.R.A. 874, 48 Atl. 8, holding that deed which is not pure, voluntary, well understood act of grantor, may be set aside; *Wille v. Wille*, 57 S. C. 413, 35 S. E. 804, on ground for setting aside a deed; *Cox v. Adams*, 35 Can. S. C. 393, holding, on the ground of public policy the confidential relations existing between husband and wife bring them within this rule; *Sheard v. Laird*, 15 Ont. App. Rep. 339, holding that mortgage procured from mother-in-law by threats made to wife to bring criminal proceedings against son-in-law.

was not void, as no direct threats were made to mother-in-law; *Fitzgibbon v. Duggan*, 11 Grant, Ch. (U. C.) 188, to the point that fraud or undue influence will avoid contract where party injured thereby would not have entered into contract but for such fraud or influence.

Cited in notes in 28 L.R.A.(N.S.) 861, on relief from mistake of law as to effect of instrument; 6 Eng. Rul. Cas. 878, on undue influence as ground for avoidance of contract.

Cited in 1 Beach, Contr. 1030, on rescission of conveyance by erratic persons.

— Of settlements in trust.

Cited in *Rogers v. Rogers*, 97 Md. 573, 55 Atl. 450, holding that voluntary settlement in trust for benefit of settlor and heirs at law will not be set aside merely because declaration of trust contains no power of revocation; *Angell's Petition*, 13 R. I. 630; *Aylesworth v. Whitcomb*, 12 R. I. 298,—holding that voluntary settlement in trust for settlor's benefit during life, remainder to devisees, may be required to be reconveyed by trustees, even though settlement contained no power of revocation.

Cited in note in 15 L.R.A. 78, on power to revoke or set aside voluntary trust or settlement.

Equitable relief against fraudulent or unduly influenced transfers.

Cited in *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174, holding one who obtains an estate in fraud of the rights of another, shall be held the trustee of him, whom he has defrauded; *Driver v. Fortner*, 5 Port. (Ala.) 9, holding equity will set aside a sale under a trust deed where the purchaser by false representations prevents the party from litigating his rights before the sale; *Rumph v. Abererombie*, 12 Ala. 64; *Hoppin v. Tobey*, 9 R. I. 42,—holding wherever confidence is reposed the court will require that it be faithfully acted upon, and restrained at all times to purposes of good faith; *Harkness v. Fraser*, 12 Fla. 336, holding equity will lend its aid to remedy an injury where one party takes advantage of confidential relations to impose on another by imposition, fraud or undue influence; *Frazier v. Miller*, 16 Ill. 48, holding equity will rescind a conveyance in consideration of future support upon breach of agreement to give proper support; *Ewing v. Wilson*, 132 Ind. 223, 19 L.R.A. 767, 31 N. E. 64, holding equity will decree the cancellation of a trust deed when the donor invokes its aid upon a showing that it was the result of undue influence; *Harding v. Randall*, 15 Me. 332, holding a court of equity will not permit taking advantage of a deed obtained by one's own fraudulent acts to create a disseisin, while holding it inoperative as a conveyance; *Byles v. Rowe*, 64 Mich. 522, 31 N. W. 463, holding, as between the parties, a conveyance will always be set aside upon a sufficient disclosure of fraud, if party imposed upon is injured thereby; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7, holding the principle of redress in cases of undue influence, in law as in equity, must be as broad in its application as the mischief it is designed to remedy; *Dickerson v. Dickerson*, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429, holding a court of equity will compel a restoration to the injured party where property is obtained by deceit by means of confidential relations between the parties; *Marvin v. Bennett*, 26 Wend. 169, holding equity will rescind or convert deeds by reason of presumptive fraud arising from the peculiar relation of the parties; *Cameron v. Barnhart*, 14 Grant, Ch. (U. C.) 661, holding that if purchaser at tax sale agrees to accept money personally, and owner is thereby induced to refrain from sending redemption money to treasurer, consent cannot be withdrawn to owner's prejudice.

— In case of proper acts prevented.

Cited in *Arthur v. Arthur*, 10 Barb. 9, holding where an heir, whose interests would be affected by a will induces the testator to omit making a provision for an object of his bounty by assurance that his wishes shall be carried out such assurance will raise a trust; *Townsend v. Townsend*, 4 Coldw. 70, 94 Am. Dec. 185; *Smart v. Waterhouse*, 10 Verg. 94, —holding where an act has been prevented from being done by fraud, equity will consider it exactly as if it had been done.

Distinguished in *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, holding equity will not enforce a parol promise of one taking a conveyance to hold the property in trust for a third party where no fraud appears.

Denial of relief because of fraud.

Cited in *Oakes v. Smith*, 17 Grant, Ch. (U. C.) 660, on inability of equity, in a case in which a deed has been affected on account of undue influence, to attend to anything if not expressed merely to oblige the parties.

Improvident gifts.

Cited in *Green v. Thompson*, 37 N. C. (2 Ired. Eq.) 365, holding the courts cannot arrogate to themselves power to annul dispositions, because they are improvident; *Wilton v. Osborn* [1901] 2 K. B. 110, 70 L. J. K. B. N. S. 507, 84 L. T. N. S. 694, 17 Times L. R. 431, holding courts of equity never set aside gifts on the ground of folly, imprudence or want of foresight on the part of the donors.

Avoidance of act because of mental incapacity.

Cited in *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17,181, on imbecility of mind as ground for relief in equity.

Knowledge of act as affecting validity.

Cited in *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, holding it essential to the maintenance of a deed or gift that the donor comprehend the full force and effect of his act; *Marx v. McGlynn*, 4 Redf. 455, holding it is not enough that testator was aware of contents of instrument and assented to all its provisions.

Distinguished in *Earle v. Chace*, 12 R. I. 374, holding where relation of grantor and grantees exists between a step-mother and her step-sons, and no evidence of any trust or confidence is shown, all the grantees need show is that grantor conveyed the estate knowingly; *Adams v. Probate Court*, 26 R. I. 239, 58 Atl. 782, holding equity will not relieve an executor from his liability on a bond on ground of mistake of law and fact, where he exercised choice as to the form of bond he would give.

Rights of third parties to benefits gained by fraud of others.

Cited in *Wilson v. Prewett*, 3 Woods, 631, Fed. Cas. No. 17,828, holding where a deed in favor of two persons is procured by the fraud of one the deed will be void as to both, although without the privity of the other; *Re Blake*, 80 C. C. A. 167, 150 Fed. 279, holding whoever knowingly receives money, property or benefit from another through the fraud of a third is always liable to restore it or its value; *McDaniel v. Crosby*, 19 Ark. 533, on rights of third parties under a voidable act; *Cato v. Gentry*, 28 Ga. 327, holding land charged with a legacy to infant wards, remains charged after sale by the devisees, although payment of the legacy was made to the guardian by the devisees before the wards reached their majority; *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524, 78 N. E. 845, to dictum that delivery of the fruits

to a stranger does not purify an evil deed; *Williams v. Williams*, 63 Md. 371, holding it immaterial whether the deed secured benefits to the grantee, or some other person where it resulted from confidential relations: *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; *Cox v. Worrall*, 26 N. S. 366; *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148,—holding, in the absence of a valuable consideration paid, innocent persons not chargeable with fault, cannot retain benefits gained by a conveyance void by reason of undue influence or fraud; *Hooker v. Axford*, 33 Mich. 453, holding one associated with an attorney as trustee, cannot take a benefit growing out of fraud and abuse of confidence on part of attorney; *Cone v. Hamilton*, 102 Mass. 56, holding where conveyance was fraudulent as to judgment creditors and no consideration for the conveyance was made their debts might be made a charge upon the land; *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830 (dissenting opinion), on the right to benefits brought about by wrong doing; *Money v. Dorsey*, 7 Smodes & M. (Miss.) 15, on the rights of one receiving title by reason of fraud of others; *Planters' Bank v. Neely*, 7 How. (Miss.) 80, 40 Am. Dec. 51, holding a purchaser at a fraudulent administrator's sale, who has paid no consideration, will not be permitted to hold the property; *Yosti v. Langhran*, 49 Mo. 594, holding where the wife is the recipient of a gift when donee's husband was confidential friend and adviser of the donor, she cannot retain such gift; *Ranken v. Patton*, 65 Mo. 378, holding the interposition of third persons will not purify the transaction or enable the donees to evade the responsibility arising from undue influence; *Roberts v. Bartlett*, 190 Mo. 680, 89 S. W. 858, holding fact that there was no personal interference by officers of a charitable institution in bringing about the gift is immaterial where it was brought about by undue influence of one in confidential relations; *Merchants' Nat. Bank v. Greenwood*, 16 Mont. 395, 41 Pac. 250, holding interests obtained through fraud of the debtor cannot be sustained upon any principle known to the law; *McNeill v. Call*, 19 N. H. 403, 51 Am. Dec. 188, holding it competent for a court of equity to take away from third parties benefits derived from fraud and undue influence although they may not have been parties to the fraud; *Preston v. Cutter*, 64 N. H. 461, 13 Atl. 874, holding one taking by a mere voluntary transfer of a title fraudulent as to creditors, without consideration cannot retain the property; *Powell v. Yearance*, 73 N. J. Eq. 117, 67 Atl. 892, holding that interests under trust obtained by third person by means of fraud of another cannot be retained; *Whelan v. Whelan*, 3 Cow. 537, holding a deed fraudulent by reason of undue influence will be set aside not only as to one practicing the fraud, but also as to third parties acquiring an interest; *Hildreth v. Sands*, 2 Johns. Ch. 35, holding a deed admitted fraudulent as to grantor should not be allowed to stand, even if the grantee be innocent of the fraud; *Rathbun v. Platner*, 18 Barb. 272, holding interests obtained by a fraudulent assignment by a debtor cannot be sustained though the assignees are free of all fraudulent designs; *Bedell v. Bedell*, 37 Inn. 419, holding a party cannot retain a benefit of a contract procured by fraud although it be not committed by his procurement; *National Bank v. Cox*, 47 App. Div. 53, 62 N. Y. Supp. 314, holding the party affected by the duress is at liberty to assert the invalidity of the contract though a bona fide holder may be seeking its enforcement; *Scott v. Duncan*, 16 N. C. (1 Dev. Eq.) 407, holding where actual and deliberate imposition on part of defendant is shown all rights and benefits resulting to his sisters and their children must yield to the rights of party suffering the imposition; *Sprunt v.*

May, 156 N. C. 388, 72 S. E. 821, holding that one who sues on contract made for his benefit by one assuming to act as his agent may not accept benefits under contract and repudiate agency as to those moving upon same subject matter to other party; *Goode v. Hawkins*, 17 N. C. (2 Dev. Eq.) 393, on the point that no one can be permitted to set up a benefit derived through the fraud of another although he may not have had a personal agency in the imposition; *Beeson v. Smith*, 149 N. C. 142, 62 S. E. 888, holding it not necessary to relief in equity that the fraud or undue influence be that of the one to be deprived of the benefit; *Trevitt v. Converse*, 31 Ohio St. 60, holding one who does not stand upon a valuable consideration moving from himself, cannot assert a benefit obtained through the fraud of another; *Winder v. Scholey*, 83 Ohio St. 204, 33 L.R.A.(N.S.) 995, 93 N. E. 1098, 21 Ann. Cas. 1379, holding that no person can claim interest under fraud committed by another; *Gordon v. McCarty*, 3 Whart. 407, holding it against conscience that one should hold a benefit deprived through the fraud of another; *Sheriff v. Neal*, 6 Watts, 534, holding equity will not permit one to hold such benefit; *Broomall v. Root*, 1 Chest. Co. Rep. 471, on right of legatees to reopen judgment permitted to be recovered by fraud of executors; *Smith v. Henry*, 1 Hill, L. 16, holding a conveyance in satisfaction of a previous debt to a relative where there is a fraudulent intention to defraud other creditors will be set aside; *M'Meehin v. Edmonds*, 1 Hill, Eq. 288, 26 Am. Dec. 203, holding though neither the trustee nor cestui que trust had any accession to the fraud, they are not allowed to keep an advantage gained over creditors by the fraud of another; *Brown v. Bonner*, 8 Leigh, 1, 31 Am. Dec. 637, holding though one is not even originally party to the transaction, yet if it was effected through fraud, he becomes a party to the fraud by seeking to have advantage of it; *Cox v. Adams*, 35 Can. S. C. 393, holding even a third party knowing of the relation can derive no benefit from the transaction, unless he establishes that independent advice had been given the party acting under the influence; *Henry v. Burness*, 8 Grant, Ch. (U. C.) 345, holding a sale for taxes will be set aside where property sold for a trifle by reason of a combination to prevent competition, though the purchaser was not a party to the combination; *Dawson v. Dawson*, 12 Grant, Ch. (U. C.) 278, holding the grantee of a deed of gift cannot profit by the ignorance, or negligence or unfaithfulness of the grantor's advisor; *Irwin v. Freeman*, 13 Grant, Ch. (U. C.) 165, holding one though not himself a party to the fraud cannot claim the benefits of it; *Barron v. Willis* [1900] 2 Ch. 121, holding a volunteer has no equity against setting aside a deed void by reason of abuse of confidential relations; *Alleard v. Skinner*, L. R. 36 Ch. Div. 145, 56 L. J. Ch. N. S. 1052, 57 L. T. N. S. 61, 36 Week. Rep. 251, holding mere volunteers can assert no rights stronger than those through whom they claim; *Morley v. Loughman* [1893] 1 Ch. 736, 62 L. J. Ch. N. S. 515, 3 Reports, 592, 68 L. T. N. S. 619, holding third parties will be denied the benefits flowing from a voluntary gift affected by undue influence; *Vane v. Vane*, L. R. 8 Ch. 383, 42 L. J. Ch. N. S. 299, 28 L. T. N. S. 320, 21 Week. Rep. 252; *Re McCallum* [1901] 1 Ch. 143, 70 L. J. Ch. N. S. 206, 83 L. T. N. S. 717, 49 Week. Rep. 129; *Harris v. Delamar*, 38 N. C. (3 Fed. Eq.) 219; *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293,—holding interests gained by one person by the fraud of another cannot be held by them; *Scholefield v. Templer*, 28 L. J. Ch. 452, 1 Johns. 155, 5 Jur. N. S. 619, 7 W. R. 353, S. C. 4 DeG. & J. 429, 7 W. R. 635, holding innocent surety not relieved by release of security procured by principal's fraud.

Distinguished in *Law v. Grant*, 37 Wis. 548, holding if the fraud be unknown to vendor and a valuable consideration moves from him, fact of fraud of third person being shown will not effect rights of vendor; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. ed. 423, criticising dictum that every person claiming under a fraudulent deed, for a valuable consideration, though untainted with the fraud, must necessarily lose his property; *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding that where an executrix before selling land for less than its value to pay debts, makes agreement with prospective purchasers for reconveyance on payment of principal and interest she could not enforce a similar agreement with a third person who bought the property from such purchaser with her consent; *Wright v. Carter* [1903] 1 Ch. 27, 72 L. J. Ch. N. S. 138, 51 Week. Rep. 106, 87 L. T. N. S. 624, 19 Times L. R. 29, holding though the deeds were void as between solicitor and client, since the benefits conferred upon the children were not induced by any undue influence on the part of the solicitor, they were not void as to them.

Necessity of letters of administration to pass marital rights in property.

Cited in *McKay v. Allen*, 6 Yerg. 44, holding the husband, if entitled, upon the death of his wife, to her personal estate by virtue of his marital rights, must obtain it by taking out letters of administration.

Undue influence at elections.

Cited in *Starratt v. Miller*, Hodg. Elect. Cas. (Ont.) 458, holding that to sustain charge of undue influence under election law it would be necessary to prove that intimidation was so general in its operation that freedom of election had ceased in consequence.

Effect on petition of extraneous matter.

Cited in *Sauley v. Jackson*, 16 Tex. 579, on a petition containing matter that might have been omitted.

Costs chargeable to counsel.

Cited in *Baker v. Loader*, L. R. 16 Eq. 49, 42 L. J. Ch. N. S. 113, 21 Week. Rep. 167, holding a solicitor may be ordered to pay costs or left to pay his own where he is made party to a suit to set aside improper deeds he assisted in preparing.

6 E. R. C. 852, *LYON v. HOME*, 37 L. J. Ch. N. S. 674, L. R. 6 Eq. 655, 18 L. T. N. S. 451, 16 Week. Rep. 824.

Validity of gifts or transactions between parties in confidential relations to each other.

Cited in notes in 16 L.R.A.(N.S.) 1096, on independent advice as condition of a valid gift inter vivos between parties in confidential relation; 11 Eng. Rul. Cas. 227, on parol evidence to contradict written instrument; 18 Eng. Rul. Cas. 358, on relief in equity against mortgage for inadequate consideration towards person in fiduciary relation.

Cited in 2 Cooley, Torts, 3d ed. 1005, on improper dealings by physicians and clergymen; 1 Beach, Trusts, 292, on trust resulting to grantor from undue influence.

Distinguished in *Barr Car Co. v. Chicago & N. W. R. Co.* 49 C. C. A. 194, 110 Fed. 972, holding that relation between employee of railroad company and head of department in which he works are not of such confidential nature as to sustain claim of employee that his failure to claim inventions as his own was caused by duress.

Validity of a gift induced by spiritualism or like influence.

Cited in *Leighton v. Orr*, 44 Iowa, 679, holding evidence of undue influence shown by gifts of property to a woman living in adultery with the donor where the woman claimed to be a spiritualistic medium and in communication with the donor's deceased wife; *Dewey v. Goodman*, 107 Tenn. 244, 64 S. W. 45, holding a gift from a wife to her husband who was a spiritual medium was presumptively void.

Cited in notes in 37 L.R.A. 271, on belief in spiritualism as insane delusion and imposing upon medium, to whom gift is made, burden of proof to show that gift is voluntary; 16 L.R.A. 678, on belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed.

Distinguished in *Alleard v. Skinner*, L. R. 36 Ch. Div. 145, 56 L. J. Ch. N. S. 1052, 57 L. T. N. S. 61, 36 Week. Rep. 251, holding a gift of property by a religious enthusiast to the lady superior of a convent where rules of convent required the giving up of property could be set aside by equity on ground of undue influence, provided the donor, upon leaving the convent sought to have it set aside.

Belief in spiritualism as evidence of mental unsoundness.

Cited in *Steinkuehler v. Wempner*, 169 Ind. 154, 15 L.R.A.(N.S.) 673, 81 N. W. 482, holding a belief in spiritualism does not, ipso facto, constitute an insane delusion; *Middleditch v. Williams*, 45 N. J. Eq. 726, 4 L.R.A. 738, 17 Atl. 826; *Buchanan v. Pierie*, 205 Pa. 123, 97 Am. St. Rep. 725, 54 Atl. 583, holding a belief in spiritualism is not evidence of mental unsoundness or that a person is subject to an insane delusion.

Burden of proof as to undue influence.

Cited in *Baker's Will*, 2 Redf. 179, holding that burden of proof as to undue influence in case of parties in relation of trust and confidence is upon beneficiary.

Character of act to constitute ratification of a voidable contract.

Cited in *Rau v. Von Zedlitz*, 132 Mass. 164, holding part payment, after signing an agreement by a woman on eve of her marriage by threats of imprisonment of her intended husband, is not a ratification of the agreement where payment was made while she was still ignorant of her rights.

Restitution of property as measure of damages.

Cited in *Nant-y-glo & Blaiva Ironworks Co. v. Grave*, L. R. 12 Ch. Div. 738, 38 L. T. N. S. 345, 26 Week. Rep. 504, holding mere restitution of shares worth but 20 shillings does not give adequate relief where shares were worth £80 at time of misfeasance.

6 E. R. C. 879, *OAKES v. TURQUAND*, 36 L. J. Ch. N. S. 949, L. R. 2 H. L. 325, 16 L. T. N. S. 808, 15 Week. Rep. 1201. Affirming the decision of the Vice Chancellor, reported in 36 L. J. Ch. N. S. 413, 15 Week. Rep. 528.

Voidableness of a contract induced by fraud.

Cited in *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402, holding a fraudulent transfer merely voidable at the election of those whom it defrauded; *Wheeler v. McNeil*, 41 C. C. A. 601, 101 Fed. 685, holding a contract and pledge of stock induced by fraud is voidable and until disaffirmed is valid; *Hickey v. McDonald Bros.* 151 Ala. 197, 13 L.R.A.(N.S.) 413, 44 So. 201, holding that title to property sold and delivered to one who fraudulently misrepresents his identity and executes note for purchase price, passes out of seller so that he cannot maintain detinue against a purchaser from vendee;

Re Central Bank, 17 Ont. Rep. 110; *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 449,—holding a contract induced by fraud is merely voidable at the election of the one defrauded; *Railway Advertising Co. v. Standard Rock Candy Co.* 24 Misc. 722, 53 N. Y. Supp. 790; *Carmer v. Still*, 53 Misc. 443, 103 N. Y. Supp. 247,—holding the contract continues valid until the party defrauded has determined his election by avoiding it; *Spiers v. R.* 4 B. C. 388, holding a contract obtained by fraud is valid until disaffirmed; *Brownlee v. Hyde*, Rap. Jud. Quebec, 15 B. R. 221, holding subscribers in a joint stock company not entitled to relief from subscriptions on the ground of fraud in procuring them as against the liquidator of the company after it becomes insolvent.

Cited in *Benjamin*, Sales, 5th ed. 457, 459, on effect of fraud on seller in passing of property.

Diligence necessary to rescission of fraudulent transaction.

Cited in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, holding one claiming to have been drawn into a fraudulent purchase, must exercise vigilance to discover the fraud, and must be prompt in repudiating; *Mudsill Min. Co. v. Watrous*, 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163, holding the dealing with the property as owner after knowledge of facts entitling him to rescind, is evidence of an affirmance; *Evans v. Bacon*, 99 Mass. 213, holding the right to rescind remains only for a reasonable time after the discovery of the fraud; *Duffield v. E. T. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310, holding the party defrauded must proceed with diligence to ascertain the truth or falsehood of the representations; *Lapp v. Ryan*, 23 Mo. App. 436, holding the vendor must make his election to rescind the fraudulent contract within the shortest limit of time which is fairly practicable; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 92 N. W. 246, holding where party had full benefit of insurance procured by fraud of agent, for nearly a year before repudiation of the contract he will be precluded from exercising his right of rescission.

Cited in 1 *Thompson*, Neg. 34, on negligence in connection with fraud; 1 *Beach*, Contr. 998, on knowledge and conduct by defrauded purchaser amounting to acquiescence in contract.

Rescission of stock subscription for fraud.

Cited in *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800, holding as between the company and the one induced to subscribe for stock by means of fraud practiced by the company's agent, the benefits of the subscription cannot be retained; *Gress v. Knight*, 135 Ga. 60, 31 L.R.A.(N.S.) 900, 68 S. E. 524, holding that where subscriber for stock seeks to set aside subscription on ground of fraud in its procurement, fact that receiver has been appointed will not necessarily bar action; *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306, holding a person who has a right to repudiate being a stockholder must act without delay or lose his right to do so.

Cited in note in 33 L.R.A. 726, on rescission for fraud or misrepresentation in procuring subscription to stock.

Cited in 1 *Bolles*, Banking, 63, on rescission for fraudulent increase of stock.

Distinguished in *Farrell v. Manchester*, 40 Can. S. C. 339, holding relief will not be refused a shareholder whose shares had been fully paid up and who repudiated within a reasonable time, merely because of delay between repudiation and action.

—Insolvency of corporation as bar to rescission of avoiding of liability.

Cited in *Wetherbee v. Baker*, 35 N. J. Eq. 501, holding fact that the stock-

holder was induced to subscribe by fraudulent representations of the corporation or its agents is no defense where rights of creditors are in issue; *Briggs v. Cornwell*, 9 Daly, 436, holding false representations that stock was "full paid up capital stock" is no defense to claim of creditors of the company; *McEwen v. West London Wharves & Warehouses Co.*, L. R. 6 Ch. 655, 40 L. J. Ch. N. S. 471, 25 L. T. N. S. 143, 19 Week. Rep. 837; *Dottra v. Kestner*, 147 Pa. 566, 23 Atl. 889,—on right to set up fraud as defense to action by receiver; *Henderson v. Lacon*, L. R. 5 Eq. 249, 18 L. T. N. S. 527, 16 Week. Rep. 328, on right of removal from the position of a contributory by reason of fraud; *Giesen v. London & N. W. American Mortg. Co.*, 42 C. C. A. 515, 102 Fed. 584, holding the assignor of stock who had made no application to have stock transferred on the company books and continued to receipt for dividends, is liable on the stock after proceedings in liquidation; *McIntyre v. McCracken*, 1 Ont. App. Rep. 1, holding the stockholder must exercise his option to rescind before winding-up to escape liability as against creditors; *Nelles v. Ontario Invest. Asso.*, 17 Ont. Rep. 129, holding the fact of the existence of large creditors of the association will not affect one's right of rescission if he be otherwise entitled to such rescission; *Ogilvie v. Currie*, 37 L. J. Ch. N. S. 541, 18 L. T. N. S. 593, 16 Week. Rep. 769, holding nothing can be done, on ground of misrepresentation to disturb the position of a shareholder in the company as to creditors; *Hare's Case*, L. R. 4 Ch. 503, 28 L. T. N. S. 156, 17 Week. Rep. 628, holding after failure of company a shareholder cannot escape liability on ground of alleged fraud in establishment of the company; *Stone v. City & County Bank*, L. R. 3 C. P. Div. 282, 47 L. J. C. P. N. S. 681, 38 L. T. N. S. 9, holding the rule extends to the voluntary winding up of a company; *Tennent v. City of Glasgow Bank*, L. R. 4 App. Cas. 615, holding it too late, after winding up has commenced, to rescind a contract for shares on the ground of fraud; *Kent v. Freehold Land & Brickmaking Co.*, L. R. 3 Ch. 493, 37 L. J. Ch. N. S. 653, 16 Week. Rep. 990, holding after a petition for winding-up, on which an order was later made, one cannot repudiate his contract for shares on ground of misrepresentation; *Pugh & Sharman's Case*, L. R. 13 Eq. 566, 41 L. J. Ch. N. S. 580, 26 L. T. N. S. 274, holding the grossest fraud on the part of the company in inducing one to take shares will not relieve him from bearing the liability which he as a stockholder owes to the creditors; *Black's Case*, L. R. 8 Ch. 254, 42 L. J. Ch. N. S. 404, 28 L. T. N. S. 50, 21 Week. Rep. 249, holding one taking shares in a company in payment of engines furnished, cannot set up failure of consideration after an order winding-up the affairs of the company; *Ex parte Carling*, 56 L. J. Ch. N. S. 321, 56 L. T. N. S. 115, 35 Week. Rep. 344, holding fact that company is insolvent at time of rescission is not enough to deprive one of his right to rescind, in absence of countervailing equities; *Ex parte Storey*, 62 L. T. N. S. 791, 2 Megone, 266, holding it is too late, where one has taken no steps to have his name removed before commencement of winding-up, to be relieved of his contract; *Re Hemp, Yarn & Cordage Co.* [1896] 2 Ch. 121, 65 L. J. Ch. N. S. 591, 74 L. T. N. S. 627, 44 Week. Rep. 630, holding one cannot get off the list of shareholders after an order for winding-up the company though he was induced to subscribe by reason of fraud practiced upon him; *MacLagan's Case*, 51 L. J. Ch. N. S. 841, 46 L. T. N. S. 880, holding he is too late to rescind after a winding up order has been made.

Cited in note in 31 L.R.A.(N.S.) 908, on fraud as ground of relief from subscription to stock after insolvency of corporation.

Distinguished in *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27, holding where it is the duty of the stockholder to use diligence to see that creditors are not deceived and he is guilty of laches he is entitled to no relief as against rights of creditors; *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64, 39 L. J. Ch. N. S. 849, 17 Week. Rep. 1024, holding where one subscribed for shares by reason of false statements in the prospectus of the company and on being informed of such fact repudiated his contract before order for winding-up he could not be held as a contributor; *Ex parte Stevenson*, 16 Week. Rep. 95, holding where shareholder had instituted proceedings in repudiation of shares when winding-up order was made he was entitled to be struck off; *Wheeler & W. Mfg. Co. v. Wilson*, 6 Ont. Rep. 421, holding a subscriber has a right to avoid before liquidation proceedings have been instituted.

Disapproved in *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414, holding the repudiation by a stockholder of stock procured by fraud within a reasonable time after discovery of the fraud constituted a defense to an action by the trustee after insolvency; *Newton Nat. Bank v. Newbegin*, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135, holding he may escape liability by showing diligence though his action to rescind is brought after insolvency; *Wallace v. Hood*, 89 Fed. 11, holding one seeking to escape the liability of a stockholder after insolvency, on ground of fraud where fraud is discovered after the insolvency must show acts of diligence such as will disprove any negligence.

— Reception of dividends as affecting right to rescind.

Cited in *Cote v. Stadacona Ins. Co.* 6 Can. S. C. 193, holding as between the corporation and a stockholder it may be shown a subscription was for five and not fifty shares of stock though dividends had been accepted.

— Remedy of defrauded stockholder.

Cited in *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677, holding though the winding up put an end to rescission and restitution by reason of fraud, still the right of an action for damages remained against the company.

Cited in *Benjamin*, Sales, 5th ed. 480, on remedy of one induced to purchase shares of joint stock company by fraud of company's agent; 2 *Cooley*, Torts, 3d ed. 942, on relief from misrepresentations in prospectuses.

Right to rescind agreement for purchase of stock.

Cited in *Silliker Car Co. v. Donohue*, 44 N. S. 315, holding that even when memorandum and articles are not in existence at the time of the subscription the stockholder, at the very latest, when he receives his allotment of shares, ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make objection; *Re Ontario Bank*, 24 Ont. L. Rep. 301, holding that person who agrees to become shareholder, and has his name placed on register, cannot rescind agreement, and is liable thereon to company or its creditors.

Right to rescind when parties cannot be placed in statu quo.

Cited in *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716, holding equity will not rescind on the ground of fraud, when party asking relief is not able to put those against whom it is sought into the same situation as they stood when the contract was entered into.

Sufficiency of application and entry to make one a stockholder.

Cited in *Gunn's Case*, L. R. 3 Ch. 40, holding a mere application and entry on the register of shareholders is not sufficient to constitute one a stockholder.

Liability of record stockholders to creditors.

Cited in *Cree v. Somervail*, L. R. 4 App. Cas. 648, 41 L. T. N. S. 353, 28 Week. Rep. 34, holding where company attempted to purchase its own shares in the names of trustees, these trustees were liable as shareholders where their names were permitted to remain on the register fifteen months before company went into voluntary insolvency.

Distinguished in *Pentelow's Case*, L. R. 4 Ch. 178, 39 L. J. Ch. N. S. 8, 20 L. T. N. S. 50, 17 Week. Rep. 267, holding where the contract of subscription was in fieri and was repudiated before the day set his name should be removed from the list of contributories: *Alabaster's Case*, L. R. 7 Eq. 273, 38 L. J. Ch. N. S. 32, 17 Week. Rep. 134, holding where one made no contract to become a shareholder and was in no ways estopped to deny that contract was void, fact that his name was included in list of contributories cannot render him liable; *Fisher v. Seligman*, 7 Mo. App. 383, holding one holding paid-up stock under a trust deed given by a corporation to secure the payment of first mortgage bonds, may deny liability as a stockholder as against a creditor who became such before the stock was issued; *Bullivant v. Manning*, 41 U. C. Q. B. 517, holding where facts disclose that one never became a stockholder, though he appeared as such, he cannot be held liable by a creditor as the holder of unpaid stock.

Allottee of stock as stockholder.

Distinguished in *Stace & Worth's Case*, L. R. 4 Ch. 682, 21 L. T. N. S. 182, 17 Week. Rep. 751, holding stock, allotted under an agreement for amalgamation of companies, which agreement for want of confirmation was void, does not render the holders liable to creditors.

Liability of stockholders for amount of unpaid subscription.

Cited in *Ex parte Jeaffreson*, L. R. 11 Eq. 109, 49 L. J. Ch. N. S. 3, 23 L. T. N. S. 645, 19 Week. Rep. 57, holding the amount unpaid upon shares is part of the assets of the company and in a winding-up belongs first to the creditors.

Distinguished in *Foreman v. Bigelow*, Fed. Cas. No. 4,934, holding bona fide purchasers of capital stock of a company in the open market, shown by the company's books to be fully paid up, are not liable to the corporation though the shares were fraudulently issued by directors: *Pawle's Case*, L. R. 4 Ch. 497, 38 L. J. Ch. N. S. 412, 17 Week. Rep. 599, holding where share holders repudiate their subscriptions on the ground of fraud and file a bill of relief and secure a decree in their favor, they cannot be held as a contributory of the company, if, pending an appeal, the company is ordered to be wound up; *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. App. Cas. 29, holding where share holder has paid all that could be demanded of him under his contract he cannot be held by the liquidator for an additional sum which the company could not have recovered; *McIntyre v. McCracken*, 37 U. C. Q. B. 422, holding taking stock in good faith as paid up stock where the book showed it as fully paid up may depend as against a creditor seeking to hold him for the stock as unpaid; *Re London Speaker Printing Co.* 16 Ont. App. Rep. 508, holding a signature to an instrument for shares in a company "proposed to be incorporated" and an agreement by another person to accept such subscription does not constitute a subscription and no liability attaches.

Action necessary to show repudiation of contract for stock.

Cited in *Re Ontario Exp. & Transp. Co.* 24 Ont. L. Rep. 216, holding mere attempted repudiation, unless followed by active steps to vacate the subscription, avails not as against the liquidator representing the creditors through the

company; *Peck's Case*, L. R. 4 Ch. 532, 20 L. T. N. S. 340, 17 Week. Rep. 508, holding the writing of a letter of repudiation merely where the subscriber knew there was a dispute as to his right to repudiate his contract for stock was not ground excusing him from being on the list; *Peck v. Gurney*, L. R. 13 Eq. 79, holding the repudiation must be by bill, which must be filed before the winding up has commenced; *Re Scottish Petroleum Co.* L. R. 23 Ch. Div. 413, 49 L. T. N. S. 348, 31 Week. Rep. 846, holding he must have repudiated the contract and have got his name taken off the register subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed, that will be sufficient.

Membership of old stockholders in successor corporation.

Cited in *Challis's Case*, L. R. 6 Ch. 266, 40 L. J. Ch. N. S. 431, 23 L. T. N. S. 882, 19 Week. Rep. 453, holding where a company agrees to transfer its business to a new company and it is understood that each shareholder is to be a shareholder in the new company, one acknowledging the receipt of the certificates of stock in the new company is a shareholder.

Stockholder's presumptive knowledge of corporate affairs.

Cited in *Hinkley v. Sac Oil & Pipe Line Co.* 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629, holding as between the stockholder and the company procuring the subscription, the stockholder is not required to suspect the promoters and directors of disregarding their obligations to the subscribers; *Downes v. Ship*, L. R. 3 H. L. 343, 37 L. J. Ch. N. S. 642, 19 L. T. N. S. 74, 17 Week. Rep. 34, holding a shareholder who neglects to inform himself where the memorandum of association is registered cannot fairly be heard to claim discharge because he afterwards finds the memorandum is different than that proposed by the prospectus; *Boaler v. Brodhurst*, 8 Times L. R. 398, on implied notice to stockholders of changes to be made in corporate affairs.

Rights of third parties under fraudulent contract.

Cited in *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509, holding a payee of a note for stock fraudulently procured may depend on ground of want of consideration as against one taking with notice of equities where he is not chargeable with negligence; *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 591, holding where innocent third parties, in reliance on the fraudulent contract, have acquired rights which would be prejudiced by the rescission, they may generally have it enforced.

Mutual rights of subscribers in insolvent company.

Cited in *Wright's Case*, L. R. 7 Ch. 55, 41 L. J. Ch. N. S. 1, 25 L. T. N. S. 471, 20 Week. Rep. 45, holding all the subscribers are entitled to, is that the status of any subscriber shall not be altered after the date of the winding-up.

— Priority of general creditors over creditor stockholders.

Cited in *Macbeth v. Smart*, 14 Grant. Ch. (U. C.) 298, holding an advance of money by a stockholder, for which he became a creditor of the company cannot be set up against one seeking to recover from such stockholder to the extent of his "statutory liability."

Right of shareholder to set-off debt due him from corporation in action by creditor.

Cited in *Macbeth v. Smart*, 14 Grant. Ch. (U. C.) 298, holding that shareholder in action against him by judgment creditor of company could not set off, in equity debt due to him by company before judgment was recovered.

Liability of a member to contribute to assets of company to pay debt to co-contributory.

Cited in *Burgess's Case*, L. R. 15 Ch. Div. 507, 49 L. J. Ch. N. S. 541, 43 L. T. N. S. 45, 28 Week. Rep. 792, holding a member liable to contribute to the assets of the company even to an amount sufficient to pay such additional sums as may be required for the adjustment of the rights of the contributories among themselves; *Brett's Case*, L. R. 8 Ch. 800, 43 L. J. Ch. N. S. 47, 29 L. T. N. S. 256, 22 Week. Rep. 22, holding as to all matters for which, under the statute, a liability is cast upon past members, the liability of all the present members should be first exhausted, or ascertained to be insufficient.

Action by one contributory shareholder against another, how instituted.

Cited in *Hudson's Case*, L. R. 12 Eq. 1, 40 L. J. Ch. N. S. 444, 24 L. T. N. S. 534, 19 Week. Rep. 691, holding proceedings by one contributory against another must be instituted through the official liquidator.

Fraud by failure to make full disclosure.

Cited in *McKay v. Commercial Bank*, 14 N. B. 1 (dissenting opinion), on effect of concealing material facts.

Cited in 1 *Beach, Trusts*, 489, on constructive trust by fraud from concealment.

— In company prospectus.

Cited in *Overend, G. & Co. v. Gurney*, L. R. 4 Ch. 701, 39 L. J. Ch. N. S. 45, 21 L. T. N. S. 73, on failure of directors to make full disclosure as ground for repudiation by stockholders; *Sullivan v. Mitealfe*, 7 E. R. C. 497, L. R. 5 C. P. Div. 455, 49 L. J. C. P. N. S. 815, 44 L. T. N. S. 8, 29 Week. Rep. 181, explaining the evils which led to the act requiring the prospectus to set forth contracts made with promoters or before incorporation.

Legislation relative to joint stock companies.

Cited in *McCracken v. McIntyre*, 1 Can. S. C. 479 (dissenting opinion), on the legislation relative to joint stock companies.

Trading companies.

Cited in *Whiting v. Hovey*, 13 Ont. App. Rep. 7, holding an incorporated company a trading association and governed by the ordinary rules of partnership.

Assent of subscribers in formation of company.

Cited in *Re Nassau Phosphate Co.* L. R. 2 Ch. Div. 610, 45 L. J. Ch. N. S. 584, 24 Week. Rep. 692, holding a certificate of registration sufficient to incorporate a company, notwithstanding one of the seven persons is an infant at the time.

Conclusiveness of certificate of incorporation.

Distinguished in *Re National Debenture & Assets Corp.* [1891] 2 Ch. 505, 60 L. J. Ch. N. S. 533, 64 L. T. N. S. 512, 39 Week. Rep. 707, holding the certificate of registration not conclusive of the fact that seven persons signed, and if it be shown that but six signed the memorandum the court has no jurisdiction to make a winding-up order.

Right of inspection of registry of membership in corporation.

Cited in *Farrell v. Portland Rolling Mills Co.* 38 N. B. 364, holding the book required to be kept is to be open to the inspection of the shareholders and creditors of the company; *Re Kent Coalfields Syndicate* [1898] 1 Q. B. 754, 67 L. J. Q. B. N. S. 500, 78 L. T. N. S. 443, 46 Week. Rep. 453, 14 Times L. R.

305, holding the statutory right of inspection of the registry of members does not exist after the company has gone into voluntary liquidation.

Misrepresentations of officers imputed to company.

Cited in *Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 37 Atl. 741, holding the misrepresentations of officers of a corporation are imputed to the company where a person who has been deceived institutes an action to rescind his contract to purchase stock.

Conclusiveness of memorandum of membership.

Cited in *Hamilton & F. Road Co. v. Townsend*, 13 Ont. App. Rep. 534, on the conclusiveness of the original memorandum of association.

Necessity of notice of intention to propose appointment of liquidators.

Cited in *Re Welsh Flannel & Tweed Co.* L. R. 20 Eq. 360, 44 L. J. Ch. N. S. 391, 32 L. T. N. S. 361, 23 Week. Rep. 558, holding liquidators may be appointed without special notice of meeting where a winding-up resolution had previously been passed.

Right to raise point for first time on appeal.

Cited in *Gray v. Richford*, 1 Ont. App. Rep. 112, on practice of bringing up points after the original hearing.

Distinguished in *Gray v. Richford*, 2 Can. S. C. 431, holding the court of appeals cannot refuse to entertain a question not raised before the appeal.

Right to costs where parties are equally at fault.

Cited in *Edison General Electric Co. v. Edmonds*, 4 B. C. 354, on right to costs where both parties are in fault.

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